SAVVY LITIGATION STRATEGIES
FOR THE FRANCHISE LAWYER

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BIOGRAPHIES

Deborah S. Coldwell is a business litigator who focuses on franchise, distribution, and contract disputes, and business tort litigation. She is a partner in the Dallas office of Haynes and Boone, LLP. She has successfully tried jury trials, bench trials and arbitrations on behalf of franchisors and distributors and has sought and received preliminary and permanent injunctive relief for franchisors. Deb was the editor in chief of the ABA Forum on Franchising Franchise Law Journal from 2006 - 2009. She currently serves on the ABA Forum on Franchising Governing Committee and is the Forum’s Publication Officer. She is a chapter author of the Franchise Litigation Handbook, ABA Forum on Franchising, and of The Franchise and Distribution Termination Handbook, ABA Section of Antitrust. Deb was plenary co-speaker and author of Judicial Update I – Compliance and Relationship Issues, International Franchise Association 36th Annual Legal Symposium, 2003, plenary co-speaker and author of Dealing With System Change In a High Tech World: Early Tremors, Early Warning, ABA Forum on Franchising 2001 Annual Forum, and co-author of the annual Franchise Update, SMU L. Rev. (1999-2010.)

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

J. Michael Dady is widely regarded as one of the most prominent franchisee attorneys in America. He and the other lawyers in his firm, Dady & Gardner, P.A. of Minneapolis, Minnesota, limit their nationwide practice to helping franchisees and dealers nationwide preserve and enhance the value of their businesses as effectively and as efficiently as possible. He and his colleagues at Dady & Gardner have made new law for franchisees, and together they are credited with having tried and won more cases on behalf of franchisees and dealers than any other firm in America. He and his partners have successfully represented franchisees and dealers in more than 350 different franchise and supplier organizations, and they currently represent more than 20 different national franchise and dealer associations. Recently, Chambers USA ranked Dady & Gardner as the top franchisee law firm in America, and it ranked Michael Dady as the top franchisee lawyer in America.

Michael is a frequent national speaker and writer on franchise law topics, and was an adjunct professor at the University of St. Thomas Institute for Franchise Management. Michael is listed in the Best Lawyers in America, is a member of the Million Dollar Advocates Forum (having obtained several results in excess of one million dollars for franchisee victims of unfair treatment), was selected by the Minnesota Lawyer as one of its ten “Attorneys of the Year” for the year 2000, has been consistently recognized by Franchise Times as one of the top 100 franchise lawyers in America, and has been consistently recognized by his peers and the Minnesota Journal of Law and Politics as one of Minnesota’s Top 100 Super Lawyers.

Michael is active in supporting several service organizations. He formerly served as both the Chair of the Board of Directors of Catholic Charities of St. Paul and Minneapolis and the Chair of the Board of Regents of St. John’s University. He has been honored by both his university, Saint John’s University, and his high school, Sisseton High School, as their Alumnus of the Year. He is currently a member of both the National Advisory Council of the American Creativity Association and the Board of Directors of the C.M. Russell Museum of Western Art.
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SAVVY LITIGATION STRATEGIES FOR THE FRANCHISE LAWYER

I. INTRODUCTION

Speak softly and carry a big stick; you will go far.
Teddy Roosevelt

A. Franchisor Introduction

From many reports, litigation appears to be on the wane. Less lawsuits are being filed, less jury trials are being tried, and less individuals and companies are wanting to shell out potential profits to bring or defend lawsuits. Nonetheless, sometimes, there is no choice but to litigate. And that's where employing the right litigation strategies may get the sparring parties to the spot where they can either resolve their differences or ask a disinterested judge or jury to make a decision on the merits for them.

In this paper, we do not promise to give the reader magic bullets or “one size fits all” strategies for being successful in litigation: What we will try to do is outline best practices, from both the franchisor and franchisee perspectives (which surprisingly are often not that different), and provide you with some workable options for traveling (smarterly) down the path toward trial, if that is where you need to go.

B. Franchisee Introduction

In recent years, less than three percent of all civil cases are resolved through a trial on the merits. Accordingly, our non-trial lawyer friends in the franchise bar might appropriately ask: “Why do franchisees with a legal problem need a trial lawyer to help them; nothing gets tried anyway?” Having the ability to effectively try a franchise dispute, and the willingness to do so when and if that is your franchisee client’s BATNA (Best Alternative To A Negotiated Resolution), increases the likelihood that these clients will be able to quickly, and efficiently, find out what the franchisor’s best offer is to avoid having to be among the “less than three percent”.

Using all the gifts we have been given, and all of the lawyering skills we have acquired (which hopefully includes skills that we are continually improving), to help our franchisee clients identify and maximize their opportunities to achieve their realistic objectives as effectively and efficiently as possible is the professional mission statement which all franchisee lawyers should have.

Additionally, while we are unaware of any empirical studies determining the precise percentage of franchisor/franchisee disputes which proceed to trial, it is our experience that, for

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1 While the authors of this paper share a common view of many savvy litigation strategies and tactics, their perspectives do diverge at times. Thus, we will provide both our shared views when possible and our separate perspectives when necessary. One view the authors do share is that they could not have completed this paper without the able assistance of Melissa Celeste at Haynes and Boone, LLP. Many thanks to Melissa for her immense help with this paper.

2 See, e.g., John Barkai, Elizabeth Kent, & Pamela Martin, A Profile of Settlement, 42 CT. Rev. 34 (Fall/Winter 2006) (reviewing research that estimates the trial rate in civil cases as 2 percent to 3 percent.)

3 References to “trials,” unless otherwise expressly stated, include arbitrations as well.
a combination of reasons, both franchisor and franchisee lawyers tend to “push the envelope” a bit harder (e.g., franchisors commonly tell us, and sometimes even believe, that “this case is one we can’t possibly settle, as it would require us to change our entire franchise system in ways we couldn’t possibly voluntarily agree to change”).

Accordingly, as we attempt to deliver on the rather presumptuous suggestion made by the title of this presentation, we do hope that you will indeed be receiving some “savvy” insights here. We will do our best in this paper, and in our presentation at the Forum, to give all of you—trial lawyers and non-trial lawyers alike—our best input as to franchise litigation strategies that have helped us become more efficient and more effective in helping our franchisee clients maximize their opportunities to achieve from their franchisors, one way or another, resolutions of their disputes that do indeed allow them to achieve their realistic business objectives.

II. THE INITIAL CLIENT INTERVIEW

Inevitably, you will get the call or an email from a distraught client, or a client will come to your office, with a legal problem that can only be solved through litigation. They have been sued or they want to sue someone. The initial call/meeting/exchange is the perfect time for assessment. Lawyers should use that time to their advantage and begin the process of outlining and implementing savvy litigation strategies.

A. What Questions Do You Need To Ask?

The very first question to ask the client is this: What is the ultimate business goal you would like me to help you accomplish here? Asking the client to articulate the endgame may sound like starting at the finish line, but it can save steps along the way. If the initially stated goal is retribution and “getting even,” that will certainly disappear over time. If the goal is based purely on “principle,” the principle may erode after a few large monthly bills have arrived. Starting out by understanding, and then maintaining a focus on, the client goal or goals is the surest way to prepare a strategy that achieves the client’s objectives. Once you help your client figure out what outcome he or she is trying to obtain, the strategy becomes more apparent and easier to articulate and to support.

Another basic question to ask involves both human and monetary resources. Have you provided a good estimate of the amount of time the client, officers, staff members and employees expect to spend dealing with the litigation? It is important for the client to have a realistic view of litigation and the time it takes away from the central job of doing business. Long after an initial lawsuit loses its luster, there will be the business of document gathering, depositions, hearings, discovery motions, good and bad rulings, and the like. The client should be engaged in most aspects of this process, and needs to understand early on just what that means, including the time commitment necessary. In addition, there should be a realistic discussion of the resources the client will spend on getting to various stages of the lawsuit. In the current environment, sophisticated and unsophisticated clients alike want to understand what their counsel believes a lawsuit will cost. In our experience, incremental budgeting is the most helpful (since, for example, a one number budget will only come to fruition about 3% of the time).

B. Listening v. Talking

Lawyers love to hear themselves talk and can often come across as if they get paid by the word, and not by the hour or fixed fee. The initial interview is not the time for talking,
however, but the time for listening. When asking the crucial questions, it is important to hear not only what the client is saying but how the client is saying it. You can get a good assessment of the type of witness your client may be later on in the process, including the all important “like” and “believability” factor through a trial on the merits.

We recall interviewing an officer of a company at one point early on in the litigation process. The client was bringing a fraud case and the officer was going to be the main witness to prove up the fraud. In the initial interview, however, the officer skirted away from ownership of the situation and underlined his “bit player” part. When we advised the in-house counsel of that fact, counsel decided to have another visit with the officer and later advised us that the officer was really the right person, would take ownership of the matter, and would be the main witness.

When it came time for trial and the officer had rehearsed his direct testimony, that certainly looked to be the case. When pressed by the federal judge about certain details of a crucial meeting supporting the fraud, however, the officer once again shied away from any first hand knowledge of the fraud and retreated to the stance that he had take in the initial interview. Really listening, and then trusting your first impression instincts from that focused listening, can help create a long term strategy for the matter.

C. Developing “To Do” Lists – For The Client And For Yourself

There are several matters that must be addressed at the onset of the case. Don’t leave to chance who is doing what:

1. Insurance

Is there insurance available to defend the matter? If so, who is sending the notice to the insurance company? Failure to timely notify the insurer may create a gaping hole later on.

2. Litigation Holds

As soon as there is the specter of a lawsuit, a litigation hold letter, to make sure that all potentially relevant documents (including e-mails) are preserved, is a must. If your client is sophisticated, they may have an in-house litigation hold policy. Regardless of the level of sophistication, this should be one of the “to do’s” on your checklist. Make sure the proper people in the company get the memorandum on the litigation hold. Make sure the IT department gets the notice. Make sure any employee who leaves the company during the course of the lawsuit leaves his/her computer, files and other documents with a proper custodian.

There is no magic to a litigation hold. It can be fairly simple if the lawsuit has not yet been filed. It can be more complex if there are several custodians of records or the case is national or international. Attached to the appendix are two samples. You might also have one of your own. This step is crucial even if you think you will have time for it later on in the case. Delegate it to your best paralegal or newest associate. More about litigation holds later on.

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4 See the form attached as Appendix “1.”
5 Id.
6 See the form attached as Appendix “2.”
3. **Pre- or Post-Complaint Investigation**

While it is always a good idea to believe what your client tells you, there is also the necessity of doing your own homework to confirm certain facts. This may require something as simple as checking the secretary of state’s records, or this may be more complex and require use of a private investigator. It also may require informal witness interviews. Make sure what you are being told matches up with the documents. If something does not pass the “smell test,” do more digging.

4. **Review The Potential Claims And Their Elements**

Whether you are on the plaintiff side or defense side, it is crucial to determine the universe of potential claims and potential defenses. It may be that the ultimate determination is not to include the “kitchen sink” of claims and/or defenses, but knowing all of the options is the best way to start.

In fact, many times there may be a belief that a certain claim or defense is nearly impossible to assert, even though there is a good faith belief that the law should be changed or that the law supports the claim. For example, asserting a venue provision, even though neither the plaintiff nor the defendant (who chose the venue) is located in the venue, should be pursued if it supports the client’s goals. Success at this stage may be a game changer for the case.

5. **Confirm Factual Support Or a Good Faith Belief In Each Element Of A Claim Or Of A Defense**

Lawyers who practice in federal court typically understand their duties as officers of the court related to Fed. R. Civ. P. 11. Similar standards exist in state courts as well. Before signing that pleading, confirm factual support or a good faith belief in each element of a claim or defense.

6. **Gathering Documents and Electronic Information**

We deal with this topic in more depth later on, but it is critical at the beginning of the lawsuit to begin gathering documents and electronic information. Sometimes clients do not want to part with certain information or documentation. It is very important that you clearly explain to the client that you need the documents and electronic information to make a proper assessment of their case. You need to emphasize that, while you cannot change the facts, you can create perspective for the judge or jury only if you are able to understand the positives and negatives of the case.

7. **Get a Good List of People With Knowledge**

Since most cases will require production of the names of “persons with knowledge of relevant facts,” it is wise to gather those names first. Ask the client for names and contact

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7 Hull v. Pizza Inn, Inc., Bus. Franchise Guide (CCH) ¶ 13,710, at 1-2 (E.D. Tex. Sept. 17, 2007) (enforcing forum selection clause even though neither the franchisee plaintiffs nor the franchisor defendant were located in the chosen venue) (Deb Coldwell was one of the lawyers representing the franchisor in this matter); see also, Deborah S. Coldwell, Altresha Q. Burchett-Williams, Will White and Suzie Loonam, *Franchise Update*, 62 SMU Law Review 1221, 1225-1226 (2009).
information which is periodically updated. Then interview the people who appear to have pieces of key information as soon as possible. This can be done in person or by telephone. In person gives the interviewing lawyer a way to assess the witness’ ability to testify as well. This can be done by an associate and is good training for taking depositions later in the case.

8. Assess Damages

Again, while this may be counterintuitive, it is important to figure out what the range of the client’s (or the other side’s) damages will be. It is crucial to determine whether the case needs an expert or if the plaintiff or defendant can provide the appropriate testimony.

9. Calendar Your Deadlines

The largest malpractice claims against civil litigators come from missing deadlines. You can delegate this responsibility to someone, but if you do, perform a quality check on the calendar and make sure the most crucial deadlines are correct and are on the calendars of everyone involved in the case.

III. GOALS OF THE LITIGATION AND CLIENT EXPECTATIONS

A. Client Goals

1. How To Help Clients Understand What They Want . . . And What They Need

a. Franchisee Perspective

When franchisees initially contact us about a dispute they are having with their franchisor, whether by telephone, email (something that is happening with increasing frequency, and which causes us to have particular concerns that need to be managed appropriately early on—e.g., by typically not responding in any substantive way by email), or in person, I find it rather odd, but quite predictable, that the franchisees typically want to talk about legal strategies rather than business objectives. For example, many are miserably angry, and say something like this: “Michael, I hear you are a mean S.O.B. I want you to sue the #*@%^@!”

My stock response: “That is not true. While I can assume the aggressive mode, and will do so, if I believe that is what is called for to be of the most assistance to my clients, I am, in fact, the gentleman my mother thinks she raised . . . and, in my experience, being that gentleman is usually more effective and more productive than acting otherwise.”

After getting this preliminary observation out of the way, I then lead into my substantive point with this additional observation: “Oddly enough, when most prospective business clients initially contact me, they want to talk about legal matters, whereas I, as their prospective lawyer, want to talk about business matters. I then explain that, in order for me to assess how I might best use my legal skills to assist them, I need to first understand and obtain the answer to this question: “What is the business objective(s) you would like me to help you accomplish?”

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8 See, e.g., First Union Nat’l Bank v. Benham, 423 F.3d 855, 868 (8th Cir. 2005).
This topic then typically leads me into an interesting, and sometimes very surprising, dialogue—e.g., “I haven't really given that any thought.”

In connection with this discussion, I always inquire as to who the decision-makers are, to make sure that I am getting the input of all decision-makers. If husbands and wives are involved in the business, for example, I make sure to get both present and involved in the discussion with me.

I work, early on, with these prospective clients to get them to the “Goldilocks” business objectives—i.e., a “just right” objective . . . not too much and not too little. I do believe that this initial discussion is among the most important, likely the most important, benefit experienced franchisee counsel can deliver to their franchisee clients—and the potential to deliver “to the max” on this topic is enhanced greatly by substantial experience, in my judgment.

Among the likely client objectives that result from this upfront discussion are the following:

- “I have lost all of the money I have and all that I can borrow in pursuing this franchise opportunity. Can you get it back for me?”
- “My franchisor is not giving me anything of value despite the substantial franchise fees I am paying. Can you either get my franchisor to deliver to me benefits at least equal to the royalties I am paying, or, if not, can you get me out of this relationship so I can now operate independently?”
- “My franchisor is requiring me to buy most of my goods and services directly from the franchisor or from its designees, even though I could get the same quality of goods and services much cheaper from others I know. Can you help me either get the prices lowered to competitive pricing or get the franchisor to allow me to buy these same quality goods and services from others, where the price is better?”
- “I am quite certain that my franchisor is taking a lot of money from the vendors that it is requiring me to purchase most of my goods and services from. Can you stop that for me, or, at a minimum, get those vendor payments used to improve the system, and my store profitability, rather than to simply fatten the bottom-line of my franchisor at my expense?”
- “My franchisor, or to say it more precisely, affiliates of my franchisor, also operates competing concepts. I am quite certain that my franchisor is sharing confidential information he has learned from me and other franchisees in this system to help his affiliates in competing systems beat my brains out in my marketplace. Can you stop that?”
- “Despite my best efforts, I continue to lose money every month operating my franchise, but my franchisor tells me I can’t get out before the end of the 20 year term of my franchise agreement unless I pay my franchisor substantial liquidated damages. Can you help me get out, and stop the bleeding, without having to pay my franchisor anything for his claim to lost future royalties and advertising fees?"9

b. Franchisor Perspective

To the contrary, the franchisor client is almost always prepared to discuss business objectives, and the objective is almost always “protect the system.” The franchisor probably has

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9 See Michael Dady’s Top Ten List of Reasons Franchisees Will Be Working with Franchisee Lawyers in the New Millennium, attached as Appendix “3.”
various ideas and notions about how best to safeguard the brand, the standards, and the goodwill that has made the system successful, and the attorney needs to help her client reconcile those preconceived notions and goals with the reality of litigation.

The franchisor might be thinking of litigation as a tool – a way to send a message to franchisees or to the public, or to protect its position on a certain issue. A franchisor might feel like it has no choice but to engage in litigation against a certain franchisee, or against certain franchisee lawyers, or against certain allegations, like racial discrimination claims. Or the franchisor might be concerned about the bad publicity that can accompany a lawsuit. The franchisor might also be weighing the practical implications of reporting the litigation in its Franchise Disclosure Document. The franchisor attorney must consider the franchisor’s specific goals and concerns and be prepared to discuss with the franchisor how the lawsuit (or lack thereof, if the franchisor decides against litigation) will impact the system and the remaining franchisees in the system.

2. When To Bring In The Cavalry . . . And How Best To Identify And Evaluate Other Potential Third Party Interventions

Once the client’s business objectives and concerns have been clearly identified (and, in that regard, they certainly have the right to change their business objectives if circumstances or other reasons—e.g., the advice of their lawyer about their dismal prospects for succeeding to accomplish the objectives previously identified), we then get to the discussion of the array of potential strategies for maximizing our opportunity, working jointly, to achieve their objectives as effectively and as efficiently as possible.

During this discussion, we typically tell clients that aggressively pursuing the litigation at the outset, while sometimes necessary, has significant related costs, including substantial economic costs, significant stressors, time delays, and uncertainty, for reasons we will discuss, infra. If commencing an action seems to be appropriate early on, we nevertheless will, at a minimum, seek to pursue a “dual track strategy” which will also include pursuing what we then believe is the most viable alternative form or forms of alternative dispute resolution. After getting this preliminary observation out of the way, I then get to the heart of the matter, like this: “What you have said to me—I want to sue the “#@$%^@!”—is a strategy, not an objective. What if I could help you accomplish your objective by simply picking up the phone and calling Deb Coldwell?”

Early on, we typically like to pursue the third party intervention strategy, typically leading off the discussion with a comment like this: “Who do you know who is all knowing, all powerful, all wise and who could accomplish anything?” The answer we are looking for, of course, is “God.” After soliciting that answer, we then say something like this: “If you are sure you are connected, say your prayers, and we are done. If you are not sure you are connected, say your prayers anyway, and then share with me who you and your colleagues might know who is the closest thing to God, when it comes to influencing your franchisor or franchisee to do what you want and need done here.” Interestingly, about ten to twenty percent of the time, when we have this discussion about third party intervention, with this hopefully not sacrilegious reference to the Divine, it leads to the identification of a “not obvious” third party who on occasion does indeed intervene to help us effect the good business solution we were seeking to achieve.

Among the other strategies we consider, separate and apart from the litigation and third party intervention strategies, would include the following: Early mediation; entering into an alternative dispute resolution agreement (e.g., arbitrate pursuant to the protocols set forth in the
Complex Procedures of the American Arbitration Association); organizing similarly situated other franchisees to engage some type of group lobbying effort or other group activity; soliciting publicity; getting important customers of the franchise system to intervene; associating with other legal counsel; political or legislative intervention.

IV. THE INITIAL ANALYSIS OF CLAIMS

A. **Outline The Causes Of Action And All Defenses**

Before undertaking any significant litigation task, counsel needs to develop a thorough understanding of the facts and claims. The attorney needs to get organized. Specifically, the lawyer needs to understand when key events happened in relation to each other, and what evidence supports (or undermines) the client’s claims or defenses. Creating a timeline and a chart of claims will help the attorney marshal the facts and evidence, and will promote an understanding up front of what are the strong and weak aspects of the case.

1. **Create A Timeline**

Counsel must – not “should” – understand the facts of the case in order to adequately represent the client’s interests. A timeline can be a useful tool that the attorney can update and refer to as the case proceeds. The timeline should include a date and description of each relevant event, and might also include the attorney’s notes about the event and perhaps a reference to a related document. The attorney might even consider creating a binder of key documents and keying the timeline to the binder.

Marshalling the facts into a timeline accomplishes several organizational matters. It compels the lawyer to catalog the relevant documents. The attorney will review the documents to create the timeline, and should organize them into a user-friendly format that can be easily referred to as the case goes on.

The timeline will also allow counsel to understand the facts sequentially and in context. The attorney can see what actions were taken (or not taken) in response to a default letter, for example, and whether the significant events transpired over the course of months or days.

Counsel can also note whether any documents appear to be missing. A letter between the franchisor and franchisee might reference an exchange of emails regarding the termination of the franchise agreement, and the attorney should make a note to request the emails from the client or from the opposing party in a document request.

The attorney should think of the timeline as a living document, and continue to update it as the litigation progresses. The timeline will also be helpful in preparing and responding to discovery requests, such as interrogatories and requests for production, in preparing for deposition, in dispositive motion practice, and ultimately, in trial. Perhaps most immediately, the attorney can refer to the timeline in identifying the strong and weak points of the case at the onset of the litigation, as discussed below.

2. **Make A Chart Of Claims And Defenses**

A chart of claims, or a case map, is a useful tool for analyzing all of the claims and defenses at issue in the case. A case map usually includes a listing of all of the causes of action alleged, the elements of each claim, and the evidence for or against each element. The
case map might also contain notes regarding the claims, such as the factual basis for the cause of action. For example, the case map might note that the breach of contract claim is based on the franchisee's failure to pay royalties, or the franchisor's untimely termination of the agreement. The chart could also indicate any special remedies for the causes of action. Do any of the claims entitle the plaintiff to attorneys' fees or punitive damages? Also, are any of the claims a segue into federal court?

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

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

It is essential to identify the strengths and weaknesses of the case as early as possible. Knowing the strengths of the case can inform counsel's choice of theme and the strategic decisions along the way. The attorney will, of course, want to develop the case in such a way as to emphasize the strengths and promote the best possible presentation of the client's case.

Likewise, it is imperative to understand the weaknesses of the case up front. Some weaknesses can be addressed if they are identified early enough. For example, is there insufficient evidence to support a particular element or claim? If the deficiency has been identified in advance of the discovery deadline, the attorney can focus the discovery requests on obtaining the necessary documents. On the other hand, if the weakness is not easily cured, the attorney can make an informed decision whether to focus efforts on other, more winning, aspects of the case. If, for instance, the case map shows that it will be difficult, if not impossible, to satisfy an element of a particular claim, the attorney might determine to omit that cause of action entirely and instead focus the case on the stronger claims.

When the attorney has taken the time early on in the case to marshal the facts into a timeline and the law into a case map, the attorney knows where the strengths and weaknesses of the case lie and can develop a tightly-focused theme and litigation plan.

B. Fact Gathering Protocols That Work

1. Franchisee Perspective

The single best development over the past 25 years for franchisees and their lawyers has been the evolution of the common law principle of good faith and fair dealing in essentially every state in this country (except Texas, absent some very narrow exceptions). Accordingly, we have long observed, and continue to observe, to our new clients that "if you believe that the way in which your franchisor has treated you is unfair, it is likely that this treatment is also unlawful." We then do spend some time collecting from our clients, early on, both their "right brain" and their "left brain" opinions, and the factual basis therefore, as to categories of unfair treatment.
We also want to know the economic effect of the franchisor’s perceived unfair conduct, since, if the unfair conduct in question is not causing significant damage, and if it is unlikely to do so in the future, we are inclined to counsel our clients to “forget about it.” If the economic consequences are substantially adverse, however, including, for example, the potential for pushing the operations at the franchised location from “black ink to red ink,” we get particularly excited, as the potential for asserting a breach of the express franchise contract, which typically prohibits termination without good cause, by asserting a de facto termination without good cause claim is a good and underutilized claim.  

As to those cases involving franchisees who have lost all their money and all they could borrow in pursuing a franchise opportunity, we typically divide our factual inquiries into two categories, and inquire as follows: “Category 1” claims are claims that the franchise opportunity was illegally sold to you; and “Category 2” claims are claims that your franchisor has not honored all of its contractual obligations to you. “Category 1” claims cause us to be interested in the following categories of potential misrepresentations or overstatements made to the franchisee to sign up in the first place: (1) any knowledge that the business experience of the franchisor or its litigation history have been misrepresented; (2) any information that the initial investment disclosed in the UFOC was in fact dramatically lower than what the franchisee had to make; (3) any knowledge on the franchisee’s part that the franchisor, while claiming to not take payments from vendors based on franchisee purchases, is in fact taking them, or any claim by the franchisor that it will help the franchisee get the best possible pricing when in fact that did not occur; (4) any statements of what the franchisor would do for the franchisee that did not occur; (5) any statements about the experience of other locations, or what the franchisee could expect, as it relates to revenues, expenses, or cash flows; and (6) any misrepresentation about the number of locations in business or the number of locations that have gone out of business. “Category 2” inquiries relate to the contract-in-fact or contract-in-law commitments the franchisor breached related to its obligation to provide reasonable assistance to the franchisee. If in fact something caused the franchisee to expect reasonable marketing assistance, for example, and the franchisee received significantly less than that, we would be particularly interested in specifics.

We also need to know, early on, if we have a chance for recovering future lost profits or, if instead, our damages opportunities will be limited to rescission/restitution damages.

We also need to assess whether there are any fee shifting provisions available, since that will likely affect our strategy and decisions—e.g., if the franchisor recovers attorneys’ fees from our clients if it prevails, that needs to be factored into the decision-making process, with the clients clearly advised of this additional downside exposure. Oddly enough, some recently enacted statutes do provide that, if a claim against a franchisor is unsuccessfully asserted pursuant to that particular statute, the franchisor may recover its attorneys’ fees from the

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10 Courts have held that, under principles of contract law, a de facto termination will be found (1) where a franchisor’s decision to change the territory from which a franchisee draws its sales results in a substantial decline of the franchisee’s net income, Peterelt v. S.B. Thomas, Inc., 63 F.3d 1169, 1183 (2d Cir. 1995); (2) where a franchisor seeks to implement a new program that would effectively reduce a franchisee’s existing territory, Bellows v. General Motors Corp., 233 F.Supp.2d 631 (D.N.J. 2002); and (3) where a franchisor takes affirmative steps to place a competing dealer in the same market served by the plaintiff franchisee, Maintainco, Inc. v. Mitsubishi Caterpillar Forklift America, Inc., 408 N.J. Super. 461, 478 (N.S. Super.Ct. App. Div. 2009). Encroachment by company-owned stores or other franchisees into the territory of an existing franchisee may also constitute de facto termination where such encroachment negatively impacts the existing store’s cash flows. 2 W. Michael Garner, Franchise and Distribution Law and Practice § 10:7 (2010-2011 ed.).
franchisee. In those cases where alternative theories for recovery against the franchisor are available, we might want to thereby advise our franchisee to put his chips on these other theories that do not expose that franchisee to having to pay the franchisor’s attorneys’ fees.

On the damages side, a principal way in which we have been successful in recovering the types of monies we have on behalf of terminated franchisees and dealers is by focusing on the economic fact (often overlooked by lawyers) that bottom-line cash flows and profits are not earned pro rata; rather, the last dollars in typically generate all or nearly all of the profits. This means that a loss of ten percent of revenue may in fact wipe out one hundred percent of bottom-line cash flows.\textsuperscript{11}

We also need to inquire, early on, about the potential for the harm being irreparable, as, in that process, we need to evaluate the four-part test for obtaining injunctive relief, which also includes balancing the hardship to the franchisor if the relationship is continued (which typically is minimal) versus the harm to the franchisee if the relationship does not continue (which typically is catastrophic). In this context, and for other proof of damages reasons, we also need to evaluate the potential for adding alternative lines or otherwise mitigating these substantial damages likely to be caused.

In seeking to gather this important information, we also want to know who, besides the person who retains us, might be the best persons to answer our inquiries. We recently had the experience of working extremely hard for a large multi-unit franchisor who was stretched very thin and who was unable to give us the specific facts we needed, as was his legal advisor. Only after pushing unsuccessfully for this information were we able to extract from the franchisor principal the right to communicate directly with his chief operations officer—an extremely informed and gifted detail person who was able to get us the key facts we needed to “turn the tide.”

2. Franchisor Perspective

Fact gathering is made significantly easier by the creation of a timeline and a case map. These documents allow the attorney to see the categories of information she needs to obtain. From the timeline, the attorney can know that she needs information regarding the sale of the franchise and execution of the franchise agreement, the operation of the franchise, and ultimate end of the franchise relationship. The timeline will help her know when those significant events happened and who was involved. Similarly, the attorney can look at the timeline and ascertain all of the significant events and documents. The attorney can use the case map to identify all of the key legal points. She can note that she needs to gather facts on: (1) the claims she knows she will assert; (2) the claims she would like to assert; and (3) the defenses she anticipates.

Of course, there will be much overlap between the information identified via the timeline and via the case map. The attorney can merge the two lists and then consider all of the sources of the relevant information. Among the potential sources are the client (including personnel and document files), third-party witnesses, information contained in the public realm (newspapers, the Internet, and social networking sites, like Facebook), and, of course, the franchisee. Additionally, the attorney should consider her list of information and sources to be an evolving document, and remain open to pursuing additional leads which come to light while interviewing witnesses or reviewing documents.

\textsuperscript{11} Buono Sales, Inc. v. Chrysler Motors Corp., 449 F.2d 715, 719-720 (3d Cir. 1971).
V. THE RULES OF ENGAGEMENT

A. Pick Up The Phone . . . And Other Ideas For Early Resolution

Too often in this technological age, a lawyer begins litigating a matter without actually interacting with opposing counsel. Complaints get e-filed and then served on the client. You get called by the client. Unless you need an extension, you may not come in contact with opposing counsel until the Rule 26 meeting. Keep in mind, however, that the relationship you create with the other side will last the length of the case – which is sometimes a very long time. It is just plain good manners to call opposing counsel and introduce yourself (if you do not know each other). It is crucial to begin discussions about discovery, timing, documents, e-discovery, vacation schedules, and such early enough to chart the course for the remainder of the lawsuit.

In addition, before the client has spent significant amounts on attorneys’ fees, this may be the perfect time to discuss resolution, or at least to get some idea of what the other side wants. There is always the actual claim and/or defense, but within the claim or defense, there is always nuance and subtext.

In addition, in the small bar of franchise lawyers, you will typically come across many of the same lawyers repeatedly. While you want to maintain a reputation as a zealous advocate, you also want to develop your reputation as someone who can be approached and trusted. In some jurisdictions, due to the nastiness of the litigation process, courts have gone so far as to require “a duty of courtesy and cooperation” with opposing counsel. ¹²

B. Don’t Be A Jerk Or “What Goes Around Comes Around”

Which actually is a good segue to the next topic – treat others as you would like to be treated yourself. While there is certainly the highest need to protect the client’s interests, there is also the need to understand early on that what you sow, you will also reap. For example, lawyers often need extra time for responding to pleadings, or discovery. When asked for an extension of time, your first inclination should be to agree to do so.¹³ Sometimes your client will want you to be abusive or act in an underhanded manner with opposing counsel but you should kindly resist any such attempts and practice the Golden Rule. You will also sleep better at night this way.

¹² See Don di Properties Corp. v. Commerce Sav. and Loan Ass’n, 121 F.R.D. 284 (N.D. Tex. 1988). Following Don di, the Northern District of Texas adopted certain standards of practice for attorneys appearing in civil actions. In fact, the pro hac vice application for this court contains the following:

X. Check the appropriate box below.

For Application in a Civil Case

☐ Applicant has read Don di Properties Corp. v. Commerce Savs. & Loan Ass’n, 121 F.R.D.284 (N.D. Tex. 1988) (en banc), and the local civil rules of this court and will comply with the standards of practice adopted in Don di and with the local civil rules.


¹³ “If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.” Don di, 121 F.R.D at 288.
C. How To Motivate The Other Side To “See The Wisdom” Of Your Positions

1. Franchisee Perspective

We like to tell our clients that, in dealing with opposing counsel (and, likely, in their dealings with us) only three modes of conduct are observed (although in varying degrees): Aggressive, business-like, and charming. In our experience, the most overutilized mode is “aggressive,” which is unfortunate because it is, in our opinion, the least effective. Business-like, of course, while it can be productive, can also be rather boring.

In our experience, the “charming” mode is the least utilized, and the most effective, and the most enjoyable. Accordingly, we do our best to always lead with the “charming” mode, encouraging our franchisor lawyer friends to help us find a “win-win” solution to the issues at hand. Knowing most of the franchisor lawyers in America is helpful, as are our clients’ insights and our other franchise lawyer colleagues’ insights about lawyers whom we don’t know.

Unless there are worries that we are going to get our initial telephonic response returned with a lawsuit filed in a venue and/or forum where we do not want to be, we will typically introduce our approach to the other side with a polite telephonic inquiry to the lawyer in their General Counsel’s office, or to their outside lawyers whom we know. Prior to that time, however, we will typically engage in some rather extensive preparation, which will include gathering the key facts and putting together a draft letter setting forth duty, breach of duty, damages caused or to be caused thereby, and topics for a potential resolution. We then use that letter to prepare for the initial telephone call, after which we either then or in a subsequently scheduled telephone conference discuss the issues with opposing counsel (ideally in person, when we can). We then offer to follow this conversation up with our letter, which we always send. In that letter we also commonly include a draft Tolling Agreement, if statutes of limitations issues will soon become a factor (or if they already are).

In our telephone conversation, and in the letter, we also like to politely communicate that “this is not our first rodeo” as to the issues at hand, referencing some helpful other situations as evidenced by reported decisions, if we have them (leaving to the other side to raise the “unhelpful” results delivered to us in other matters).

Sometimes we find that actually commencing an action, but not serving it, helps us to get the attention of the other side, so that they can see how our client is formally asserting its claims. On other occasions, we will early on obtain and share with the other side a signed sworn statement of a person with first hand knowledge of the situation.

On rare occasions, we will move for a temporary restraining order, or at least file a motion to do that, with hope that, by doing so, we can negotiate a standstill agreement.

In our experience, having some good credibility with legal counsel on the other side (and they with us) is extremely valuable in these early on negotiations for both procedural and substantive dispute resolution.

2. Franchisor Perspective

To motivate the other side to see the wisdom of your positions requires assessment of the interests, needs and risks of all parties in the case. What does the plaintiff want? What does the defendant want? What does the plaintiff need? The defendant? What are the risks
for each side in pursuing the lawsuit? Is there any point at which the parties’ interests intersect? The lawyer needs to be a behavioralist at this point and determine if helping the other side see the wisdom of your positions fills any need or interest of the other side or whether it mitigates any risk you have identified.

The reach out to the other side’s counsel is critical. If there is a continuing open dialogue, there can be dependable communications during the course of the lawsuit. This may lead to the other side understanding your positions and even communicating those to their client.

VI. TIMING IS (ALMOST) EVERYTHING

A. The Advantages And Disadvantages Of The Initial Demand Letter And Responses Thereto

As noted earlier, engaging in the discipline of gathering the key facts and analyzing the likely applicable legal principles related to identifying and discussing legal duties that may have been breached, and the damages caused thereby, is the most efficient way to early on get a handle on the key facts, relevant legal principles, and likely damages theories, rather than initially doing the “too often abused” elaborate legal opinions letters for the client. If, however, in a complex situation, or for other reasons (e.g., client board action and approval will be required), we always want to make sure that our initial client opinion letter also includes recommendations, as all clients are often interested, sometimes too interested, in our legal opinions, we find that opinions without recommendations (and observations as to likelihood of success) are lacking of the necessary “rest of the story.”

We like to use an initial demand letter, along with a client conference (frequently confirmed in writing), to make sure the client understands that the world in which we work is “one big gray area,” not “black and white,” and to offer, either in response to client inquiries or volunteered, observations about the certainty or uncertainty of our particular legal theories as to duties breached, damages caused and the best strategies to proceed. We frequently recommend that this letter be sent to the franchisor, preceded by a telephone call to either a decision-maker or someone who is likely to influence the decision-maker, with the cordial call identifying who we represent and why, what our concerns are, and how we propose to resolve them, which, we tell them, we have set forth in a draft demand letter which we would like to share with them for a follow-up, provided they commit, in turn, not to commence any action against us while we are talking settlement. We typically can get this type of response, but, if we cannot, we then consider immediately commencing an action in the forum of our choice, particularly if we are concerned about the potential of an action being commenced in a forum where we do not want to be (e.g., on the franchisor’s “home court”), or decided pursuant to laws we would prefer not be applied (e.g., laws of a state that does not have franchise disclosure or relationship statutes versus one that does).

B. Tolling Agreements

Tolling agreements operate to stop the running of potentially applicable statutes of limitation. It is preferable not to fight about statutes of limitations issues, even if one side is certain it would win them. Rather, it may be preferable to stop any likely subsequent discussion
of statutes of limitations issues with tolling agreements, which are uniformly enforced, in our experience. A sample tolling agreement is attached in the Appendix.\textsuperscript{14}

C. Evaluating Potential Venues . . . And How To Get Your Best Venue

1. Franchisee perspective

Franchisees and their lawyers have worked hard to get in place good statutory protection, including good anti-waiver language that provides that the protections available under this good statute may not be disclaimer by a contrary written agreement, including statutory provisions permitting aggrieved franchisees to proceed to litigate claims under these particular statutes in the state in which the statutes were drafted.

While one might logically think that these types of provisions give franchisees and their lawyers "bullet proof" protection against having to have their dispute resolved in a different forum, that is not the case, for a couple of reasons. First of all, the Federal Arbitration Act provides that the provisions of this Act preempt any contrary provisions of state law. Accordingly, if your franchisee client has agreed to arbitrate, it is essentially 100% the case that it will have to arbitrate. Furthermore, if the arbitration clause provides that the arbitration must go forward at a particular venue (e.g., the home state, or maybe even the home town, of the franchisor), it is extremely likely that this is what will occur, for the same reason. It is also the case that, if the franchise agreement provides that the arbitration must proceed before a panel of three arbitrators, that is the case. Additionally, the Commercial Arbitration Rules and the American Arbitration Association provide that disputes involving more than $500,000 are to be submitted to three arbitrators, absent some express provision to the contrary, that too is likely the case. We are 100% certain that essentially no franchisee understands the potentially catastrophic economic consequences of these arbitration provisions. Accordingly, we as franchisee lawyers need to do more to get that word out, and to take steps to prevent these types of arbitration clauses from being agreed to in the first place.

Even where the preemption provisions of the Federal Arbitration Act need not be contended with, because there are no arbitration provisions in the applicable franchise agreements, venues which appear to be guaranteed by state disclosure and relationship statutes may be ignored by courts in competing jurisdictions, particularly jurisdictions in which the franchisor is located, with potentially catastrophic consequences.\textsuperscript{15}

2. Franchisor perspective

The franchisor has almost always considered potential venues well before litigation arises. When a franchisor is evaluating potential venues, a number of factors may come into play. First and foremost, a franchisor will likely want any disputes decided in the franchisor’s home state. It would be extremely costly and inconvenient to transport people, evidence, and lawyers all over the country to fight battles with franchisees in multiple venues. Also, the franchisor might hope to be a “hometown favorite” in its local courts. Or perhaps the franchisor hopes to gain a tactical advantage by requiring its franchisees to litigate in its home state — it will

\textsuperscript{14} See sample Standstill and Tolling Agreement, attached as Appendix 4.

\textsuperscript{15} See, Link-Belt v. Road Machinery & Supplies Co., Bus. Franchise Guide (CCH) ¶ 14,599 (D.C. Ky. Apr. 15, 2011) (J. Michael Dady was counsel for the franchisee in this case).
shift the financial burden of litigating from afar to the franchisee, and also force the franchisee to bear the (probably significant) time and expense of disputing venue if it chooses to do so.

Thus, most franchise agreements contain forum selection clauses or arbitration provisions. As noted in Section VI.C.1 above, arbitration provisions are almost always enforced. Similarly, contractual forum selection clauses are prima facie valid and courts must enforce them unless the party opposing the forum selection clause can show that (1) enforcement of the provision would be unreasonable or unjust; (2) the clause is invalid for reasons of fraud or overreaching; (3) enforcement would contravene the public policy of the forum where the suit was initially brought; or (4) the selected forum would be seriously inconvenient for trial.\footnote{See, e.g., \textit{In re Lyon Fin. Servs.}, 257 S.W.3d 228, 231-32 (Tex. 2008).} Recently, a Texas court enforced a Georgia forum selection clause and dismissed the entire case, even though the franchisees and the master developers who sold the franchise to the franchisees were residents of Texas.\footnote{\textit{Dunlap Enters. v. Roly Poly Franchise Sys., LLC}, 2010 WL 2880179, Bus. Franchise Guide (CCH) ¶ 14,436 (Tex. App. July 23, 2010) (Deb Coldwell was counsel for the franchisor in this case).} In another case, a Florida court found that a forum selection clause in a franchise agreement was valid and enforceable even though the franchisees alleged fraudulent inducement against the franchisor.\footnote{\textit{Nina Moss, et al. v. Curves International, Inc.}; Bus. Franchise Guide (CCH) ¶13, 638 (S.D. Fl. Apr. 18, 2007). (Deb Coldwell was counsel for the franchisor in this case).} The court noted that the franchisees did not produce any evidence to show that the forum selection clause itself was the product of fraud or coercion.\footnote{Id.} If the franchisee has filed in an inappropriate forum and the franchisor desires to have the case transferred to the contractually agreed-upon court, there are several procedural mechanisms available.\footnote{See Section XII.A.1, infra.}

\textbf{D. First To File}

First to file continues to be a significant factor in deciding where franchise disputes will be resolved. Accordingly, steps must be taken to either capture this "first to file" standing or to enter into a tolling agreement to preserve the clients' right to indeed become the "first to file" if the matter cannot be successfully resolved.

\textbf{E. Class Action v. Test Cases}

Neither franchisor nor franchisee counsel are generally fans of class actions, as the certification of the class action can take many months and be extremely expensive, with the outcome uncertain and, given recent developments in the case law, less likely to predict than was the case historically.

On the other hand, counsel may use the "test case" strategy. That is, where particular conduct by the franchisor is subject to legal challenge, and is of the type that a large group of franchisees find objectionable, rather than commencing a class action or commencing an action on behalf of every franchisee adversely affected, getting a large group of franchisees to support a test case brought by one or a small group (e.g., ten or less) franchisees, in a favorable venue, is preferable to us. In our experience, getting a good result once, in a favorable venue,
dramatically increases the likelihood of receiving favorable results elsewhere, even where the law is not as good for the franchisees’ position.\textsuperscript{21}

F. Other Procedural Strategies

Separate and apart from tolling agreements, parties on the other side are often willing to enter into a standstill agreement that allows the parties to explore direct negotiations or other forms of dispute resolution without having to incur the time and expense of litigation.

At the other extreme, we find that temporary restraining orders or “business as usual” agreements, pending a final judicial resolution, can also work well to keep a relationship which our franchisee/dealer clients want to preserve, but which the franchisor wants to end, in place pending a negotiated resolution or a judicial or arbitral resolution.

VII. (THE RIGHT) THEMES WIN THE DAY

A. Choosing The Theme(s)

1. Franchisor Strategies

It has often been said that the best case themes turn on notions of fairness.\textsuperscript{22} While franchisees sometimes rely on “David v. Goliath” themes, franchisors can also frame their themes around fairness or justice. The theme should not be fact-intensive. To the contrary, the theme should be almost, if not entirely, devoid of case-specific facts, and should encourage the jurors to see and decide the case according to their own life experiences. For example, a franchisor alleging that the franchisee violated the franchise agreement might rely on a theme of “keeping promises” or “trustworthiness” or “personal responsibility.” In a case under the Lanham Act, the franchisor might promote the injustice of “benefitting from someone else’s hard work” or “taking unfair advantage.”

The best themes are overarching and encompass all aspects of the case, and are short, simple, and widely-relatable phrases. The attorney should be thinking about the case theme as early as possible. The theme can and should impact the questions asked during depositions, the documents requested in discovery, and even the motions brought throughout the case. The theme should be something that the attorney can repeat and reiterate throughout the trial—think “If it doesn’t fit, you must acquit” from the O.J. Simpson trial.\textsuperscript{23}

2. Franchisee Strategies

The use of winning themes has become more sophisticated, more prevalent, and, at the same time, more simple over the years. For example, in handling contested termination proceedings over the years, it used to be that manufacturers, suppliers and franchisors would

\textsuperscript{21} Coehlo & Bachetti, Inc. v. Ford New Holland, Inc., Bus. Franchise Guide (CCH) ¶ 10,923 (AAA) 1996 44; Anderson Tractor Co. v. Ford New Holland, Inc. (NY arbitration involving Texas dealers); Brown’s Tractor Inc. v. Fiat S.p.A. (PA arbitration involving dealers from multiple states) (J. Michael Dady was counsel for the franchisees in these cases).


\textsuperscript{23} Id. at 396 (citing Ted A. Donner & Richard K. Gabriel, Jury Selection Strategy and Science § 20:2 (3d ed. 2005)).
not give the reason for the termination if the writing in question did not require that. Rather, the franchisor’s position was “we have the legal right to terminate without cause, and that is what we did. We are not giving you any reason.” The experience of the franchisor lawyers’ back then seemed to be that stating reasons would subject them to attack, which they could otherwise successfully avoid. In fact, however, the franchisees’ responsive theme—i.e., “they did not give us a reason for the termination because they have no good reason for the termination,” commonly prevailed. Accordingly, franchisors now almost universally provide what they believe are good and compelling reasons for the termination, while, at the same time, reserving the right to assert additional reasons later (a reservation right that may not be successful).

To use a cowboy metaphor here, the simplest and best theme is “we are the cowboys (and cowgirls) wearing the white hats.” Said differently, we are the good people in this movie; the franchisor and its representatives are the bad people.

Related themes to be developed, in the right type of case, include, from the franchisee perspective, the following:

- “My franchisor knew lots of reasons why this franchise opportunity was going to fail, but did not fairly or accurately disclose these material facts to me.”
- “The purchase of a franchise is like the purchase of a security, except that more is involved here. Like the purchase of a security, if the “security” (or franchise) is not sold pursuant to the express rules in place for doing so, the purchaser is entitled to get out and get his or her investment back.”
- “We had certain ‘reasonable expectations’ when we agreed to enter into this relationship—expectations which should have been, but were not met, including expectations that the franchisor would work with us, not against us, to improve our profitability, grow the system, and use our collective buying power to obtain goods and services at the best possible delivered prices, not the opposite.”

VIII. STRATEGIC DECISIONS ALONG THE WAY

A. Control (And Take) The High Road

Whether on the defense or plaintiff side, it is important to set the agenda and establish the pace. Sometimes that means going full steam with discovery, depositions and motion practice. Sometimes setting the pace means throwing up one procedural, valid roadblock after another. Sometimes, it may mean allowing the matter to languish for a while to allow the parties to lose some of the initial emotion they brought to the case. Regardless of the agenda and pace, it is always crucial to take the high road, be trustworthy and live by your word.

B. Map The Strategy And Stay The Course

There are always pressure points available in any case. The key is figuring out what the pressure points are. For example, is the plaintiff a serial litigant? Is every problem resolved through a lawsuit? You can only find that out by running a civil background check. Is there something in the client’s background that would cause him or her unease during a deposition and later at trial? A criminal background check may be helpful there. Is the spouse/son/parent a guarantor in the case? If they are brought in as third-party defendants to pay any counterclaim damages, would that move everyone to a faster resolution? Has the plaintiff
prepared a business plan for a bank loan? That may provide fertile ground for their later pleas of poverty or a claimed lack of belief in the franchise system.

Once pressure points are identified, it is important to use them at the right time. There was a case that we handled a few years back in which the plaintiff was seeking liquidated damages for breach of a supplier agreement from our client company defendant. There were almost no arguments against the legal position of the plaintiff. There had been, however, negative postings on a defamatory website about our client company’s CEO with information only an insider might have. Through a separate lawsuit, we sued the internet service provider, got the name of the poster and identified him as one of the plaintiff’s representatives who had at one time serviced our client. He had been posting negative information about the CEO of our client, harboring some long held grudge. This turned out to be an embarrassment for the plaintiff and a pressure point for our client to use in successful settlement negotiations.

1. When to Veer Off Course

   a. Franchisee Thoughts

   Our lawyers generally try to be like Holiday Inn used to advertise—i.e., “no surprises.” For example, it is a rare case where we do not try, in every way we think might possibly work, to negotiate a mutually satisfactory resolution, either directly or with the assistance of third parties, even though we may also be pursuing, at the same time, hotly contested litigation or arbitration. One reason we might veer off this course, however, is that, in our experience, the franchisor or its attorneys have demonstrated that they should not be trusted—e.g., they say one thing, but do the opposite, and, in the process, deny or distort what they have previously communicated to us or to our clients. In those rare circumstances, we confirm everything in writing, and typically cease or at least suspend direct negotiations. If a settlement is to be obtained in these situations, it typically requires a third party mediator or judicial official.

   A second reason we might veer off course is if a franchisor and its opposing counsel mistake our, and our clients’, gracious behavior as apathy, disinterest, or cowardice, and respond with rudeness. In that case, we might then shift gears into a more aggressive form of formal dispute resolution, to dissuade the franchisor and its counsel of these erroneous notions.

   b. Franchisor Thoughts

   Every good lawyer formulates a plan at the onset of litigation to accomplish whatever goal they have in mind – be it settlement, trial, or something in between. The problem with litigation, however, is that the lawyer and her client are not the only people playing the game. In addition to the opposing party, documents and witnesses can present unexpected twists, and the franchisor lawyer should be able to respond appropriately, even if it means departing from the mapped-out path. For this reason, even though the franchisor has spent time and effort developing a case strategy, the franchisor should be prepared to veer off course if a surprise pops up that impacts the franchisor’s litigation goals.

   A franchisor might also veer off course when it appears that accomplishing the litigation goals is impossible. The franchisor might have determined early-on that it intended to settle the case after discovery, but in settlement discussions and at mediation, the franchisee made such unreasonable demands that the parties were unable to make any progress in their negotiations. In that case, the franchisor might shift gears and begin readying the case for trial, rather than continuing with fruitless settlement talks.
IX. SETTLEMENT STRATEGIES AND OTHER ADR METHODS

A. There Is A Right Time For Settlement Discussions (And Maybe More Than One) . . . And The Answers To The “Who, What, When and Where” Questions Will Vary

Our answer to this question is the same as the answer Chicagoans like to give to the voting question: “Early and often!”

It is a rare case indeed that seasoned trial lawyers will not seek to resolve by reaching out to the other side just as soon as they have a handle on the key facts, likely applicable legal duties and the viable claims, and the extent of damages.

In answer to the “who” question, we do not want to give short shrift to the possibility of our clients’ negotiating directly with appropriate business people on the other side. In discussing that, we also discuss with the client the pluses and minuses of notifying the franchisor of our involvement on their behalf.

We also like to find out early on who is likely to be representing the franchisor, as, in our experience (and likely in theirs), knowing franchisor counsel and when they are likely to throw the fastball versus the curve ball and whether they are good or not so good at discussing disputes and how they might be resolved and getting them resolved, is very important. To the extent we know franchisor counsel who has represented the franchisor in the past, we might also initiate a call there, particularly if we have the thought that this particular franchisor counsel is a good settler.

Obtaining an overview of the franchisor’s settlement negotiation history with our client and with others, over time, particularly in recent times, can sometimes provide us with valuable insights about what is likely to work and what is likely not to work.

We do have a strong preference for dealing with decision-makers or folks who are likely to be listened to by decision-makers, as, in our experience, a principal reason efforts to settle have been unsuccessful are because we have not been talking to the person who can make, or at least strongly influence, the decision to settle.

As to the “what” topic, we do find that, initially identifying likely common ground (e.g., being of better service to the likely customers of the franchise system) is a good door opener to further discussions, as is acknowledging what we always say to prospective jurors: “What you see depends on where you stand,” and thereby having a dialogue with opposing counsel as to their perspective and that of their client as to the issues at hand.

In our experience, in-person is typically better than over the telephone, and over the telephone is better than sending a letter or commencing an action, with certain exceptions noted, supra.

In our experience, familiarity makes it easier to settle cases rather than the opposite (i.e., we do not find that “familiarity breeds contempt”—where does that old saying come from anyway?).
B. There May Be A Right Time For Mediation

1. Selecting The Best Mediator

In our experience, after having participated in over 300 mediations of franchiseor/franchisee disputes, there are three principal variables affecting the likelihood of success for achieving a settlement in a mediation: (1) Skilled and experienced mediators make a tremendous difference; (2) having decision-makers in attendance for both sides (not message carriers) is essential; and (3) having both sides motivated to make a deal (e.g., because of a trial date being close; because of the win-win opportunities that can be achieved in settlement that could never happen if the matter proceeds to trial/arbitration) really helps.

In our experience, the best mediators are charming, evaluative, and assertively persuasive, and have had significant experience dealing with related business matters.

One of the two best mediators we have worked with has an interesting history as a skilled trial lawyer, as a federal magistrate, and as the CEO of multiple companies (which he operates at the same time). He leads with his business person’s hat, which business people can really relate to.

Another favorite mediator is a former federal judge who always leads with his “in my experience as a federal judge” hat, which also works very well. As a general matter, however, we think judicial experience may be overvalued—that is, it is not as important as mediators who have other important qualities necessary to facilitate a realistic negotiated resolution.

One of the ways a good mediator starts off every mediation joint session, after he tells us all the reasons why settlement is better than trial, is this: “Tell me, in ten minutes or less, what your proposal for resolution is and why it makes sense.” We think that gets the mediation off on the right tone.

2. Communicating With The Other Side vs. The Mediator

We typically try direct communications with the other side, or its representatives, prior to proposing mediation because that is the most efficient way to resolve a dispute is through direct negotiation. We have learned from other experienced lawyers that sometimes these direct negotiations, if not successful in their own right, can nevertheless “set the stage” for a follow-up mediation. The initial negotiations at least identified the topics for potential settlement and provided some “brackets” for doing so.

C. Other ADR Methods

Oddly enough, “alternative dispute resolution” (“ADR”) is often mistaken, by our clients, as a synonym for “arbitration.” In fact, arbitration is simply one of many forms of alternative dispute resolution, with the word “alternative” meaning, to us, some alternative to a formal trial to a judge or to a judge and jury. If this definition is accepted, then, forms of alternative dispute resolution would include direct negotiations; arbitration; mediation; third party intervention; mediation/arbitration; high-low arbitration; flipping a coin; five card showdown; bankruptcy; a “war of attrition;” or some combination thereof.
X. DISCOVERY AND WITNESSES

A. The Side That Wins Usually Understands The Documents

Documents dictate the outcome of most lawsuits, and, in franchise disputes, there are often many relevant documents to sift through. The parties’ relationship is usually defined by one or more written agreements. Reports are generated on a regular basis from which royalties are computed. The parties communicate with each other via e-mail rather than over the telephone. Usually, the side that wins is the side that has mastered the universe of documents and understands how the documents impact the case.

1. Responsibility For Documents And Other Things That Can Get Away From You

At the onset of litigation, the attorney should be thinking about how to preserve evidence – both the evidence that is in the client’s possession, and the evidence in the possession of the opposing party. When a party “reasonably anticipates litigation,” it has the duty to preserve any and all relevant documents, including electronically-stored information (“ESI”).24 The obligation to preserve evidence runs first to counsel, “who [has] a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.”25 Thus, the attorney needs to work with the client – including all of the client’s key personnel – to explain what types and categories of material are potentially relevant to the dispute. The attorney should direct the client to place a “litigation hold” on any documents that are relevant to the dispute.26 In other words, the client must not knowingly or intentionally destroy or alter any documents, and must also “suspend any routine document retention/destruction policies,” including routine purging of “deleted” items.27 In the process of implementing the litigation hold, the attorney should discuss with the client all of the possible sources of ESI, including computer hard drives, portable storage devices such as thumb drives, servers, CD-ROMs, and PDAs or smartphones.

The attorney should also serve a notice to preserve on the other side.28 The notice reminds the opposing party of its obligation to preserve any documents that are relevant to the parties and issues in the case.29 Notices to preserve “increase the likelihood that evidence will in fact be preserved and that sanctions will be awarded if evidence is destroyed.”30

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26 See Michael Einbinder and Michael D. Joblove, Discovery, in FRANCHISE LITIGATION HANDBOOK, 69-70-71 (Dennis LaFlura & C. Griffith Towle, eds., 2010).

27 Id. (citing Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).


29 Einbinder & Joblove, supra note 26, at 70-71.

30 Johnson & Whistler, supra note 28, at 24.
The ramifications of failing to preserve evidence can be severe. Sanctions can include the dismissal of claims, the exclusion of evidence, or a negative inference jury instruction.\(^3\) For this reason, it is imperative that attorneys adequately counsel their clients on their obligations to preserve evidence and documents as early in the litigation process as possible."

2. **The E-Discovery Morass**

As mentioned above, the scope of potentially relevant documents has broadened significantly in recent years to include such formats as e-mails, text messages, instant messages, webpages, and any other ESI. In addition to the duty to preserve evidence discussed in X.A.1 above, a number of other issues arise in the context of e-discovery.

A primary concern to most clients is going to be the burdensome expense of engaging in e-discovery and savvy litigators should be thinking about ways to shift the cost to the opposing party. The court in *Zubulake v. UBS Warburg, LLC* delineated the following factors to be considered in a cost-shifting analysis, weighted in descending order of importance:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties obtaining the information.\(^4\)

The attorney needs to determine whether or not metadata must be produced to the opposing side. "Metadata" is data about ESI, including information regarding the creation and usage of the file, such as the author, the date and time the document was created, and the "source of any subsequent changes."\(^5\) Oftentimes, discovery requests specifically demand the production of metadata accompanying any ESI. Sometimes attorneys for both sides agree to produce or withhold metadata. At any rate, attorneys must know that metadata exists for ESI and must understand that metadata may or may not be included in various production forms.

Along those same lines, the attorney must make a decision regarding the format of the production. Will the documents be produced in PDF format, or printed and produced in paper form? If so, no metadata will be produced to the other side. Alternatively, if the documents are produced in native\(^6\) or tiff format, metadata might be included. Depending upon the volume of documents to be produced, the attorney might work with the other side to reach an agreement on the format of the production. Many law firms use document review software and prefer to receive document productions in a format that is compatible with the software.

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\(^3\) *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994).

\(^4\) *217 F.R.D. 309, 322 (S.D.N.Y. 2003).*

\(^5\) *Johnson & Whistler, supra* note 26, at 20.

\(^6\) "Native format" documents include files such as Microsoft Excel spreadsheets and Microsoft Word documents.
Most of these issues can be resolved by agreement of the parties. When counsel can reach an early agreement about e-discovery, including an agreement on who will bear the cost of the document production, whether metadata will be exchanged, and the format of the production, discovery can proceed smoothly without the threat of costly disputes. It also gives the parties a sense of security in knowing that as long as they comply with the agreement, they avoid any significant risk of discovery sanctions.

B. Witness Interviews

1. Who Are They?

Of course, the groups of people who have relevant knowledge about the dispute will vary from lawsuit to lawsuit. But in most franchise cases, the potential witnesses fall into a few categories. It is likely that many of the witnesses are employees or former employees of the franchisor. For example, if the franchisee alleges that the franchisor induced it to enter into the franchise agreement through pre-sale fraudulent statements, the attorney should interview the franchisor’s sales representatives. Area developers or field representatives are likely to have knowledge of any default by the franchisee. Also consider whether former employees of the franchisee might be able and willing to provide insight into relevant facts.

Another potential category of witnesses are other franchisees. Often, franchisees communicate with each other, either informally or formally through franchisee associations. It is possible that other franchisees have some knowledge about the dispute between the franchisor and franchisee. Other franchisees might also be able to provide some insight into the system and the franchisor’s common practices and the franchisees’ perception of and thoughts about those practices.

Finally, consider whether people outside of the franchise system possess relevant information. Perhaps a landlord can offer insight into a franchisee’s pattern of not meeting its financial obligations. Perhaps a neighbor remembers observing deliveries of competing products to the franchisee’s store.

2. Figure Out What They Are Trying To Tell You And How They Can Help You

While the attorney will have goals for the witness interview, it is important to also take the time to listen to the story the witness wants to tell. Often, fact witnesses are novices at legalese. They may not understand what it means to be “fraudulently induced” into a contract, but a franchisee might feel that the franchisor told him mistruths in an attempt to persuade him to purchase a franchise. And a sales representative may not understand the concept of an earnings claim, but might see no problem with the fact that he recruited potential franchisees.

36 Id.
37 See J. Michael Dady and Jonathan Solish, Trials, in FRANCHISE LITIGATION HANDBOOK, 167-185-89 (Dennis LaFlura & C. Griffith Towe, eds., 2010).
38 But do be mindful that any current employees of the opposing party are probably off-limits. See MODEL RULES OF PROF’L CONDUCT R. 4.2.
including the plaintiff, by promising them that they could expect to make a certain amount of money each month.

The attorney also should be watching for clues into the kind of testimony the witness might provide if deposed or called to testify at trial. For example, does the witness have any interest in the outcome of the dispute? The witness may be a current franchisee who feels that the franchisor is oversaturating the market and believes that if the franchisee prevails in the litigation, his territory might be positively impacted. Or the witness might see the franchisee as a trouble-maker whose litigious antics are likely to stir up bad publicity for the brand that could harm the witness’s business. Similarly, the attorney should be looking for signs that the witness is aligned with one side or the other. Perhaps the witness is a former employee of the franchisor who left on bad terms. Or the witness could be a sales person for the franchisor who is concerned about how the franchisee’s earnings claim allegations might reflect upon him.

To that end, how can the witness help the attorney’s case? Does he have facts that support one of the elements in the case map? 39 From the franchisor’s perspective, if management has turned over several times during the life of the franchise relationship, there may not be anyone left in the company who can provide the historical details necessary to put the dispute into context for the jury. Maybe the witness can identify another source of potentially relevant evidence or authenticate important documents that the attorney knows will be crucial to the case.

The informal setting of a witness interview should be more conducive to a candid conversation than a formal deposition or examination. However, if the witness has particularly good things to say, counsel can consider asking the witness to sign a statement or to testify at a deposition. 40 If the attorney makes the decision to tie down a witness’s favorable story, be sure to limit the testimony to only the important, material facts. Including unnecessary details only exposes the witness to impeachment on issues that do not matter to the case. 41 A witness might prove beneficial in a number of different ways, so it is important that the attorney listen carefully and think creatively when interviewing a witness and determining how to use the information.

C. Good Deposition Protocols

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

Proper reasons for taking a deposition (each of which should be reviewed with clients in preparing them for their deposition) include the following: (1) discovering information; (2) limiting what the other side might effectively say at trial; (3) attacking the other side’s themes and getting admissions that promote your side’s themes; and (4) determining whether the deponents will likely be “good” or “bad” witnesses at trial.

39 See IV.A.2, supra.
40 Brian Goodwin, Informal Witness Investigation, 13 Litig. 8, 9 (Summer 1987).
41 Id. at 10.
2. **Whom To Depose**

   It is normally important to take a federal rule 36(b)(6) deposition, or the equivalent, and to additionally depose the most senior person on the other side as well as the persons most involved in the key fact issues, be they employees, ex-employees or third parties.

3. **When To Take Your Depositions**

   It is best to take depositions only after counsel has had a chance to go over the client's documents and the key documents and interrogatory responses from the other side. It is also important to remember the themes you have developed when preparing the deposition outlines to be used.

**XI. EXPERT WITNESSES**

A. **When To Use Them**

   In franchise cases, liability witnesses are not commonly used, but can have some significant value. For example, using a liability expert to talk about “reasonable expectations” which the parties are obligated to meet can be very valuable. The franchisee may want an expert to opine about recognizing the covenant of good faith and fair dealing in a termination case. A franchisor may need an expert on “independent contractor” status in a vicarious liability case in which it is being sued alongside the franchisee.

   A good case that spells out a blueprint for how to get into evidence good “reasonableness” opinions of an expert on the franchisor/franchisee relationship is *R&R International, Inc. v. Manzen, LLC.*

   There may be a good time to use a damages expert and there may be a time when the franchisee or the CFO from the franchisor company can do the same job for less money. It is not always necessary to match expert for expert but each case requires a good, hard look as to what the expert is being engaged to accomplish. If a lay person can accomplish the same thing, ask whether the expert is necessary.

B. **How Best To Identify Them**

   Too much emphasis is placed on credentials and not enough on good straight-forward oral communications skills. Our experience has been that the latter will trump the former every time in front of a jury.

   The ability to write a good written report (or the lack thereof) is not a good qualifier (or disqualifier) for identifying a good expert able to “testify at trial”. Actually going through a trial with, or against, an expert is among the best ways to identify who would be good (and not good) on the next case.

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42 2010 WL 3605234 (S.D.Fla.). See also *TCBY Systems, Inc. v. RSP Company, Inc., et al*, 33 F.3d 925, 929 (8th Cir. 1994) (expert utilized for discussion of appropriate customs and practice in particular subparts of the franchisor’s express commitments—e.g., site selections) (J. Michael Dady was counsel for the franchisee in this case).
C. How Best To Use Them . . . For Both Liability And Damages Issues?

Experts do not seem to be used much on liability issues. That may change, as there are some missed opportunities here, on the liability side, for having good experts with good practical experience, ideally on both the franchisor and franchisee side, who are also good communicators of common sense principles. For example, what should franchisors reasonably be expected to do to grow the system, to make franchisees more profitable, to properly manage the collection and expenditure of advertising funds, and to help franchisees acquire the goods and services they need at the best possible prices.

D. How Best To Minimize The Effectiveness of Your Adversaries’ Expert Witnesses

Too much time is spent cross-examining experts on matters that do not matter, at least not enough to take up the jurors’ valuable time with them.

Too little time is often spent on cross-examining experts about matters not covered on their direct examination—a cross-examination which will draw an objection—e.g., “this is outside the scope of the direct examination”—from opposing counsel, which will not be sustained. It is often the topics not covered on direct examination that are the most fertile for cross-examination—e.g., “I notice that you spend a lot of time talking about what you disagree with in our expert’s opinions during your testimony, but you did not spend any time talking about the numerous matters on which you agree with our expert. There are many, in fact, aren’t there? Let’s go through them.”

XII. MOTION PRACTICE

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

The determination of what motions to bring hinges on counsel’s goals for the case. Does the attorney prefer federal court or state court? Would counsel rather try the case to a jury or to a judge? Is any particular venue preferable? Then consult the franchise agreement. Did the franchisee waive the right to a jury trial? Did the parties agree that any disputes between them would be brought in the franchisor’s home state, or submitted to arbitration? The franchise agreement will often dictate the procedural motions that are available in a case.

1. Transferring Venue Among Federal Courts

A defendant must bring a motion challenging venue before it files its answer or the defense is waived.43 If a party desires to transfer the case to a more convenient forum in federal court, 28 U.S.C. § 1404(a) is the typical statutory procedure.44 The section provides that the district court may transfer cases “[f]or the convenience of parties and witnesses, in the interest of justice.” Courts often consider factors such as: “(1) the convenience of the parties; (2) the convenience of the witnesses; (3) the relative ease of access to sources of proof; (4) the


44 See Deborah S. Caldwell, Initial Pleadings, FRANCHISE LITIGATION HANDBOOK, 1-7-10 (Dennis LaFiura & C. Griffith Towle, eds., 2010).
availability of process to compel the presence of unwilling witnesses; (5) the cost of obtaining the presence of the witnesses; and (6) the public interest."\textsuperscript{45} One court analyzing Section 1404(a) in the franchise context held that the franchisees "essentially waived the right to argue inconvenience when they agreed to the franchise agreement and the forum selection clause."\textsuperscript{46}

If the action was brought in an improper venue, however, 28 U.S.C. § 1406(a) requires the court to "dismiss, or if it be in the interest of justice, transfer such case to any district court or division in which it could have been brought."\textsuperscript{47} In 	extit{Cottman Transmission Systems, Inc. v. Martino,}\textsuperscript{48} a franchisor brought claims against the franchisee in Pennsylvania, the franchisor's home state, including claims for violation of the Lanham Act. The franchise agreement did not include a forum selection clause.\textsuperscript{49} The court held that the appropriate forum was Michigan, where the former franchisee was located, in part because the Lanham Act violations occurred in Michigan and because the franchise agreement was executed and performed in Michigan.\textsuperscript{50}

If the plaintiff files in an inappropriate federal court and there is no other federal court where the action can or should be transferred, the defendant should bring a forum non conveniens motion to dismiss. Forum non conveniens motions are governed by federal common law.\textsuperscript{51} The court should consider a number of factors. Private interest factors include ease of access to proof, compulsory process for attendance of unwilling participants and the cost of obtaining their presence, the possibility of an inspection of the premises (where appropriate), the enforceability of any judgment obtained, and generally, "all other practical problems that make trial of a case easy, expeditious, and inexpensive."\textsuperscript{52} Public interest factors include congested dockets, the interest in having local matters tried locally, and the appropriateness of conducting a diversity case where the law of the forum matches the law applicable in the case.\textsuperscript{53}

\section*{2. Subject Matter Jurisdiction In Franchise Cases}

If the lawsuit is filed in federal court but the court lacks subject matter jurisdiction over the case, the defendant should file a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) before the defendant answers the complaint.\textsuperscript{54} Federal courts have diversity jurisdiction over actions between citizens of different states where the amount in controversy exceeds $75,000, exclusive of interest and costs.\textsuperscript{55} Note that for diversity purposes, limited

\begin{footnotesize}

\textsuperscript{46} Medicap Pharmacies, Inc. v. Faidley, 416 F. Supp. 2d 678, 686-90 (S.D. Iowa 2006).

\textsuperscript{47} 28 U.S.C. § 1406(a).

\textsuperscript{48} 36 F.3d 291, 292 (3d Cir. 1994).

\textsuperscript{49} Id. at 293.

\textsuperscript{50} Id. at 295-96.

\textsuperscript{51} See, e.g., Ravello Monereo v. Rosa, 211 F.3d 59, 511-12 (9th Cir. 2000); De Aguilar v. Boeing Co., 11 F.3d 55, 59 (5th Cir. 1993); Royal Bed & Spring Co. v. Famosul Industria e Comercio de Moveis Ltda., 906 F.2d 45, 50 (1st Cir. 1990).

\textsuperscript{52} Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

\textsuperscript{53} Id. at 508-09.

\textsuperscript{54} Fed. R. Civ. P. 12(b)(1).

\textsuperscript{55} 28 U.S.C. § 1332.
\end{footnotesize}
liability companies are citizens of every state where their members are citizens. Federal courts also have original jurisdiction over lawsuits arising under "the Constitution, laws, or treaties of the United States," and over actions relating to patents, copyrights, and trademarks. The Lanham Act also provides that federal courts have original jurisdiction over Lanham Act claims. When a federal court has original jurisdiction over one of the claims, it will have supplemental jurisdiction over ancillary state law claims, such as claims for breach of franchise agreement.

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

Two words: be prepared. Be prepared for good news and certainly be prepared for bad news. The attorney should anticipate various outcomes during the preparation of or response to a motion and be prepared with plans of action to move forward regardless of whether the news is favorable or unfavorable. When a case is well organized from its inception, the lawyer should be able to nimbly move forward after receiving a decision, whether good or bad.

Tell your clients right away about any news – good or bad. The best advice I ever received as a young lawyer was "There should be nothing in your file that is not also in the client’s file." Paper is cheap. Emails are cheaper. Let your client know the good and the bad news as soon as possible.

XIII. CONCLUSION

As we noted at the outset of this paper, our preferred approach to lawyering is to speak softly and carry a big stick. Such an approach, however, only works if you actually know how to use that stick when and if necessary. While there is no "magic bullet" or one-size fits all approach to litigation, we have attempted to take our collective experience as litigators and touch upon some of the key issues that arise in nearly every piece of franchise litigation. Given the relatively small number of cases that are actually resolved through a trial on the merits, we strongly recommend that you attempt to employ the litigation strategies outlined in this paper from the outset, rather than waiting until the eve of trial, and believe that by doing so, you and your partners will be able to more effectively manage the path towards trial and obtain better results for all of your deserving clients.

July 26, 2011

Larry Lawyer  Via electronic mail and CMRRR
Law Firm, LLP
200 Main Street
Fort Worth, Texas 76102

Re: Preservation Notice

Dear Counsel:

Newco, Inc. will request the discovery of documents, data, and information relevant to the dispute between Newco, on one hand, and Fran Franchisee, on the other hand.

Accordingly, you and your clients are hereby given notice of your duty to locate and preserve all evidence relevant to the dispute. This duty specifically includes all correspondence between you or your client and the Franchisee Council.

As you know, you or your clients’ failure to comply with this notice may result in the imposition of sanctions for spoliation of potential evidence.

Thank you for your immediate attention to this matter.

Sincerely,

Deborah S. Coldwell
Direct Phone Number: (214) 651-5260
Direct Fax Number: (214) 200-0865
deborah.coldwell@haynesboone.com
To: IT Manager
From: General Counsel
Date: July 26, 2011
Subject: LITIGATION HOLD:
Suspension of Internal Document Destruction Policy

Privileged and Confidential Attorney-Client Communication

ATTENTION: PLEASE SUSPEND OR CONTINUE TO SUSPEND THE DESTRUCTION OF ANY AND ALL ACCESSIBLE ELECTRONIC AND/OR PAPER DOCUMENTS, DATA, AND INFORMATION. NEWCO, INC. MUST PRESERVE ALL ACCESSIBLE ELECTRONIC AND/OR PAPER DOCUMENTS, DATA, AND INFORMATION UNTIL COUNSEL PROVIDES FURTHER NOTICE.

Newco, Inc. has been sued by Fran Franchisee ("Franchisee"). Franchisee was a Newco franchisee from ____ to _____. (insert dates) This dispute will involve the discovery of documents, data, and information, including electronic mail (e-mails), personnel documents, and other information related to Franchisee's termination from the Company. We have a legal duty to locate and preserve all evidence relevant to the dispute. This duty includes any and all electronic documents, data, and information generated by and/or stored on Newco, Inc.'s computers and other storage media, regardless of the availability of paper copies. Accordingly, we must immediately suspend any and all automatic or routine document destruction policies, including destruction of any electronically stored information, and specifically must preserve all backup tapes - back up tapes should not be re-circulated until further instruction. The failure to satisfy this legal duty could result in the imposition of sanctions for spoliation of potential evidence.

Furthermore, electronic documents and the storage media on which they reside may contain relevant, discoverable information beyond that which may be found in printed documents. Therefore, to avoid destruction, we must preserve the data on the original media. Initially, we must preserve all accessible electronic documents, data, and information, including but not limited to the following:

All digital or analog electronic files, stored in machine-readable format on magnetic, optical, or other storage media, including the hard drives or floppy disks used by Newco, Inc.'s computers and their backup media (e.g., other hard drives, accessible backup tapes, floppies, Jaz cartridges, CD-ROMs) or otherwise, whether such files have been reduced to paper printouts or not. More specifically, Newco, Inc. must preserve all e-mails, both sent and received, whether internally or externally; all word-processed files, including drafts and revisions; all spreadsheets, including drafts and revisions; all databases; all files, including drafts and revisions; all presentation data or slide shows produced by presentation software (such as Microsoft PowerPoint); all graphs, charts
and other data produced by project management software (such as Microsoft Project); all data generated by calendaring, task management, and personal information management (PIM) software (such as Microsoft Outlook or Lotus Notes); all data created with the use of personal data assistants (PDAs), such as a BlackBerry, PalmPilot, or other Windows CE-based or Pocket PC-based devices; all data created with the use of document management software; all data created with the use of paper and electronic mail logging and routing software; all Internet and Web-browser-generated history files, caches and “cookies” files generated at the workstation of each relevant employee and/or agent and on any and all accessible backup storage media; and any and all other files generated by users through the use of computers and/or telecommunications, including but not limited to voice mail. Further, Newco, Inc. must preserve any log or logs of network use, whether kept in paper or electronic form, all copies of accessible backup tapes and the software necessary to reconstruct the electronic data on those tapes.

NOTE: As a general rule, this litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled as set forth in the company’s automatic or routine document destruction policy.

Counsel may limit the scope of this litigation hold as soon as more information becomes available or end it if the dispute ceases. However, until further notice, please retain all accessible data, documents, and information in both electronic and paper form. If you have any questions with regard to this memorandum or your affirmative duties, please contact me immediately and we will seek guidance from our legal counsel.

Thank you for your immediate attention to this matter.
MICHAEL DADY'S TOP TEN LIST OF REASONS
FRANCHISEES WILL BE WORKING WITH
FRANCHISEE LAWYERS IN THE NEW MILLENNIUM

I.  THE FRANCHISE OPPORTUNITY WAS MISREPRESENTED OR NOT FULLY
    AND FAIRLY DISCLOSED.

- Franchisees frequently approach us after they have lost all the money
  they had and could borrow, and want to know if they can get it back. The
  answer to that question is typically found in getting a thorough
  understanding of the written and oral communications from the franchisor
  to the franchisee before the franchise documents were signed, and
  analyzing that fact situation under all applicable common law (e.g., fraud,
  including the material omissions standard) and franchise disclosure
  statutes.

- Generic and client specific advertising/marketing materials are particularly
  helpful, as are any pro formas (be they the napkin variety or otherwise)
  furnished to the franchisee in advance of the time the franchise
  documents were signed.

- Franchisee lawyers typically assume that only pre-signing representations
  are actionable; there are arguably cases when post-signing
  misrepresentation/material omissions are actionable (e.g., if the full facts
  had been furnished during training, for example, wouldn't the franchisee
  have gotten out and cut its losses, rather than go forward?)

II. THE FRANCHISOR'S PROMISED ASSISTANCE DID NOT MATERIALIZE.

- The franchise expects to get at least as much value from the franchisor as
  it pays in up front and ongoing royalties. When that does not occur,
  franchisees search for a remedy.

- Unfortunately, typically the written promises of services are far different
  than those orally promised during the sales presentations.

- To prevail, franchisees and their attorneys must typically get beyond the
  restrictive language of the written agreement, and successfully argue that
  the common law of contract, as augmented by the covenant of good faith
  and fair dealing, create obligations from the franchisor to the franchisee
  not found in the writing.

- A common type of complaint is that the franchisors promised cost savings
  from group buying have not occurred, with franchisees sometimes

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complaining that, in fact, franchisees can buy cheaper themselves than through the franchisor’s group buying efforts (which, in turn, frequently leads to findings that the franchisor is getting vendor kickbacks or rebates -- which, particularly if not disclosed, may create additional causes of action above and beyond contract claims).

- Advertising fund concerns are another common complaint (with the franchisor making unreasonable payments to itself to handle advertising/marketing being a common complaint; separate fund/right to audit issues also commonly arise).

III. THE CONTEMPLATED “CRITICAL MASS” DEVELOPMENT OF THE FRANCHISE SYSTEM WITHIN THE ADI HAS NOT OCCURRED.

- Unsuccessful franchisees frequently are also lonesome franchisees -- i.e., there is not a “critical mass” of franchised and/or company-owned stores within the ADI, which, in tum, causes marketing/advertising efforts to be unsuccessful and/or too expensive on a per store basis.

- A combination of misrepresentation/disclosure/contract claims must be reviewed.

IV. THE FRANCHISOR IS LOCATING OTHER FRANCHISE OR COMPANY-OWNED STORES TOO CLOSE TO THE FRANCHISE UNIT, OR IS OTHERWISE ENCROACHING.

- New forms of encroachment are more commonly occurring -- e.g., Internet sales by the franchisor; alternative forms of marketing (e.g., direct mail; grocery store).

- Misrepresentation/disclosure/contract claims must be reviewed.

V. THE FRANCHISEE HAS PRICING PROBLEMS – E.G., THE FRANCHISOR’S PROMISED “BEST PRICING” DOES NOT MATERIALIZE; THE FRANCHISEE IS PAYING TOO MUCH FOR GOODS FROM APPROVED VENDORS TO SUBSIDIZE VENDOR PAYMENTS TO THE FRANCHISOR; THE FRANCHISOR IS GIVING PREFERRED PRICING TO COMPETING FRANCHISEES; THE FRANCHISOR SQUEEZES THE FRANCHISEE’S PROFIT MARGINS BY ESTABLISHING MAXIMUM RESALE PRICES.

- Undisclosed or inadequately disclosed payments from vendors to franchisors based on franchisee purchases, if discovered, present an array of potential options.

- Franchisors are getting more aggressive in establishing maximum and minimum prices at which franchisees may resell.

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• The antitrust laws continue to evolve in favor of franchisors and against franchisees (e.g., Kahn).

VI. THE FRANCHISOR SELLS TO A “BAD BUYER.”

• “Bad buyers” include buyers who are too highly leveraged, who have no expertise, or who have conflicts of interest (e.g., they own competing franchise systems).

• While it has been historically accepted that franchisors have the right to prohibit the sale by the franchisee to an unsuitable buyer, it has also historically been assumed that the opposite is not the case.

• New uses of old theories, and new uses of new theories, give the franchisees some rights to challenge the franchisor’s sale to a bad buyer.

VII. THE FRANCHISEE’S EFFORTS TO TRANSFER ITS BUSINESS FOR FAIR VALUE ARE IMPEDED WITH RIGHTS OF FIRST REFUSAL OR WITH OVERLY STRINGENT ENFORCEMENT OF RESTRICTIONS ON RIGHTS TO TRANSFER.

• Franchisors are getting more aggressive in trying to steer sales to particular buyers or to themselves, with the necessary effect being a reduction in the value the franchisee can get for the business.

VIII. THE FRANCHISEE WANTS TO “GO PRIVATE” OR SWITCH TO ANOTHER FRanchise SYSTEM . . . OR CLOSE WITHOUT PENALTY.

• Mature franchisees, in particular, after realizing that they are paying more in franchise fees than they are getting value, are interested in getting out of their written agreement before it expires.

• The entire array of legal remedies must be reviewed, with “go private” options being available (and are easier, if the franchisor does not control the real estate, and if there is no post-teen noncompete).

IX. THE FRANCHISEE IS BEING FACED WITH WRONGFUL TERMINATION.

• While underperforming franchisees, who have been given reasonable notice of the perceived deficiencies and an opportunity to correct them, but who do not do so, may be terminated, there is an underutilized array of remedies available to franchisees who are performing (or who have not been given reasonable notice of claimed deficiencies), to prevent wrongful termination or to recover fair compensation (although franchisors’
aggressive drafting, attempting to limit forums and damages available, make this task more difficult).

X. THE FRANCHISOR REFUSES TO RENEW OR PROPOSES TO RENEW ONLY IF THE FRANCHISEE AGREES TO A DRAMATICALLY DIFFERENT AGREEMENT.

- Franchisees need reasonable criteria for renewals, ideally in both the written agreement and in an applicable statute.

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STANDSTILL AND TOLLING AGREEMENT

This Standstill and Tolling Agreement ("Agreement") is made as of __________, 2011 (the "Effective Date"), by and between Fran Franchisee ("Franchisee"), and Newco, Inc. ("Franchisor"). All of the aforesaid persons or entities are collectively called the "Parties" or individually as "Party."

WHEREAS, Franchisee and Franchisor are parties to a Franchise Agreement, and the Franchise Agreement grants Franchisee the right to operate a __________ franchise;

WHEREAS, the Parties have a dispute regarding certain pre- and post-signing representations allegedly made to Franchisee, as well as a dispute regarding allegations that Franchisor breached its contract-in-law and contract-in-fact obligations;

WHEREAS, Franchisor denies the allegations made by Franchisee;

WHEREAS, the Parties wish to explore a resolution of their dispute without the need to invoke formal legal proceedings;

NOW, THEREFORE, the Parties agree as follows:

1. **Standstill Period.** The Parties agree to a standstill of the aforesaid dispute from __________, 2011 (the "Effective Date") until __________, 2011 (with such time period to be referred to herein as the "Standstill Period"). The Parties agree that any deadlines, time periods, or limitation periods (whether statutory, contractual or otherwise) relating to any claims that Franchisee, or their affiliates or assigns, have or might have against Franchisor, and/or its control persons, affiliates or assigns, shall be tolled and suspended from the Effective Date of this Standstill Agreement until fifteen (15) days after the expiration of the Standstill Period to allow the Parties to jointly explore a resolution of their dispute. At the conclusion of the Standstill Period, Franchisee shall have fifteen (15) days to first institute legal proceedings in arbitration, state or federal court. Only if Franchisee has not instituted legal proceedings within this fifteen (15) day period, __________ shall have the right to proceed against Franchisee in state or federal court or in arbitration. Regardless if Franchisee has or has not initiated a legal proceeding within the fifteen (15) day period, any limitations period shall be deemed tolled for the time period described above.

2. **Actions Done Without Prejudice to Assert Claims and Defenses.** If the Parties fail to reach a resolution of their dispute by __________, 2011, subject to Paragraph 1, the Parties are free to assert all claims and defenses that arose before, during, and after the Standstill Period. This Agreement, and the actions of the Parties pursuant to it during the Standstill Period, shall not create either a claim, or a defense, under the doctrine of estoppel. The Parties also agree that the Parties' discussions during the Standstill Period,
and documents generated during the Standstill Period and shared with the other Party for purposes of attempting to reach a mutually satisfactory resolution of this dispute, are not admissible in litigation or arbitration.

3. **Covenant Not to Sue During Standstill Period.** All Parties agree neither they, nor any of their affiliates, successors, subsidiaries or assigns shall, initiate or take, at any time during the Standstill Period, any further legal action, including the filing or serving of any lawsuit or arbitration, against any other Party to this Agreement relating to the Development Contract or Franchise Agreement.

4. **Term and Termination.** This Agreement shall become effective on the Effective Date and shall continue as described above, provided, however, that following the termination or expiration of this Agreement for any reason, the provisions of Paragraphs 1, 2, 3, 8, and 9 shall survive such termination or expiration and shall continue in full force and effect.

5. **Counterparts.** This Agreement may be executed by facsimile and any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

6. **Severability.** This Agreement shall be deemed severable, and the invalidity or unenforceability of any term or provision hereof shall not affect the validity or enforceability of this Agreement or any other term or provision hereof. Furthermore, in lieu of any such invalid or unenforceable provision hereof, the parties shall add as a part of this Agreement a provision as similar in terms to such invalid or unenforceable provision as may be possible to be valid and enforceable.

7. **Draftsmanship.** The language of this Agreement shall be construed simply and in accordance to its fair meaning, and shall not be construed for or against any Party as a result of the source of its draftsmanship.

8. **Applicable Law; Attorneys’ Fees.** This Agreement shall be governed by and construed in accordance with the laws of the State of Minnesota excluding its conflicts of laws principles. In the event of litigation to enforce the terms of this Agreement, the prevailing Party shall recover its actual attorneys’ fees and costs in addition to any other relief to which it may be entitled.

9. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties with respect to the Standstill and Tolling Agreement and supersedes all prior or contemporaneous agreements, negotiations, representations, warranties, guarantees, promises and other understandings with respect to this Agreement. Nothing in this agreement shall affect the Parties’ ability to enter into other written agreements with some or all of the other parties to the extent the terms thereof do not contradict the terms herein.
10. **No Admission of Liability.** The Parties recognize that this Agreement is entered into in an attempt to resolve any disputes that may exist and that this Agreement does not represent an admission of liability by any Party to this Agreement.

11. **Confidentiality.** The Parties, including their officers, employees, directors, attorneys and agents, agree to keep confidential all communications, discussions, data and compilations arising out of this Agreement and shall not disclose or share any communications, document, data or compilation arising out of this Agreement with any Party not a party to this Agreement. A Party may share such information only with its counsel, provided its counsel agrees not to discuss or disclose any information with any third parties. A Party may share such information with third parties provided the Party has express written authority from the other parties to share the information. Nothing in this paragraph is intended to preclude a Party from sharing any such information with a mediator.

12. **Notices.** Any notice, document, or other communication required or permitted to be given hereunder shall be in writing and shall be sufficiently given if delivered by hand or sent by a reliable overnight delivery source such as Federal Express, or by deposit in any United States Post Office, postage by registered or certified mail, return receipt requested. Notices shall be given to the other Party to this Agreement through their respective counsel at the following addresses:

To: Franchisor

____________________________________

____________________________________

____________________________________

To: Franchisee

____________________________________

____________________________________

____________________________________

**IN WITNESS WHEREOF,** the Parties hereto have duly executed this Agreement to be effective as of the Effective Date.

Franchisor

By: ________________________________

Its: ________________________________

Franchisee

By: ________________________________

Its: ________________________________