

Meet the top attorneys in franchising

Do you need a great franchise lawyer? Look no further than the Franchise Times Legal Eagles. These lawyers live and breathe franchising and truly understand the nuances of the unique business model. In a world of chaos and uncertainty, these exceptional professionals are more necessary than ever.

With a keen mind for both the legalese and business, they understand the gravitas of every single legal battle, every transaction and the importance of every document. That engenders a spirit of collaboration and efficiency among this tight-knit group of legal professionals.

No matter the issue, the Franchise Times Legal Eagles want to get it solved so everyone can get back to business.

For business owners and leaders, having a knowledgeable partner with the business case top of mind is priceless—even when the bill comes.

This year, we touch on the biggest issues in franchising.

We looked into the regulatory climate under President Joe Biden. Are we sliding back into the joint-employer dark ages? Probably not, but that and many other changes could affect franchising, see how on page 37.

And how will staffing challenges affect everything from the FDD to operations and franchisee-franchisor relations? Check out page 56 find out.

We also checked in with our newest and most-tenured Legal Eagles. See what the New Class is thinking about on page 54 and what keeps the Hall of Famers up at night on page 58.

Congratulations to all our Legal Eagles, keep up the great work. [FT](#)

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Franchise Times LEGAL EAGLES®

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As the FTC stirs, attorneys take note



By Beth Ewen

Is the sleeping giant waking up? That's what Federal Trade Commission watchers are discussing after the FTC sued failed franchise Burgerim for alleged fraud in February—the first such case in 15 years—and also launched a new fraud reporting tool called ReportFraud.FTC.gov.

"This action—our first under the Franchise Rule since 2007—reflects a renewed commitment across the agency to protecting franchisees from illegal practices. As part of this work, we're making it easier for franchisees to report predatory practices to us," tweeted Lina Khan, chair of the FTC since her appointment in June 2021.

Some Franchise Times Legal Eagles lawyers think it's far too late, noting more than 1,500 Burgerim franchisees have lost their investment, the founder has reportedly fled the country and no assets are left. "It's well past the time when it would have been an effective move," said Lee Plave of Plave Koch.

He worked at the FTC in the early part of his career, and says about the agency, "What's the old line? An enigma wrapped in a riddle wrapped in a puzzle, something like that."

During the Trump administration's "de-regulation bent," he said, "there was a concern that perhaps the FTC would be asked to kill off the Franchise Rule. Franchisors and franchisees and the IFA all successfully in effect petitioned to not let that occur."

Susan Grueneberg of Cozen O'Connor believes the new complaint line specifically for franchises "does signal perhaps a more activist approach. We were all kind of reading the tea leaves last year, when Lina Khan came on, and she mentioned franchising in one line of a letter."

She's also watching a new ANPR, or advance notice of proposed rule-making, regarding earnings claims, not just in franchising but in a wide variety of industries. "It would be a whole new kind of undertaking, regulation, for the FTC," she said, but don't expect any action soon—the process at the FTC is loooooonnnnnng.

Action in the states

Jeff Haff, a Dady & Gardner attorney who represents franchisees, is watching a bill moving through the U.S. House to provide a private right of action for people



▲ Kristin Corcoran of Appleby & Corcoran.

harmed by violations of the FTC's Franchise Rule, meaning individuals could sue regardless of the state they live in.

"The state of the private right of action under the FTC rule is that there isn't one," Haff said. "If you violate the FTC rule as the franchisor, you can walk right into court and say, 'Yes, I admit it, I violated it,' but the court would say there's no private right of action."

Sponsored by Janice Schakowsky, D-Ill., the bill "gives a little teeth to the belief that you should get an accurate and well-made FDD. The fact that I have a quote-unquote right to get an FDD is pretty worthless if I can't sue about it," he says. "The only other remedy I would have is to turn it over to the FTC to seek enforcement," a long shot as the Burgerim case shows.

David Kaufmann of Kaufmann, Gildin & Robbins, who authored the New York Franchise Act while serving as special deputy attorney general of New York, is taking aim at two legislative efforts in California. "The state whose recently enacted AB-5 law has in significant part triggered the nationwide supply chain breakdown is now threatening to turn franchising into a socialist endeavor," he wrote in a fiery piece in the New York Law Journal in December.

Called AB-257 or the FAST Act, the bill seeks to create an 11-member council to establish industry-wide standards on wages, working hours, and other working conditions including the "necessary cost of proper living."



▲ Susan Grueneberg of Cozen O'Connor.

"In other words, the government will dictate how much franchisees must pay their employees in order to afford them a 'proper living'—whose attributes will be determined by, you guessed it, the state of California," he wrote. Needless to say, he's not a fan.

Data privacy a 'giant' concern

Kristin Corcoran of Appleby & Corcoran has one word to describe the burgeoning slate of new laws around privacy and data use: "Giant," she said, especially for international brands, but domestic ones, too.

"Honestly it is challenging, even just trying to figure out which countries or which states are going to be enacting legislation and then the rollout of them. It's just so much," said Corcoran, who got an early start on the topic when she was at Subway for 25 years, working on international development.

"But what I always say, whenever this topic arises: It is doable. There's lots of other companies that are figuring it out. The challenge that lawyers are always going to have, is the technology is happening so fast, and the law is behind the technology," she said.

For this attorney, like others in our Legal Eagles class, helping clients with regulatory issues like these makes her work worthwhile. "I think it's fascinating." [FT](#)

Talking big trends and best lessons



What are the biggest trends you're watching in 2022, and how are you approaching them?

“ 1. Delays in registering in registration states is still a pain point. We are hoping that using all available electronic filing options will help reduce hang ups and delays. 2. Making clear FPRs in Item 19, to make sure the effects of COVID do not distort the total financial picture. 3. Franchises are selling! Clients are busy with sales and that is exciting news! ”

—Laura Lewis, Canada Lewis & Associates

“ The potent addition of a private right of action under the amended FTC Rule. ”

—John Holland, Dady & Gardner

“ The franchise model has been moving away from brick-and-mortar units and I have seen smaller brands embrace technology and use it to grow their footprint

during COVID. Leveraging technology involves more than just improving the customer experience through apps and online ordering/paying and can include the use of mobile and online platforms to support franchise sales, training and operations. We have worked with smaller international brands that are taking advantage of the available technology to launch in the U.S. on relatively modest budgets. They have realized that they can perform many support functions from abroad using technology, keeping their model nimble and costs low. ”

—Nicole Micklich, Urso Liguori Micklich

“ The ‘work-from-home’ concept has not only hit the traditional corporate world, but it’s also changing franchise opportunities. Many franchise concepts are gravitating toward concepts that can be operated with fewer employees and from home. These growth sectors may include IT and technology services, at-home cleaning services and tutoring and educational concepts. The way in which a franchise is offered is changing as well. More and more concepts are offering virtual discovery days to allow prospective franchisees to learn about a brand while never leaving their homes. Even the FDD registration process is evolving to a remote process with NASAA’s introduction of FRED, the electronic filing depository. ”

—Christina Fugate, Ice Miller

What is an important lesson you've learned recently?

“ We have engaged in several Zoom mediations during the pandemic. This form of mediating disputes is faster, less expensive and more likely to lead to a successful negotiated resolution than traditional in-person mediations. The principal reason: At key times during the all-day—and potentially into the evening—Zoom mediations, we are able to get key decision-makers on both sides, as well as insurance company executives with decision-making authority (if needed), to directly and fully engage in the process. This is not always the case in in-person mediations. ”

—J. Michael Dady, Dady & Gardner



“ COVID: Recovery, recovery, recovery. What continuing and lasting impacts will COVID have on businesses generally and, specifically, on businesses that were uniquely hard-hit by those impacts? How can or will businesses adapt to what has been a clear cultural shift in the way consumers and workers are managing their work and leisure activities? ”

Approach: Stay nimble and innovate. Successful businesses will continue to take advantage of this period of forced innovation. ”

—Michael Daigle, Cheng Cohen

“ We were involved in addressing franchise issues in the middle of a multi-billion-dollar acquisition. The franchised part of the system was a small part of the overall enterprise being acquired. A good reminder that humility and a sense of proportion are useful when dealing with bigger concerns. ”

—Lee Plave, Plave Koch

“ Closing is never a sure thing. I saw a home run of a deal fall apart this past year and I closed others that were on the brink of termination. It takes a total team effort of buyers, sellers, lenders, attorneys and advisers to bring a deal to the finish. Everyone plays an important role and nobody should be taken for granted. ”

—Michael Ackerman, Paris Ackerman



“ Clients need plain English legal guidance and for their lawyers to explain why a legal decision makes sound business sense. I’ve done several trainings with franchisor and large franchisee clients, and it’s always an opportunity to practice speaking to actual humans instead of attorneys. ”

—Caroline Fichter, Bundy Law Firm



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Bethany L. Appleby has practiced franchise law for over 20 years and represents clients in a wide variety of transactional matters, litigation, and arbitration.

Before launching the franchise law boutique firm Appleby & Corcoran, LLC, Bethany was Chief Legal Officer for Subway Restaurants and previously co-chaired the Franchise and Distribution Practice Group at a law firm with a substantial franchise practice. She serves on the American Bar Association Forum on Franchising's Governing Committee and is the organization's Diversity Officer and a past Editor-in-Chief of the Franchise Law Journal. She is active in the International Franchise Association and a frequent speaker and writer on franchise law topics. She also serves as an arbitrator and mediator.

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For over 25 years, Kristin has provided legal advice on a broad range of domestic and international franchise matters.

As co-founder at Appleby & Corcoran, LLC, Kristin drafts franchise disclosure documents and negotiates license agreements, master franchise and franchise agreements, area representative agreements, and supply agreements and advises on the many matters that affect franchising, such as advertising and marketing, technology, COVID-19, privacy/data protection, competition, under-reporting, and dispute resolution. For inbound and outbound international franchisors and developers, Kristin provides practical legal recommendations on market entry and drafts documents that are right sized for the target market. As Senior Associate General Counsel, she led the international legal team for Subway and gained a broad range of applicable experience on market entry, legal compliance, advertising and marketing, supply chain management, legal support of brand initiatives, and dispute resolution. She has found this extensive in-house experience to be invaluable to current clients.

She enjoys teaching Franchise Law and the Commercial Transactions Workshop at Quinnipiac University School of Law and is an active member of the ABA Forum on Franchising Professors Committee. She is also a trained arbitrator and speaks and writes frequently on a variety of franchise topics.

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Carmen D. Caruso and his firm are sought-after for high stakes litigation and arbitration cases throughout the United States. Nationally recognized for its success in franchise and dealership litigation, and at the negotiating table, the firm's cases have expanded legal protections for franchisees and dealers, and their independent associations, against anti-competitive, abusive, and bad faith or fraudulent conduct.

Carmen's practice extends to all types of business and professional liability litigation, and Carmen is also an Arbitrator for the American Arbitration Association.

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Richard Bayer, a partner with Einbinder & Dunn LLP, leads the firm's franchise regulatory practice. Richard has extensive experience in representing franchisors with the development and growth of their franchise systems domestically and internationally. Services for franchisors include franchise disclosure document preparation and registration, franchise sales compliance and onboarding, corporate structuring, mergers & acquisitions, trademark registration and protection and commercial real estate leasing. Richard also represents franchisees in connection with the acquisition of single-unit, multiple-unit, area development and master franchises, the formation and operation of franchisee associations, as well as matters involving corporate structuring, financing, commercial real estate leasing, and mergers & acquisitions. Richard is a frequent author and speaker on franchise and business law topics.

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Stephanie J. Blumstein focuses her practice on commercial and franchise litigation. She has comprehensive experience representing franchisors and franchisees in multiple business sectors in a wide range of matters. She represents clients in federal and state courts throughout the United States, as well as in various alternative dispute resolution forums. In addition to her work as a litigator, Ms. Blumstein regularly advises clients on contract drafting and negotiation, and on numerous other business law issues. Ms. Blumstein serves on several committees, including the American Bar Association Forum on Franchising Program Committee and the New York State Bar Association Franchise, Distribution and Licensing Law Committee. She is also a frequent speaker at leading franchise industry events and a contributor to various publications on franchising.

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Mackenzie L. Dimitri is a partner with Einbinder & Dunn LLP. She splits her practice between litigation, representing franchisor and franchisee clients in trials and other dispute resolution forums throughout the country, and transactional work, which includes an extensive number of complex franchise acquisitions, including for multi-unit franchisees, drafting and negotiating commercial contracts including franchise disclosure documents, and advising on corporate structure, among other things. Ms. Dimitri is a member of the American Bar Association Forum on Franchising, the Women's Caucus for the Forum, the International Franchise Association, IR Global, and other prominent legal organizations.

Ms. Dimitri is a frequent author and presenter, including the ABA article, "Enforcing the Bargain or Buying Your Way Out? The Right to Specific Performance in Franchise Agreements versus the Concept of Efficient Breach," an upcoming article for the IFA on representing franchise systems in their handling of social justice issues, the New York Chapter of the Franchise Deskbook, and a number of magazine and trade journal articles. Ms. Dimitri has also spoken at several franchise conferences, hosted webinars, and taught continuing legal education classes on franchise legal issues, and is a frequent contributor to Einbinder & Dunn's legal blogs.

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Legal landmines operators can avoid



By Callie Evergreen

While new issues stemming from the pandemic have attracted the spotlight in the franchise legal world for the past two years, some issues pop up over and over regardless of external factors.

From leasing and compliance to false representations and operating in general, the Franchise Times Legal Eagles noted a myriad of items they consistently address with clients.

Elliot Ginsburg, a lawyer at Garner, Ginsburg & Johnsen, sees a lot of fraud in the sale of franchises and overselling on what the franchise system is. Franchisors will often make claims about having proprietary information, techniques and methods, for example, when in some cases they don't have anything proprietary, he said.

In conversations with franchisee clients, Ginsburg often has to explain "that the agreement they signed is not necessarily what they thought they signed, based on perhaps marketing, statements made at various discovery days or online, and they're surprised to learn in some cases they don't have the rights they thought they did."

Over the last five to six years, Ginsburg has seen an uptick in questionnaires attached to the back of franchise agreements that require franchisees to sign off on a number of statements specifically disclaiming various representations. Ginsburg noted there's talk at the Federal Trade Commission about restricting the use of those questionnaires or limiting their effectiveness.

"My take on them is, they attempt to undo reality by putting franchisees in an even tougher position than they might otherwise be in," he said.

Support snafus and bad actors

One thing Laura Lewis, a lawyer at Canada Lewis & Associates, sees is emerging franchisors getting into some trouble for not providing the level of support they represented or implied. She gave the scenario of a franchisor that promises 60 hours of combined classroom and on-the-job initial training, but has a franchisee who learns quickly and stops after 30 hours. "Do they have a claim against you because they could say you didn't properly train them? Maybe," Lewis said.

Lewis encourages all her franchisor clients to do post-training surveys, where



▲ Laura Lewis of Canada Lewis & Associates.

franchisees can evaluate the speakers, how applicable the content was, if they feel they learned what they needed to, or if there were areas where they needed more training or support. That way, the corporate team can follow up with owners to schedule additional training if needed.

"New franchisors should consider feedback from franchisees invaluable, especially on training. You might know your business very well, but teaching it to someone else is a completely different gift," she said.

"If certain things aren't clear and they're still wondering about that, that's gold to a new franchisor, if they use it. If they care, assuming they care. I fire clients who don't care."

Lewis is also seeing predatory conduct in commercial leases, particularly in large metro urban markets. Some landlords are using minor payment delays as a basis for terminating unfavorable leases that are up for renewal, since oftentimes they could lease that space for 30 to 40 percent more than what was negotiated.

"I've literally gotten two restraining orders in the past year against landlords attempting to lock out my client on technical defaults on their lease," she said.

In one case, a client sent a check directly from the bank to their landlord.

"The landlord had been receiving checks on time for the last 14 years, so there was no reason to think there was a problem. Then the landlord claimed they didn't get the check, so we won't know if they got



▲ Elliot Ginsburg of Garner, Ginsburg & Johnsen.

it and held it or the mail ate it." Her client stopped payment on the first check and mailed another, but in that time, the landlord said they were in default, and "we're terminating your lease and evicting you."

In other attempts to push tenants out, Lewis has seen landlords re-audit account expenses and then demand large sums of money in connection with an underpayment, but when the tenant does not pay in full within the 10- to 14-day deadline—often because they are confused or angry about the unexpected demand for significant money—the landlords use that to terminate the lease as a default, which can cripple a business, she said. Her advice?

"Either put the money in a trust or pay it to the landlord with a protection, some statement saying you have the right to claw it back if it isn't right."

"You have to fund it if you have the money and can," she added. "If you're just fighting about the appropriateness, you have to pay that money somewhere—an escrow account, a lawyer's fund—because if you give up the money to someone else, courts will say, well, you were prepared to pay it, you were just truly disputing technicalities. It's a way to preserve your rights." **FT**



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Michael Einbinder is a founding member of Einbinder & Dunn LLP. He is a member of the American Bar Association Forum on Franchising, the International Franchise Association and other prominent franchise organizations, as well as a frequent speaker at leading franchise industry events. An author in numerous publications, he has contributed a chapter to the "Franchise Litigation Handbook," and to "Covenants Against Competition in Franchise Agreements," both published by the ABA Forum on Franchising. Michael Einbinder also serves as an arbitrator in franchise cases for the American Arbitration Association.

Einbinder & Dunn handles litigation, arbitration, and mediation nationwide for both franchisors and franchisees (including associations). The firm also represents start-up and established franchisors in franchise development and regulatory compliance.

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Mark is a founding member and current President of Fahey Schultz Burzych Rhodes PLC. He leads the firm's franchise practice, representing start-ups to Top 300 franchise systems in virtually all aspects of the industry. Mark takes his role in representing franchisors far beyond the traditional preparation and registration of disclosure documents. Mark counsels clients on franchise sales compliance, franchise relationship management, dispute resolution, supply chain contracting, marketing, and operations. For over 30 years, Mark has lived out his passion working with executives and representing businesses looking to expand their business model through franchising.

Mark is a frequent author on franchising topics for the Michigan Restaurant and Lodging Association's magazine and the Franchise Law Journal. He is also nationally recognized by publications such as "The Best Lawyers in America," "Super Lawyers," and is rated "AV" by Martindale-Hubbell -the highest possible rating.

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"We may reject the contention that the ordering of institutions is always defective because the distribution of natural talents and the contingencies of social circumstance are unjust, and this injustice must inevitably carry over to human arrangements. Occasionally this reflection is offered as an excuse for ignoring injustice, as if the refusal to acquiesce in injustice is on a par with being unable to accept death. The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts. Aristocratic and caste societies are unjust because they make these contingencies the ascriptive basis for belonging to more or less enclosed and privileged social classes. The basic structure of these societies incorporates the arbitrariness found in nature. But there is no necessity for men to resign themselves to these contingencies. The social system is not an unchangeable order beyond human control but a pattern of human action. In justice as fairness men agree to avail themselves of the accidents of nature and social circumstance only when doing so is for the common benefit. The two principles are a fair way of meeting the arbitrariness of fortune; and while no doubt imperfect in other ways, the institutions which satisfy these principles are just."

— John Rawls, *A Theory of Justice*



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Experienced in all facets of franchise law, Matt Kreutzer assists both startup and mature franchisors with developing, protecting, and licensing their franchise and distribution systems. As part of this practice, he counsels companies regarding the laws and regulations pertaining to franchising nationwide, and assists them in creating their contracts, Franchise Disclosure Documents, and other critical operational documents. He also responds to state administrative inquiries and investigations and obtains exemptions and interpretive opinions from regulatory agencies. With his background in franchise litigation, Matt understands the risks inherent in the relationship and works with his clients to limit those risks allowing those franchisors to focus on brand and system growth.

Matt also helps potential franchise buyers understand contracts before signing on the dotted line. If franchise disputes cannot be avoided, Matt assists them in litigation or alternative dispute resolution.

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Karl Brandes has assisted franchisors and franchisees as a trial lawyer since 1984 and as a mediator since 1992. His diverse trial lawyer and mediator experience includes state and federal court work in the following areas: petroleum marketing, retail, franchise and other trade regulation; trademark disputes; class actions; environmental; construction for engineer, architect, contractor and developer clients; condominium; ADA accessibility; professional liability for lawyer and engineer clients; non-compete agreement disputes; computer; personal injury, including insurance and self-insured defense; toxic tort; product liability; insurance coverage disputes; and real property, which includes extensive land use work. His experience as a mediator in state (where he is Supreme Court certified in Circuit Civil) and federal court is even more diverse and includes labor and employment disputes. Karl currently serves as the firm's Florida Pro Bono partner.

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Julie Lusthaus has been practicing franchise law for more than 22 years, representing both franchisors and franchisees. Services for franchisors include assisting with the development of franchise programs, corporate structuring, preparation and registration of FDDs, onboarding franchisees, compliance with franchise sales and relationship laws and ongoing operational issues.

Julie also represents single unit, multi-unit and multi brand franchisees as well as master franchisees, guiding them through franchise acquisitions, sales and real estate matters. She has extensive experience assisting sophisticated operators navigating the risks associated with multi-unit and multi-brand development.

Julie is a member of the Governing Committee of the ABA Forum on Franchising, is a past Director of the LADR Division of the ABA Forum on Franchising and was Program Co-chair for the 2018 ABA Franchise Forum. She has published extensively on franchise law issues and is the co-author of the chapter on "Representing Franchisees" in the Fundamentals of Franchising, 4th Edition. Julie is also a frequent speaker on franchise issues at events hosted by various organizations including the ABA, IFA, NYS Bar Association and WCBA.

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What's been your most interesting case or transaction lately? How did you work through it?

“A transaction involving the sale of a medical marijuana dispensary that took about a year to negotiate and close. There were multiple parties involved and it was a complex purchase agreement. And I have a weird case where a franchisee bought the assets of a company that included the trademark that the franchisor fraudulently claimed to own. In fact, the franchisor had no rights in the mark. There are earnings claims, fraudulent omissions, breaches of contract and bizarre business dealings.”

—Elliot Ginsburg, Garner, Ginsburg & Johnsen



“I recently assisted a multi-unit franchisee on its successful exit from two different foodservice franchise systems, including the termination of franchise and multi-unit development agreements and resolutions of leasing and other issues in multiple states. Several lawyers from various firms and practice groups in multiple states were involved and the professionalism of lawyers and clients allowed us to work out significant issues to the satisfaction of all players.”

—Nicole Micklich, Urso, Liguori, Micklich

“We recently tried a wrongful termination case where the franchisor clearly deviated from their stated practices in their ops manual and from their normal course of performance to target a particular franchisee. The franchisor took the position that they can terminate anyone at anytime for any deviation from brand standards. The arbitrator disagreed and awarded \$1.6 million.”

—Laura Lewis, Canada Lewis & Associates

“We recently had a transaction which, in most simplistic terms, involved a business which had several distinct (but related) aspects to it, each of which was set up as a separate franchise, all of which are to be funded by cryptocurrency, and where the master rights are to be sold in various countries.”

—Richard Rosen, Rosen Karol Salis

“One of the active franchise registration states accused our client, a non-franchise brand that runs a licensed network of retail stores by enlisting independent contractors, of being a franchise. After presenting the evidence to demonstrate that the commission structure was not a franchise fee, the state withdrew its complaint.”

—Rochelle Spandorf, Davis Wright Tremain

“Educating opposing counsel about the existence, and requirements, of the FPR commentary.”

—John Holland, Dady & Gardner

“Successfully trying to a seven-figure conclusion an arbitration seeking to recover all financial losses incurred by out-of-state franchisees based on claims that they were unlawfully over-sold on investing in a one-store franchise opportunity.”

—J. Michael Dady, Dady & Gardner

“I've worked with several clients in the cannabis industry, including CBD and cannabis adjacent products. Dealing with complicated state and federal laws and regulators has been an adventure. I've dealt with it by spending more time learning about my client's business model and developing



“I represented the seller in a Dunkin' deal where Inspire Brands exercised its right of first refusal and stepped into the transaction to acquire the network for itself. Historically, Dunkin' has implemented an asset-light business model, wherein it did not operate corporate-owned restaurants. This transaction marks the first time in recent years where Dunkin' has actually purchased stores for its own operation.”

—David Paris, Paris Ackerman

contacts in the industry. It's vital that I be able to explain franchising to a cannabis regulator and cannabis regulation to a franchise regulator.”

—Caroline Fichter, Bundy Law Firm

“More than a specific case, there is a trend affecting most franchise systems acquired by private equity owners. Many who do not realize short-term revenue or growth goals explore every possible way of passing costs and expenses on to franchisees, the cumulative effect of which poses significant hardship. Occasionally, these demands are outside of what franchise agreements actually allow. Barring that type of challenge, the economics and effects that increasing costs on franchisees can backfire quickly and be counterproductive to the brand's owners when they go to sell as well. This is particularly true when a significant paradigm shift occurs, such as the one caused by COVID, inflation, supply chain and general business disruption.”

—Peter Singler, Singler PLC



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Erica is a senior attorney at Mullin P.C., a full-service commercial law firm located in the Dallas-Fort Worth area. Erica counsels and assists commercial clients in developing new franchise programs, protecting their intellectual property, complying with franchise laws and regulations, and resolving franchise relationship disputes. She also assists individuals evaluate franchise opportunities and assists them with business formation and ownership structuring. Erica also has a thriving real estate practice and frequently represents clients in commercial lease and purchase transactions. Erica received her J.D. from Texas A&M University School of Law in 2018 and her Masters in Dispute Resolution and Conflict Management from Southern Methodist University in 2014.



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Cheryl is the founding shareholder of Mullin P.C., a full service commercial law firm located in the Dallas-Fort Worth area, and leads the firm's practice in areas of franchise, corporate, tax, intellectual property, and commercial litigation. In addition to "Legal Eagle" recognition, Cheryl has been recognized as one of the top franchise lawyers in *International Who's Who Franchise Lawyers* since 2013. She is AV-Rated by Martindale-Hubbell, has been selected by her peers as a Texas *Super Lawyer* since 2012, and has been selected for inclusion in the peer-rated *Best Lawyers in America* since 2007. Cheryl received her J.D. from Widener University School of Law in 1995 and her LL.M. (Taxation) from Southern Methodist University in 2013.



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Josh is chair of Taft's Franchise and Distribution group. He combines his legal experience, business background, and entrepreneurial skills to help clients grow their businesses with a particular focus on franchising and other licensing opportunities. He is passionate about helping entrepreneurs make smart franchise decisions and prepare for growth and expansion.

Josh and his team have created a specific Franchise Advance Program that helps entrepreneurs assess, convert, and grow through franchising. In addition, he is the creator and host of Franchise Euphoria, a top-rated podcast, and a frequent author and presenter on topics related to franchising.



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Tim Bryant advises franchisors nationwide in prosecution, defense, and resolution of disputes related to franchise regulatory, intellectual property, and business relationship issues. He has assisted numerous startup and existing franchise businesses with relationship agreements and disclosure/regulatory compliance. He is also a member of the American Arbitration Association's panel of arbitrators. Tim is repeatedly recognized by *Benchmark Litigation*, *Best Lawyers in America*, and *Chambers USA* for work in the areas of franchise law and commercial litigation.



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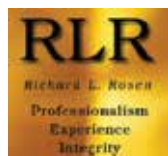
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Richard L. Rosen has represented franchisors and franchisees in a wide range of business and legal matters for over 40 years. Mr. Rosen has formed and counseled franchise associations and franchising entities and has mediated, arbitrated, and litigated on their behaves. His Franchise clients have encompassed virtually all business areas. Mr. Rosen has written and lectured extensively on franchise issues. He is a founding member of the Franchising and Licensing Section of the New York State Bar Association and its immediate past Chairman, Chairman of the Fair Franchising Standards Committee of the AAFD, a member of the Steering Committee of the National Franchise Mediation Program and a member of the CPR Institute for Dispute Resolution Distinguished Panel of Neutrals. Richard is listed in the International Who's Who of Franchise Lawyers and International Who's Who of Business Lawyers, Chambers, Super Lawyers, Who's Who in America and recipient of its Lifetime Achievement Award, Who's Who in American Law, Who's Who in the World, Best Lawyers in America, 101 Best Franchise Lawyers in America and Charter Member of Franchise Lawyers Hall of Fame (the Franchise Times), and a variety of similar publications. In 2008 Richard was the recipient of the AAFD's Lifetime Achievement Award for his contributions to franchising and he has been honored by Lawyer Monthly as its Franchise Attorney of the Year in the USA. He has received the Global 100 Award as Franchise Attorney of the Year in the USA. Richard and his firm were recently honored as International Franchise Law Firm of the Year by the Global Franchise Organization. In 2018, 2019, 2020 and 2021 Richard was named one of the 100 Best Attorneys in the World by LegalComprehensive.com



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David Cahn is in his 25th year of providing franchising legal services, often serving as outside general counsel for franchisors and franchisees. For franchisors, his focus includes creating and maintaining franchise disclosure documents and contracts; state registrations; trademark selection, protection and enforcement; and negotiation of agreements with franchisees and other parties. For franchisees, he primarily evaluates franchise opportunities and negotiations with their franchisor. David counsels franchisors and franchisees on resolving disputes and claims, and often represents buyers and sellers of closely held businesses. More recently, he has represented founders-owned franchisors being acquired by private equity investors. He serves on the Membership Committee for the International Franchise Association, and leads IFA's Franchise Business Network for Maryland.



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16 OFFICES THROUGHOUT THE MID-ATLANTIC

When enforcement meets flexibility



By Nicholas Upton

The push and pull of system enforcement is a delicate topic in an ideal world, and let's say the past couple years have not been idyllic. Staffing, supply chain challenges, government regulations and consumer fears all add up to some degree of atypical stress in every single franchise system and on both sides of the franchise disclosure document.

For franchisors who have a responsibility to provide brand standards and franchisees who have a responsibility to maintain those standards, it's a mess unlike anything seen before. The difficulty is compounded by the rapid pace of innovation and change that started prior to the pandemic. These issues are bubbling up for many Franchise Times Legal Eagles, who have seen numerous instances of concept enforcement, brand updates and operations become legal matters.

"Enforcement of system standards in the context of the pandemic is even more challenging than it normally is," said Idan Erez, who represents both franchisors and franchisees at Hoffer Adler. The pandemic has resulted in legislation at different levels of government "that arguably modifies the rights and obligations of parties to franchise agreements. The legislation and the agreement are sometimes irreconcilable."

Keep an eye on costs

Mark Dady, a partner at Dady & Gardner, said the secondary effects of the ongoing pandemic are affecting his franchisee clients, and costs are adding up.

"I've had a number of clients start to examine ways to do more with less by adding in additional equipment, e.g., card scanners at the door instead of an employee checking passes, digital ordering, et cetera. The expenses associated with automation

are large, however, and not everyone is in a position to be making significant capital expenditures," said Dady.

Both Dady and Erez have seen the ugly legal outcomes, but they're focused on finding solutions that are less dire. Erez said franchisors should also be looking for solutions, and most are avoiding litigation.

"Think about what your core elements of your system are," said Erez. "Everyone is wearing their practical hats; I'm not getting calls to terminate. We all know what the agreement says and it allows us to terminate but that's not what we want to do. Generally, the approach is less lawyer down, but figure out practical approaches and ensure that our system looks like a system."

He said some restaurant clients were struggling to get core menu items as supply chain shortages drove up costs or couldn't fulfill some ingredients at all. Some operators could get the corporate-approved ingredients, others couldn't. He said franchisors should think about those "core elements." If the manual calls for a large round tomato but only beefsteak tomatoes are available, is it really a deal breaker?

"You have to build in this idea of flexibility and realize what the core elements are and retain some uniformity, but recognize that you can't do the thing that you used to be able to," said Erez.

The response should be standardized, but that hasn't always been the case. The franchisor will tell one franchisee it's fine to get that hypothetical beefsteak tomato while another franchisee is struggling to keep round tomatoes on the menu.

"In a perfect world, I'd like to see some update to a manual or systemwide communicate," said Erez. "It can be an update to the manual or a blast. But there needs to be a signal that says in writing that we're making this concession for a brief period of time. We're not waiving any rights, but for the time being we'll be flexible."

That notice should come with a time



▲ Idan Erez represents franchisors and franchisees at Hoffer Adler.

frame, and if those tomatoes or another key brand element are still proving difficult to execute on, that time frame can be extended.

Dady said staffing issues should get the same kind of flexibility. As for system updates like new, efficient technology tools, he looks for—you guessed it—flexibility, but also optionality.

"I think you're going to see franchisors push some of this tech. I think you'll see franchises push for this. At the end of the day, franchisors should be working on these things and not saying, 'I can force you to do these things,' but, 'I'm asking you to do this because it makes good business sense.'"

He also suggested franchisees plug into their associations, if they have one, that can help communicate with a united front instead of asking for one-off tweaks. **FT**

“At the end of the day, franchisors should be working on these things and not saying, ‘I can force you to do these things,’ but, ‘I’m asking you to do this because it makes good business sense.’”

— Mark Dady, Dady & Gardner

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This Franchise Times list of star legal professionals in the franchise industry is built with nominations and recommendations from clients, peers and other legal professionals. Hall of Fame Legal Eagles are lawyers who have been named to the list for 10 years.

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Don't overlook these notable issues



What is a legal topic that more people in franchising need to know about?

“Encroachment claims seem to be making a comeback. Even distinct brands under one corporate umbrella that should not be considered as competitors are now being forced to defend against encroachment claims.”

—Deborah Coldwell, Haynes and Boone

“Data and privacy rights regarding ownership, use and monetization.”

—Frank Robinson, Cassels Brock & Blackwell

“Music copyright laws. For businesses using music, particularly fitness facilities but also other businesses that may periodically play or perform music as part of their business, the rules on the required licenses can be complicated, can vary across countries, and can carry significant penalties. Compliance requires understanding the laws and educating franchisees to avoid playing their favorite music in a manner that may be out of compliance.”

—Dawn Newton, Donahue Fitzgerald

“Private equity isn't just on the franchisor side anymore. This past year, I had more private equity clients (on the franchisee side) than ever before. I don't see that trend changing anytime soon.”

—Mark Dady, Dady & Gardner

“I see predatory conduct in commercial leases. I see landlords using very minor payment delays as a basis for terminating unfavorable leases. I also see landlords auditing their expenses and then demanding large sums of money in connection with an underpayment to which they are entitled under the lease, but then when the tenant does not pay in full within the 10- or 14-day deadline—often because they are confused or angry about the unexpected demand for significant sums of money—they use this to terminate the lease as a default. This can cripple a business.”

—Laura Lewis, Canada Lewis & Associates

“Complying with all of the new laws around privacy and data can be challenging for many franchisors, especially international brands. Having terms of use and

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privacy policies posted on websites or alongside apps is not enough and franchisor need to carefully consider data flow/data mapping and information held by all of the stakeholders in their franchise system. In addition to personally identifiable information they collect directly, franchisors may need to look at what personally identifiable information is collected, stored, used and transferred among franchisees, master franchisees, suppliers, affiliates, etc. ”

—Kristin Corcoran, Appleby & Corcoran

“ The general topic of corporate structure is one which I consider to be underrated. While it may seem to be simplistic on some levels, it is not. Utilizing a variety of entities in order to separate different aspects of your business allows greater protection but also provides a simpler means of both transferring interests to others, and of bringing in third persons to participate in limited areas of your business. Subsidiaries and affiliates are not the same.

The negotiation, formulation and drafting of operating and shareholders’ agreements is an art form, but often not recognized as such. For those who carefully examine the nuances of corporate structure, many will find that the results are well worth the effort. ”

—Richard Rosen, Rosen Karol Salis

“ Mergers and acquisitions and the intricacies of the due diligence process. If more new franchisors understood the ‘why’ behind the demands to franchise in a smart and compliant way, I feel they would be more apt to ‘buy in’ to those compliance efforts and build strong systems from day one. ”

—Drew Chalfant, Roda Chalfant Law

“ State franchise acts, while historically viewed by many as only applicable to franchisees in those states, have recently been recognized by federal courts to also apply to out-of-state franchisees if the franchisor is located in a state with state franchise act protections for franchisees,

including protection against terminations without good cause, and protection against franchisors being able to arbitrarily not approve a franchisee’s sale of its franchise to a reasonably qualified successor franchisee. ”

—J. Michael Dady, Dady & Gardner

“ I wish franchisors learned more about the risks and rewards of start-up franchising. So many early decisions to ‘save money’ wind up being much more expensive than doing it right the first time. Franchisees need to develop a better handle on employment law because non-competes and unionization will likely be big issues in the next few years. ”

—Caroline Fichter, Bundy Law Firm

“ Insolvency and creditor’s remedies and priorities. ”

—Idan Erez, Hoffer Adler

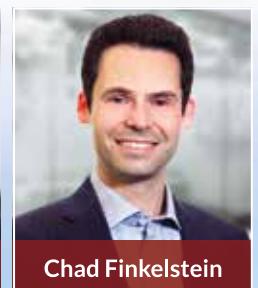
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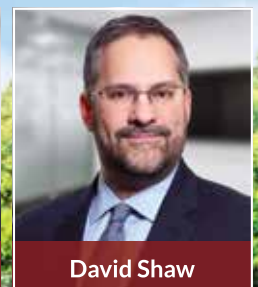
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New Legal Eagles offer fresh take



By Arthur Robert

Who better to tackle the challenges in the franchise space than adaptive, savvy and young(er) Legal Eagles?

These fresh faces to the list have taken some interesting paths, and they're taking on tricky issues like omnichannel operations, new ways of doing business and re-thinking foundational parts of the franchise legal world.

One such attorney, Drew Chalfant, a partner at Roda Chalfant, said his path to franchising began in a taqueria. He was working as a bartender while in law school, and the in-house counsel at St. Gregory Development Group, a franchise development firm, was a regular who invited him to be a law clerk.

During his time there, he also served as in-house counsel for CycleBar, the fitness franchise St. Gregory invested in. The company sold its stake in CycleBar in 2017 and shut its doors a few years later, prompting Chalfant and fellow in-house counsel Joseph Roda to open their own firm, catering to the same kind of emerging franchisor they worked with at St. Gregory.

Chalfant said he was focused on helping his clients build sustainable and scalable compliance systems from the beginning. While keeping such records is important, the uptick in M&A activity and the emergence of private equity as a big player in the franchising world has added a financial incentive to do good administrative work. In the event of an acquisition, Chalfant said good records decrease the risk for the acquirer and can prompt higher valuations. Conversely, disorganized or incomplete records can lead to purchase price hold-backs or even scuttle a deal.

Russell Kinsey, managing partner at Kinsey Law, also took an unorthodox path to franchising. He was a jazz saxophonist in undergrad and graduated from law school in 2013, a time he said was marked by layoffs at large law firms, which made it difficult to find a job. But franchise consultant friends noticed emerging brands were having trouble finding in-house counsel. He wasn't thrilled with the idea of opening his own practice, but after some prodding, he went through with it and has been working with emerging franchisors ever since.

COVID-19 pushed more businesses online and brought with it another challenge. How do you "adjust the standard



▲ Jessica Dempsey of Spadea Lignana.

FDD format to accommodate the lack of or differently defined territories?" Kinsey asked rhetorically. For "anywhere" businesses that can do business throughout the country from a single office, the answer has been disclosure. For example, he said staffing businesses he worked with were adding clauses that said, "you're going to face competition from us and from other franchisees."

He's observed a similar trend in brick-and-mortar businesses.

"Most of my restaurant businesses have let go of a territorial restriction," relying on business prudence to avoid oversaturating a market, rather than a contractual obligation. As a middle ground, he said some brands were offering existing franchisees the right of first refusal on new development in their area.

The secondary effects of the pandemic have begun appearing in Item 7 of FDDs. Jessica Dempsey, an attorney with Spadea Lignana, said franchisors have been asking questions about whether to disclose the ostensibly temporary construction delays the industry is facing. The answer, she said, was to disclose "it's going to cost more and take longer because you want to make sure that your franchisees have a good understanding of the process," although she hasn't seen franchisors build in inordinately long timelines as a hedge against uncertainty. They're "talking to other franchisees and talking to contractors" to get a sense of the timeline and give franchisees a reasonable estimate.



▲ Russell Kinsey of Kinsey Law.

Chalfant said some franchisors have been asking if they need to disclose that supply chain issues have forced them to limit a service line or hold back a product.

"We always counsel them: You know your business better than we do. If this is something you would want to know if you were going to invest, then let them know," he said.

Joint employer concerns have made labor a trickier issue. Support in that area is a "slippery slope," said John Moore, a partner at Husch Blackwell. But by doing nothing, franchisors may be leaving some value on the table.

He said there's some opportunity to put hiring guidelines under the auspices of branding—things like best practices and ideal employee profiles—but it isn't a magic bullet. He noted the ongoing stress of the pandemic has reaffirmed the need for flexibility in the franchisee-franchisor relationship.

Noah Lescecz, an attorney at Canadian law firm Cassels, said the rise of ghost kitchens and other off-premises business formats is adding complexity to franchise agreements. He said the firm's preferred approach is to add a "ghost kitchen rider" to the back of a franchise agreement, adapting the document to the unique needs of an off-premises business.

The rider typically covers "design and construction, development provisions, site selection provisions, site access and franchisor inspections, operating standards and delivery," said Lescecz. [FT](#)

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Labor challenges are still evolving



Labor and staffing have created many challenges. What legal issues do you see arising?

“Franchisees are looking for franchisors to assist them in finding, training and onboarding employees. Yet many franchisors still need to carefully consider these requests in light of the ever-changing joint employer legal landscape.”

—Kristin Corcoran, Appleby & Corcoran

“We have seen a lot of questions relating to employee vaccine mandates and

whether booster shots are required for an employee to be considered fully vaccinated. Right now, the CDC does not include ‘booster shots’ in its definition of fully vaccinated. To encourage vaccination and booster shots, many clients have adopted incentive programs, stressed personal responsibility and provided paid time off to allow employees to get vaccinated.”

—Christina Fugate, Ice Miller

“The number one issue will be the ability to manage remote workers, maintain productivity, morale and a sense of common goals/purposes. However, remote working and technological advances pose a significant opportunity, if managed well. For retail, restaurant and service businesses that need to work from a fixed location, business owners must be proactive in addressing

inflation (general and wage inflation) to retain a consistent workforce, while being able to balance price increases to accommodate those costs increases.”

—Pete Singler, Singler, PLC

“It’s possible franchisees will not have sufficient staff to remain open during required hours, in which case we may see terminations based on abandonment but the abandonment may ultimately be due to impossibility to perform.”

—Elliot Ginsburg, Garner, Ginsburg & Johnsen

“One particular legal issue stemming from the labor shortage relates to store closures. Most every franchise agreement contains a ‘go dark’ clause, or similar prohibition on unauthorized store closures.

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What you are seeing, especially in the QSR world, are restaurants with skeleton crews, or in some instances, only one or two employees in the space. After first reducing hours of operation, many of these franchisees are closing restaurants for weeks at a time. I am interested to see if any franchisors issue default notices for these closures.”

—David Paris, Paris Ackerman

What COVID-era legal issues are you still watching?

“We still have clients fighting with landlords over rent during the first few months of the COVID-era. The way we are dealing with it is to try to give something back in return for a rent abatement. Either we add more term at favorable rentals or promise to make substantial improvements, which ultimately enhance the property value.”

—Michael Ackerman, Paris Ackerman

“We have already worked with one franchisee to avoid termination as a result of a temporary store closure that was impacted negatively by COVID-19. We approach these with care and based on the client’s objectives, but find that negotiations are often the better route than lawsuits in situations like this.”

—Elliot Ginsburg, Garner, Ginsburg & Johnsen

“We are monitoring legal issues relating to supply chain problems. This includes monitoring lawsuits addressing force majeure and other contractual provisions. Force majeure was a buzzword in 2020 and 2021, and we are now starting to see some of the cases work their way through the courts.”

—Christina Fugate, Ice Miller

“What rights, if any, that tenants may have where local law restricts their ability to fully occupy their space(s) or where the percentage of permissible occupancy is

limited to less than normal numbers or percentages, remains a challenging issue for both landlords and tenants. For new leases that are being negotiated, we try to anticipate these issues and provide for the various circumstances in the lease. Where the issue arises in an existing lease, typically as a result of reduced revenues and difficulties in meeting rental obligations, we try to negotiate a fair deal, frequently including some abatement of the rent and some unpaid rent being ‘folded into’ payments over future periods of the lease term.”

—Richard Rosen, Rosen Karol Salis

“I think we will continue to see more cases asserting force majeure as a defense to performance as well as claims for insurance coverage for COVID-related losses. I keep an eye on developments and jurisdictional quirks in this area.”

—Bethany Appleby, Appleby & Corcoran

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2022 Hall of Famers offer insight



By Laura Michaels

Depending on where you look or who you ask, the first franchise in the United States came from Benjamin Franklin, arose as Albert Singer sold his sewing machines or was launched in 1891 by salon owner Martha Matilda Harper. (The International Franchise Association in 2000 gave Harper the title of first franchisor.)

Franchising as it operates today, however, has a shorter history, and even within the past decade has changed. How? We asked new inductees into the Legal Eagles Hall of Fame—these attorneys have each been on the list for 10 years—to share the evolution they’ve seen over their tenure and what they’re watching now.

Using social media & marketing funds

“The name is Polish and the accent is Swedish,” said Beata Krakus by way of describing where she was born and then where she was raised and attended law school—the first time around. Krakus holds what she called the “dubious distinction of going to law school for seven years,” first at Stockholm University and again at Loyola University after moving to the U.S.

An attorney at Greensfelder, Hemker & Gale in Chicago, Krakus works with franchisors and said the development of social media and use of marketing funds came to mind when she thought about the evolution of franchise contracts.



▲ Beata Krakus

When social media “first started becoming a thing, franchisors were very reluctant to let franchisees post for themselves,” she said. Franchisors wanted everything to run through the corporate office, but shifts in how companies and consumers use platforms such as Facebook, Twitter, Instagram and TikTok have prompted ‘zors to reassess their stance. Those sites, continued Krakus, serve many purposes “and one of them is brand building.”

“So it’s natural for franchisors to want to control and curate that,” she said, but franchisors began to recognize franchisees are part of that brand-building process and need a local connection in their market.

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“Back then, we wrote into agreements that franchisees cannot have any social media presence unless expressly permitted by the franchisor,” she said. Now, “it’s more ‘your social media presence must comply with our franchisor presence.’”

Another shift on the marketing front is to the funds themselves, or at least the name. While still typically called a marketing fund in franchise disclosure documents and franchise agreements, some franchisors are changing the name to “brand development fund,” said Krakus, mainly because “franchisors want to have a little more leeway in how they use those funds.”

The shift is largely driven by litigation. “Someone realizes marketing funds are used to pay for collection fees of royalties, something like that,” and they file a lawsuit, said Krakus. Franchisors are looking at provisions to allow different uses of those funds.

A rise in buyout rights

Ten years ago, said Matthew Kreutzer, franchisor buyout rights that weren’t tied

Hall of Fame continued on 60

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to the termination or expiration of a franchisee agreement “didn’t exist.” Now, he continued, “I’m seeing that in a bunch of contracts.”

Typically, a buyout provision states the franchisor retains the right to purchase the business upon the occurrence of a prescribed event—aka a termination or the end of a contract term. “The explosion of private equity and its interest in franchising,” however, is driving a different type of provision, said Kreutzer, a partner at Howard & Howard in Las Vegas.

“As private equity gets more and more involved, these funds, from the outset, are thinking what if we want to own all these units and not franchise them,” said Kreutzer. “So buyout rights are a way for these firms to de-franchise their system if they choose to.”

Such a provision might read: Either at any time after an initial period of operation (like six months to one year of operation) or immediately, the franchisor has the right (but not the obligation) to buy all assets and property used in the franchise, including the tenant’s right to real estate. The purchase price will either be calculated according to a set formula, or there will be a procedure for a valuation to be conducted by independent appraisers.

The purchase price, noted Kreutzer, “will typically include goodwill/valuation for the business as a going concern. In fact, in these same agreements there usually is also a separate provision that would allow the franchisor to buy assets after termination if it chooses to do so, but with no allowance for goodwill.”

Another increasingly common provision covers liquidated damages, or the monetary amount a franchisee must pay the franchisor if they exit the system before the end of the contract term, often because the franchisor terminates the agreement.

Franchisors, said Kreutzer,

prefer liquidated damages clauses because it comes down to a “simple calculation in the agreement.” The clause may stipulate, for example, that the franchisee pay the franchisor the equivalent of three years’ royalty fees to account for what the franchisor would have earned had it not terminated the agreement.

Across the border

Canada, said Peter Viitre, is a “franchise friendly jurisdiction,” but that doesn’t mean a U.S. franchisor can simply drop in and run their franchise program exactly as it operates in the States. Regulations include “pretty

bold rescission rights,” said Viitre, a partner at Toronto-based Sotos, “so if you screw up, franchisees have some pretty robust remedies.”

Although there are no federal franchise laws, six provinces (Alberta, British Columbia, Manitoba, New Brunswick, Ontario and Prince Edward Island) have franchise-specific legislation and disclosure requirements. If a Canadian court finds a franchisor failed to fully meet its disclosure obligations, the penalties can include not only damages but also rescission of the franchise agreement. If rescission is granted, the franchisor must reimburse

the franchisee’s investment plus any operating losses.

The cost of doing business in Canada can surprise franchisors, said Viitre, and because it’s “all about unit economics, just like in the States, they need to recalculate unit economics for Canadian inputs—and the model may just not work.” Food, labor and rent are all more expensive, he continued. “You can’t just take your Item 7 disclosure and multiply that by the exchange rate. And we see that.”

He counsels franchisors to “understand and appreciate that it’s a different country with different rules,” and just like in the U.S., having an experienced franchise attorney matters. **[ET]**



▲ Matthew Kreutzer



▲ Peter Viitre

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