

Let's hear it for the 2020 Legal Eagles

Congratulations to our 2020 class of Legal Eagles. These attorneys live and breathe franchising and understand the nuances of this unique business model at a deep level. Whether they're working for a franchisor, a franchisee or an association, they are the people to find when something goes wrong—and, of course, to keep things going right—in a franchise business.

With a keen mind for both the legalese and business, they understand the gravitas of every single legal battle, every trans-

action and every document. That engenders a spirit of collaboration and efficiency among this tight-knit group of legal professionals. Nobody lasts long on this coveted list while trying to make waves in a dramatic court

battle or driving up hours researching franchise law.

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 looked closely at the beginning and the end of a franchise business. First, how to make sense of the critical franchise agreement. What can really be negotiated? And what are some of the most impactful areas for franchisees to push back? And conversely, where should franchisors stand firm? Then we looked a few years down the road to the end of term and what happens when a franchise business relationship ends. While it's all detailed in the franchise disclosure document, there is plenty of nuance to a termination and a renewal that both franchisors and franchisees need to understand.

We also chatted with our newest inductees to the prestigious Legal Eagles Hall of Fame and touched base with some of the newest members on our list.

Congratulations to all our Legal Eagles, keep up the great work. **FT**

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FranchiseTimes LEGAL EAGLES®

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Baker McKenzie.

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These Legal Eagles are part of our Chambers and Partners Band 1 Global-wide ranked team, which is proud to advise many of the largest franchise companies in the world on franchising, licensing, distribution, brand expansion and protection, joint ventures, strategic transactions, compliance matters and disputes both domestically and on a global basis.



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Experience drives results

We are proud to have our partners Andraya Frith, Jennifer Dolman, Gillian Scott and Dominic Mochrie once again recognized as Legal Eagles with Jennifer earning the added distinction of being named to the Legal Eagles Hall of Fame.

The strategic advisors of Osler's Franchise Group have the expertise and extensive track record to help our clients build and protect their franchise systems and brands.

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Looking ahead at big trends in 2020



What are you watching in 2020, and how are you approaching it?

“There are companies that are starting to sell franchises even though they are not proven systems and have no financial backing behind them. I have recently looked at several new franchise systems that have one location for their brand and thereby are not systems that have proven that the concept is truly ‘franchisable’ and a model that can work beyond the one location. Additionally, these same franchises are completely underfunded as a franchise company, with balance sheets showing as little as \$1,000. How can these franchise companies expect to have a franchisee invest hundreds of thousands of dollars in their brand when they have not? This is a serious issue. In these instances, I try to talk the client into walking away from that brand and to going back to looking at others.”

—Nancy Lanard, *Lanard and Associates*

“The ever-increasing appetite for international expansion—earlier on in the lifecycle of franchise systems and beyond traditional borders—is one of the biggest trends for 2020. This requires franchise lawyers to have broader understanding of the widening regulatory regimes across the globe, together with a firm grasp on issues that are pertinent to structuring and implementing international transactions.”

—Andrae Marrocco, *McMillan LLP*

“Continued emphasis on Item 19 by state regulators. Regulators continue to push deeper into the 2018 FPR (financial performance representation) Commentary and beyond. Maintaining meaningful relationships with state examiners and consulting them often is key.”

—Dan Matthews, *Drumm Law*



▲ Tom Spadea

“The biggest trend is the impact of FASB’s new revenue recognition rules on emerging franchisors. We are working carefully with our franchisor clients to make sure their systems are structured to minimize fee deferral.”

—Ritchie Taylor,
Manning, Fulton & Skinner

“The impact of California’s AB-5 on franchising. Specifically, whether California’s new law on classification of independent contractors may lead to increased employment-related claims against franchisors, both from franchisees and franchisee employees. We are reviewing and revamping franchise agreements to include stronger independent contractor acknowledgements, requiring franchisees to enter into agreements as an entity they own and control rather than individually, looking into insurance to help manage franchisors’ risks, and looking into lobbying efforts to help exempt franchisors from the law.”

—Tal Grinblat, *Lewitt Hackman*

“The sale of franchisors, typically to private equity firms. Because of the financial models used by the PE firms, what were once very strong financials of the franchisor become very weak. It makes solid systems needing to deal with financial



▲ Nancy Lanard

assurance obligations imposed by the states, as well as making it difficult for the franchisor to meet banking requirements.

We have to live with the results. We try to explain to the states what has happened. We also try to explain to the PE firms what they are doing.”

—Douglas Ferguson,
Robinson Waters & O’Dorisio

“With the economy staying strong, many franchisors are struggling to get deals over the finish line. In a counter-intuitive trend, franchise fees have actually risen as more and more franchisors depend on the broker community to do deals and a commissions arms race of sorts has begun. Our advice to our franchisors is to continue to play the long game and put most of their focus on franchisee unit economics. If their franchisees make money and are happy, they will surely continue to grow. And it’s OK to pay out big commissions if necessary, as long as you have the cash flow and capital to support your franchisees. In the end, franchisors are not in the franchise fee game, they are in the royalty game.”

—Tom Spadea, *Spadea Lignana*



▲ Tal Grinblat

“The biggest trend I have observed has been the increasing number of bankruptcies, by both franchisors and franchisees.”

—Kevin Shelley, *Kaufmann Gildin & Robbins*

A photograph of two men in business suits standing in front of a large, abstract, colorful mural. The man on the left is bald with a goatee, wearing a dark suit and a patterned tie. The man on the right has grey hair and glasses, wearing a blue suit and a striped tie. The background features bold, geometric shapes in shades of blue, grey, and red.

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Mark M. Leitner & Joseph S. Goode

FRANCHISE TIMES LEGAL EAGLES 2020



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Overlooked issues & best lessons



We asked Legal Eagles what issues they think more people in franchising should know about. Read what they had to say.

Lease Language

“Key points to negotiate in a retail lease. Retail leases are extremely important documents for any retail franchisee. A good retail franchisor should have a strong real estate team consisting of a national real estate firm to help locate good local realtors and ensure that the franchisor’s requirements for the space are met, and an experienced retail lease law firm that can work with the franchisees in negotiating a strong lease. For example, one topic that is often overlooked is the requirement for assigning the lease. Many franchisors have their own assignment requirements, but what about making sure that the personal guarantee is released upon assignment? Many franchisors are not going to be concerned about that, but every franchisee should be. I am sure that a franchisee would not want to be guaranteeing the financial obligations of the buyer of their business. Leases are extraordinarily negotiable documents and having a strong lease attorney to negotiate the legal matters in the lease can often make or break a franchisee’s business.”

—Nancy Lanard, *Lanard and Associates*

Social Media

“The power of Facebook on franchise lead generations. Through my clients, I continued to be amazed how brands are innovating to use social media to identify qualified franchise prospects.”

—Ritchie Taylor,
Manning, Fulton & Skinner



▲ Lloyd Hoffer



▲ Barry Heller



▲ Fredric Cohen

Human Resources

“The franchising world has now been impacted by the application of employment issues. More folks in franchising need to be aware of the risk of ignoring the types of practices that expose the franchisor to employment-type claims and remedies.”

—Barry Heller, *DLA Piper*

We also asked our 2020 Legal Eagles, what are your best lessons of late? Several obliged.

FDDs

“Picking up the phone and having a 10-minute call with an examiner can prevent wasted time and save money for the client. Recently, in response to an examiner comment on Item 19, we were preparing to edit a table and make amendment filings in several registration states. A brief call to the examiner and some negotiation resulted in the comment being withdrawn.”

—Dan Matthews, *Drumm Law*

Tech & Litigation

“Mastery of and use of technology in the course of litigation is becoming a necessity, in the area of mass document and electronic document files. This applies in the franchising scenario as much as elsewhere. I learned it by having to deal with a difficult mass document file and through monitoring technological developments in our profession and seeing what techniques others are applying.”

—Lloyd Hoffer, *Hoffer Adler*

General Wisdom

“The faster you can figure out what the other side really wants, the more quickly you can get to a solution.”

—Deborah Coldwell, *Haynes and Boone*

“An old lesson that revisits frequently (and recently): A law license is not a license to be an ass. And the corollary: Humility and understatement are among the most lethal of legal weapons.”

—Fredric Cohen, *Cheng Cohen*

“Managing disclosure. Not a new issue, but still a major problem we see in cases that become disputes. Franchisors need to get high quality advice and pay attention to it sooner rather than later in their operations.”

—Lloyd Hoffer, *Hoffer Adler*



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Congratulations to Barnes & Thornburg partners Rebekah Prince and Victor Vital for being named Franchise Times Legal Eagles 2020.

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(but you already know that by his Legal Eagle designation)

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Negotiating the franchise agreement



By Nicholas Upton

At first look, the grandiose franchise disclosure document is not something mere mortals can understand, let alone negotiate. But between the FDD and the franchisee there is the franchise agreement, and everything there is on the table.

“Unless it’s something ridiculous,” said Harold Kestenbaum, of Spadea Law. “Everything else is pretty fair game.”

Kestenbaum, the Legal Eagle with the most nominations in 2020, said getting a good deal still requires a franchise legal expert on either side to zero in on what are the most impactful things to negotiate, and importantly for his franchisor clients, what not to negotiate. For franchisors, there are a few things that fall in the “ridiculous” category, namely royalties.

“You try to make no concessions on the fees. They ask for a bigger territory, ask for five locations,” said Kestenbaum, noting that territories can be a balance, too. “But if they get a bigger territory early on and the concept blows up and the territory is too big, you’re stuck.”

The key for franchisors is just being open. After all, the franchisee-franchisor relationship is a long and intimate one, and saying no to comments on the franchise agreement is a good way to avoid even the first date.

“Don’t just say we won’t negotiate, that will kill the deal. You’ve got to see what the comments are,” said Kestenbaum.

For Mark Dady, a lawyer at Dady & Gardner in Minneapolis, his work on the franchisee side of the agreement means he has a lot of go-to things to negotiate around.

“My top five are territorial protection, renewal rights, transfer rights, the franchisor termination rights, and does the

franchisee have any early-out rights or protection against claims or lost future damages,” said Dady.

Territorial protection begins with a simple yes or no. Does the franchisee have any protection from the franchisor or other franchisees encroaching on their trade area?

“You see, some agreements say that you don’t have any protection, this is a site-only franchise and we can compete with you anytime, anywhere,” said Dady. “Then it’s how is that denominated? Most frequently, it’s a radius, you get a three-mile or five-mile radius. Sometimes you’ll see ZIP codes. But we want to see if you have it and if so, can we increase it.”

He said another quirk is exceptions to exclusivity, such as non-traditional spaces like airports, hospitals or the growing number of food halls. That’s easy to overlook, but “if you’re located a half mile away from a hospital, you don’t want them going in there, so

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you want to carve out the carve outs.”

The next three key points of negotiation all fall under the category of what happens at the end of an agreement term, which you can learn more about on page 56. But some key things for franchisees to think about are, how does this affect the long-term plan for my business?

“Oftentimes it’s a 10-year term and then you have a five-year renewal right. That’s fine if you’re 70, but if you’re 40 that’s not enough,” said Dady. “That’s important for transfers as well, because you want to make sure you have something to sell. A buyer might say, ‘You only have seven years left on the term, so why would I buy?’”

Another key is what protections there are if a business fails. It’s not something bright-eyed franchisees often think about, but if they don’t, they could be on the hook for major payments when their business is floundering.

“This is a big one that most people don’t

pay attention to. Most people think, I have the right to do this. But the way most FDDs are written, you have the right to operate but also the obligation to operate for 10 years,” said Dady. “Even if you’re losing your shirt you have to keep operating because they expect to be paid.”

He said part of his job is to see if those damages are reasonable and whether that’s attached to a personal guarantee. He said the smart thing for franchisees to ask for is a cap on the liquidated damages that would come after a business fails, and if it’s connected to a personal guarantee—which most franchisors want—can that be eliminated or reduced to a sensible level.

Jason Brisebois, a lawyer at Sotos, works on legal compliance with U.S. firms expanding to Canada. He said while some of the legal code is quite different, the negotiations are largely the same. He said franchisees should certainly try to negotiate some things, but a rubber stamp on a list of

comments may be a red flag.

“It’s great if they are willing to give you concessions, but if they are so willing, why are they so willing to give concessions when cohesion is the rule? Should that worry me? It sounds counterintuitive, because it’s in the franchisee’s interest, but it raises questions,” said Brisebois. “Ultimately, it’s not to your advantage if others aren’t adhering to the standards.”

He said in general, smaller systems are more willing to acquiesce on things such as personal guarantees and territories, but he advises his franchisor clients not to go too far. The best areas to negotiate are those with mutual benefits for both the franchisee and franchisor.

“Kick in a little more money to help with grand openings? That, I see, is met with open arms,” said Brisebois. “Early days operational support, too. These are concessions that improve the system. There are areas where franchisees can find some meaningful concessions; maybe not on the royalty or ad rate.” ^{FT}



▲ Mark Dady

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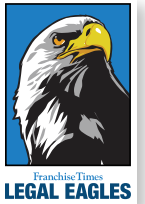
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Josh and his team help entrepreneurs find success through franchising. "My practice allows me to help people realize their dreams, while fulfilling one of my own."

Josh regularly advises local and national multi-unit operators and emerging franchisors on regulatory, growth and strategic positioning with respect to their franchise systems. Josh also assists franchisees and franchisors with litigation, commercial real estate, franchise succession planning, and all matters relating to the franchise relationship.

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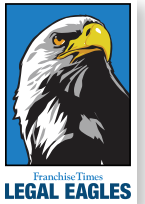
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Mark is a founding member and current President of Fahey Schultz Burzych Rhodes PLC. Mark leads the firm's business practice, which focuses on designing and implementing business growth strategies, including franchising. His practice also includes Michigan-specific corporate matters such as liquor licensing and regulation, real estate matters, and other business related matters with Michigan law emphasis. Mark's practice also includes commercial litigation, including franchise enforcement actions, trademark litigation, enforcement of covenants not to compete, and other litigation matters as lead counsel or Michigan local counsel.



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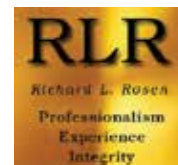
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We also stress risk avoidance services, including the evaluation of client's business, IP and HR practices, policies and procedures and regulatory compliance issues. All of these strategies are designed to maximize recovery and enhance the client's position.



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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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- Business Law & Litigation
- Construction Litigation
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- Intellectual Property

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Reger Rizzo & Darnall LLP

regerlaw.com

The Firm's national franchise and hotel practice provides franchise, hospitality and business legal services to franchisors, brands, single and multi-unit owners, area developers, management companies, master franchisees, franchisee associations, and businesses desiring to expand through franchising and distribution systems.

The Firm provides clients with franchise regulatory (FDD's), corporate, merger & acquisition, real estate, leasing, intellectual property, employment, financial, and immigration services, along with day-to-day counseling and dispute resolution services, including mediation and arbitration.

Harris has served on various committees, including the ABA Forum on Franchising Governing Committee, IFA, and county/state bar association Franchise Law Committees. He is a frequent speaker on franchise, hospitality and business-related topics, and serves as a mediator and arbitrator.



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- Intellectual Property
- Real Estate/Leasing
- Immigration (EB-5)

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Shipe Dosik Law LLC

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Pete Dosik is a leader in Atlanta's franchise law community as well as a sophisticated business law generalist. He is committed to providing clients with high-value, efficient, and practical legal service at a reasonable cost.

Drawing on his experience as in-house counsel at Church's Chicken® and Starwood Hotels, Pete develops in-depth knowledge of his clients' businesses and emphasizes practical methods to protect his clients while helping them achieve their goals.

Pete advises franchisors on how to establish, operate, and grow "best-in-class" franchise systems. He prepares Franchise Disclosure Documents and franchise agreements that incorporate best practices in franchising. He advises on domestic and international franchising, complying with federal and state franchise laws and regulations, dealing with franchisees, enforcing brand standards, terminating non-compliant franchisees, and resolving disputes.



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- Transactional matters
- Real Estate
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Shipe Dosik Law LLC

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For over 20 years, Brad Shipe has represented franchisors and franchisees in all phases of their relationship, including preparing disclosure documents, complying with state relationship laws, negotiating franchise agreements, offering counsel on transfers and terminations, and representing parties in lawsuits and alternative dispute resolution.

Brad also has extensive experience in trademark and patent law. He assists clients in developing, maintaining, and expanding their intellectual property portfolios by providing initial clearances, preparing registration and renewal filings, responding to office action letters, negotiating and enforcing co-existence agreements, and prosecuting and defending both opposition and cancellation proceedings and infringement lawsuits.



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- Litigation, Arbitration, and Mediation

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Name	Law Firm	Location	Specialty	Represents
Sam Khajeei	Nerland Lindsey LLP	Calgary/Edmonton (AB) and Vancouver (BC), Canada	Transactional	Both
Edward "Ned" Levitt	Dickinson Wright LLP	Toronto, ON	Transactional	Franchisors
Andrae J. Marrocco	McMillan LLP	Toronto, ON	Transactional	Franchisors
Jonathan Mesiano-Crookston	Goldman Hine LLP	Toronto, ON	Litigation	Both
Dominic Mochrie	Osler Hoskin & Harcourt LLP	Toronto, ON	Transactional	Franchisors
Frank Robinson	Cassels Brock & Blackwell, LLP	Toronto, ON	Transactional	Franchisors
Derek Ronde	Cassels Brock & Blackwell, LLP	Toronto, ON	Litigation	Franchisors
Gillian Scott	Osler Hoskin & Harcourt LLP	Toronto, ON	Litigation	Franchisors

Name	Law Firm	Location	Specialty	Represents
Geoffrey B. Shaw	Cassels Brock & Blackwell LLP	Toronto, ON	Litigation	Franchisors
Peter Snell	Gowling WLG (Canada) LLP	Vancouver, BC	Transactional	Franchisors
John Sotos	Sotos LLP	Toronto, ON	Litigation/Transactional	Both
David Sterns	Sotos LLP	Toronto, ON	Litigation	Both
Debi Sutin	Gowling WLG (Canada) LLP	Toronto, ON/Hamilton, ON	Transactional	Both
Peter Viitre	Sotos LLP	Toronto, ON	Transactional	Franchisors
Larry Weinberg	Cassels Brock & Blackwell, LLP	Toronto, ON	Transactional	Franchisors
Melissa Won	McKenzie Lake	London, Ontario, Canada	Transactional	Franchisors
John Yiokaris	Sotos LLP	Toronto, ON	Transactional	Franchisors
Andy Seretis	Sotos LLP	Toronto, ON	Litigation/Transactional	Both

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Meet the new class of Legal Eagles



While they might be freshmen, appearing on the list for the first time, they all join the ranks of Legal Eagles with serious franchise backgrounds. Whether they've been working in franchise law for years or came into the franchise world more recently, these star lawyers put clients first and help them navigate the complex franchise model.

Who better to explain why these top vote-getters among the new class were nominated than happy clients and peers? See what makes a standout franchise lawyer, and congratulations to the entire new class.

Sam Khajeei

“Sam is very capable, and very active in the franchise community. He has an excellent understanding of franchising, trademarks and corporate law. I have worked with Sam on large, complex transactions and he is first rate—smart, careful and personable.”

—Guy Lander, lawyer
Carter Ledyard & Milburn

Eric Friedman

“Eric maintains a client-centered approach to his practice that distinguishes him within the field. He takes the time to understand his client's business needs, and has the legal know-how to accomplish those goals. Eric's competence and commitment have earned him a strong reputation within the bar—which will surely increase as he continues his career.”

—Evan Silagi, lawyer
Berkowitz, Lichtstein, Kuritsky,
Giasullo & Gross

Stephanie Blumenstein

“Stephanie is a tireless advocate for her clients, gives seasoned advice and knows franchise law exceptionally well.”

—Theo Arnold, client
Money Mailer

Farheen Ibrahim

“A very hardworking lawyer. Words can't even explain how amazing she is!”

—Narmeen Sabahat, client

2020 NEW CLASS

<p>Sam Khajeei <i>Nerland Lindsey LLP</i></p> <p>Stephanie Blumstein <i>Einbinder & Dunn</i></p> <p>Farheen Ibrahim <i>Canada Lewis & Associates PLLC</i></p> <p>Eric Friedman <i>Paris Ackerman LLP</i></p> <p>Joseph Brooks <i>Fisher Zucker</i></p> <p>Stephanie Grobler <i>Spadea Law</i></p> <p>Daniel Matthews <i>Drumm Law</i></p> <p>Michael Sturm <i>Lathrop GPM</i></p> <p>Adrian Felix <i>Bilzin Sumberg Baena Price & Axelrod LLP</i></p> <p>Christina Fugate <i>Ice Miller</i></p> <p>Devona Reynolds-Perez <i>Amex Travel</i></p> <p>Cameron McKinley <i>Spadea Law</i></p> <p>Jason Brisebois <i>Sotos LLP</i></p>	<p>Joseph Santaniello <i>Shumaker, Loop & Kendrick, LLP</i></p> <p>Kevin Maher <i>Baker & McKenzie</i></p> <p>Richard Bayer <i>Einbinder & Dunn</i></p> <p>Andy Seretis <i>Sotos LLP</i></p> <p>Daniel Hamson <i>Sotos LLP</i></p> <p>Marta James <i>Sotos LLP</i></p> <p>Melissa Won <i>McKenzie Lake</i></p> <p>Yianni Alexopoulos <i>Sotos LLP</i></p> <p>Aaron-Michael Sapp <i>Cheng Cohen LLC</i></p> <p>Antonia Scholz <i>Cheng Cohen LLC</i></p> <p>Christina Graziano <i>Fisher Zucker</i></p> <p>Gina Malandrino <i>Cheng Cohen LLC</i></p> <p>Kevin Shelley <i>Kaufmann Gildin & Robbins LLP</i></p> <p>Maisa-Frank <i>Lathrop GPM</i></p>	<p>Nathan Verbiscar-Brown <i>Singler Law Professional Corporation</i></p> <p>Sawan Patel <i>Larkin Hoffman Daly & Lindgren</i></p> <p>Allison Grow <i>Cheng Cohen LLC</i></p> <p>Brad Cashman <i>Monroe Moxness Berg</i></p> <p>Chris Feldmeir <i>Lathrop GPM</i></p> <p>Mark Dady <i>Dady & Gardner</i></p> <p>Tami Mcknew <i>Fox Rothchild</i></p> <p>Andrew Malzahn <i>Dady & Gardner</i></p> <p>Bret Seltzer <i>Warshawsky Seltzer</i></p> <p>Kristy Miamen <i>Dady & Gardner</i></p> <p>Mark Leitner <i>Laffey, Leitner & Goode</i></p> <p>Samuel Wiczorek <i>Cheng Cohen LLC</i></p> <p>Terrence Dunn <i>Einbinder & Dunn</i></p>
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Joseph Brooks

“Joe has gone above and beyond. I am new to the franchise business and the world of entrepreneurship, and Joe has been the guiding light to ensure all boxes are checked. From my original business registration, to lease negotiations and now membership contracts, Joe has been an invaluable resource to have on my side.”

—Kathryn King, client
Fit Body Boot Camp

Stephanie Grobler

“Stephanie is extremely thorough and particularly patient. We are new franchisors. We have many questions all of the time. She makes the time for us and has been able to speak to us in terms we understand.”

—Lynn Mione, client at The Vine Wine Bar



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Thinking through the end of the term



By Nicholas Upton

In the wise words of 14th century poet Geoffrey Chaucer, “All good things must come to an end.” Alas, that holds true for franchising as well. And when good (or bad) things end in franchising, there are plenty of legal consequences, as two of the 2020 Legal Eagles describe.

“At some point, every agreement with a franchisee ends,” said David Gusewelle, a transactional lawyer at Drumm Law. “Either it ends and everyone is happy or everyone is bitter in court.”

He said the typical end comes at the contractual end of term, oftentimes 10 years. Then, like a lease, it goes month-to-month, but “that doesn’t happen very often because people think about these deadlines,” said Gusewelle.

In a happy world, the term ends and there are a few options. Get another term and go for another 10 years, maybe with a development agreement or some remodeling commitments that are beyond the scope of the franchise disclosure document. Or, a franchisee can sell.

“If you’re a franchisee and you sell your business, most of the time the concept will have the new owner sign a new agreement. Oftentimes that will include things like a non-compete agreement, so if you’re operating an in-home health business, we and the buyer don’t want you to sell your business and open up another business and take the clients. So that’s a common thing on the more friendly side of things,” said Gusewelle.

There’s also a termination that would end the franchise agreement before the contractual term. He said while “termination” sounds like it’s not on the positive side of things, it’s typically a mutual agreement.

“There’s also a termination that is typically friendly that is mutual. Just because we have a contract that ends in 10 years doesn’t mean we can’t terminate it. It could be you’re unhappy, I’m unhappy—we’re both unhappy. That’s another option, that’s the preferred option,” said Gusewelle.

But of course, it can get dicey if a termination is not mutual.

“You’ll see in Item 17” of the FDD “that summarizes your termination rights. You really need to get to the franchise agreement

to see what rights the franchisor has to termination,” said Gusewelle, and franchisors need to look at that, too. “If someone calls and say we want to terminate a franchisee, I’ll say, ‘Why? Is this a good reason.’ That’s a subjective term. There’s nothing in there saying you can terminate franchisees because they’re crappy.”

While the FDD is almost universally favorable to the franchisor, those termination clauses aren’t exactly an easy out.



▲ David Gusewelle

“Basically, every clause in the agreement can lead to a termination. But real world, if you just close your business five minutes early one day and I try to terminate your business, a judge will likely not be happy with me,” said Gusewelle. “And you also want to be fair with somebody; every state has good faith and fair dealings. Yes, our agreement may say this but are you acting in good faith. So that’s something you need to look at. It’s easier

when you have nonpayment; someone didn’t pay royalties for three months and I sent you a note and I terminated you, that’s black and white.”

He said these decisions can be more art than science because how a franchisor acts has ramifications throughout the system.

“It’s a delicate dance to figure out when it’s appropriate,” said Gusewelle. “Franchisees talk. If I terminate this one franchisee for this conduct, do I need to terminate these other 10, or am I sending a message to the system that this conduct is OK?”

In cases where a forced termination does make sense, he said there are a number of things that happen, namely de-identifying the location, signing a mutual release agreement to break the contract and any non-disclosure agreements. Then, it’s down to the FDD and the franchise agreement to outline the post-contract damages and responsibilities.

Dan Warshawsky, a partner at Warshawsky Seltzer, said regardless of how the franchise term ends, franchisees need to think about it before they sign anything and really go through what those post-contract responsibilities are and if they can even renew the contract if they so choose.

“When people are buying a franchise, they’re focused on the initial term of the first 10 years,” said Warshawsky. “So, the first thing you want to do is check what the contract says; most have a limited number

of renewals.”

He points to some other key issues that can significantly alter things in a termination, such as customer liabilities, which typically fall on the franchisee that initially worked with the customer.

“That’s another thing to consider in advance. I’ve seen that become a real problem for spa clients. What happens is No. 1, I have an indemnity and No. 2, I probably have a personal guarantee. So, when you close the doors, it’s not just what I owe for royalties or liquidated damages and supplier liabilities. The supplier doesn’t care if you close, they have a contract,” said Warshawsky.

He said the important thing is to get started on all this early, get the franchisor involved to approve or find a buyer for a smooth transition, and help ensure the contract ends as happy as possible. **FT**



FranchiseTimes
LEGAL EAGLES

About this project:

This 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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Adam J. Siegelheim, Shareholder, exemplifies Stark & Stark's client-focused approach in his practice representing franchisors and master franchisees throughout the United States. Adam's Franchise Law practice includes preparation of disclosure documents and franchise agreements, state registrations, regulatory compliance, and international expansion.

Adam is a member of the International Franchise Association, the American Bar Association Forum on Franchising, and is the past Chair of the New Jersey Bar Association Franchise Law Committee. He was recently presented with the designation of Certified Franchise Executive by The Board of Governors of the Institute of Certified Franchise Executives.

The law firm of Stark & Stark offers a full range of legal services for businesses and individuals. More than 100 attorneys, over 30 practice disciplines, and a philosophy of putting the law to work for our clients is the basis from which we build and maintain our practice.

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David Cahn is in his 23rd year of providing franchising legal services, often serving as outside general counsel for franchisors and franchisees. For franchisors, his focuses include creating and maintaining franchise disclosure documents and contracts; state franchise registrations; trademark selection, protection and enforcement; and negotiating with franchisees and other business partners. For franchisees, he evaluates franchise opportunities, negotiates franchise agreements and real estate leases, and creates LLC operating or shareholder agreements. Mr. Cahn also represents buyers and sellers of a variety of closely held businesses.



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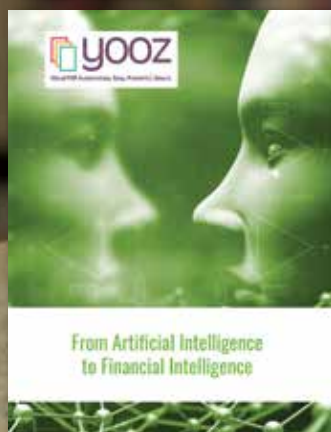
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Download any or all of these papers at www.franchisetimes.com. If you'd like more information on how to submit your whitepaper, contact Mary Jo Larson at mlarson@franchisetimes.com or Lucas Wagner at lwagner@franchisetimes.com.

Franchise Times® WHITEPAPERS

Hall of Fame welcomes 7 members



This year, Franchise Times is welcoming seven new members into the Hall of Fame. Each of these attorneys has been part of the Hall of Fame for 10 years, and is joining the ranks of the best franchise attorneys in the industry. Congratulations to these illustrious individuals, and thanks for being an integral part of the franchise community.

We spoke with a few of our new Hall of Famers; here's what they had to say:

Tao Xu

Q: What are the biggest challenges with international expansion?

A: I always tell my clients that they need to strike the balance. The U.S. has been very good at selling Americana, and that is what the consumers want. But at the same time they need to be able to adapt to the local environment, culture and legal system to make sure they are successful. How to strike the balance is always a challenge. Some of them are exploring alternative models, and designing the franchise system from the ground up, in a different way. I think that is very interesting and I think we will just come to that and see how successful those systems will be.

Q: What is a big trend you're watching?

A: U.S. franchisors have been going under a change from a quantitative change to a qualitative change for international franchising. I believe in the very near future—if not already—the top 200 systems will have equal number of units outside of the U.S. compared to the units inside the U.S. That is obviously a key change for the top U.S. franchise systems.

Jason M. Murray

Q: What do you think is the best method of dispute resolution?

A: Having arbitrated a number of cases and serving as an arbitrator for a number of cases, I'm still a fan of arbitration. If the parties on the front end carefully draft their arbitration



▲ Jason M. Murray

clauses and provisions with the proper structure and protection, they can have their arbitration run efficiently and manage costs and get to a resolution sooner and quicker. You have to think about that before there is a problem.

impact of that.

Michael Ackerman

Q: What is a big trend you're watching?

A: The trend I'm seeing is that in the systems



2020 HALL OF FAME

Michael Ackerman
*Paris Ackerman
& Schmierer*

Jason Murray
K&L Gate

Jennifer Dolman
Osler, Hoskin & Harcourt

Tao Xu
DLA Piper

David T. Azrin
Gallet Dreyer & Berkey

Elizabeth Weldon
Snell & Wilmer

Kevin Kennedy
Wiggin & Dana

I work with there is a lot more consolidation these days, most of the franchisees are getting larger. That is really the best way for them to survive. From my experience, people would get by on one to five stores, but now individuals and private equity companies are really stepping in and becoming larger scale franchisees. It is a trend that has probably been going on for a while now. When my partner, Dave, and I first started doing deals we were selling two to three stores and that was it. Now, we have clients who own 70, 80, 100 stores. These clients are buying the mom and pop franchisees out. I don't think in the future there will be a ton of one- and two-store franchisees, at least in the systems that I work in.

Q: What is your favorite part of franchise law?

A: My favorite part is that a lot of the things I work on, the parties have a common goal. Everyone wants to get to the finish line; everyone wants to get a transaction closed when parties do a transaction. It is very satisfying to be able to know that

you can complete something, and that it is a collaborative effort. The circumstances change every time, the parties change a little every time, but it is nice to know that you can continually get things done.

Jennifer Dolman

Q: What is your favorite part of franchise law?

A: What I love about franchise law is that as a consumer I recognize a lot of the brands. I also love the fact that you are dealing with high energy, growth-minded clients who have real-time business problems. I really like the branding aspect and dealing with entrepreneurs. There are a wide variety of clients. What I particularly like is that I get to use the crossover of all of my skills but within one industry, which makes it unique.



▲ Elizabeth Weldon

Q: What is the biggest challenge facing Canadian franchise business?

A: There are many unanswered questions in Canada and the law is often switching. The biggest challenge, which also makes it interesting, is that you don't know where the courts are going to go. And things can change based on differences in the facts, and it requires being on top of the law on a regular basis and the trends. It is challenging because it is unpredictable.

Q: What is a big trend you're watching?

A: One trend has to do with the impact of technology on franchising. More specifically, third-party food delivery services and the impact of that on franchising. I got interested in encroachment issues, because how do you clearly indicate territories when you are

dealing with global channels?

Elizabeth Weldon

Q: What is a big trend you're watching?

A: I think we are at an inflection point, where people are looking at how franchising has worked, and how it should work in the future. From a legal perspective, the things that bring this to mind are joint employer and independent contracting concerns. Issues like that make people think about how franchising is working now and how it is going to work in the future. It may be because we are at the beginning of a decade or a reflection of things that have happened in the legal world, but regardless that is where we are.

Q: What is a big change since you've started practicing?

A: The change is that I'm seeing franchisors being more in tune with the state of the law. They are very actively looking at whatever the state of the law is and how it is changing and developments in these areas.

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By Callie Evergreen

The franchise space has been awash in mergers and acquisitions in the last decade at just about every level. The transactional gurus among the 2020 Legal Eagles help spot some of the trends and best practices that have evolved in their firms as the industry continues to respond to this new normal.

Morgan Geller, a newcomer to Legal Eagles in 2019, represents both franchisees and franchisors at AXS Law Group based in Miami. She has seen more investment groups and family offices wanting to acquire multi-unit brand operations, along with a lot more activity in smaller portfolios.

Historically, big M&A deals have fallen on the franchisor side as concepts find complementary brands. In the past couple years, however, Geller has seen more multi-unit franchisees selling. “A lot of companies are going back to the drawing board to figure out how they can remain competitive,” said Geller.

She said even sophisticated operators should get some legal help as those transactions move beyond a handshake deal. Geller recommends seeing a lawyer before you sign anything. Last year, she worked with a family office looking to exit a large chain, and they didn’t have a lawyer review much of the initial contract. Having one at the end, though, helped.

“Even though it didn’t get to litigation, it helped to have a lawyer negotiate exit agreements,” Geller said. “Especially with valuable real estate involved, it made the exit a little more nuanced.”

Her advice for franchisees is to involve the franchisor as soon as possible. Oftentimes, she sees franchisees go through all the steps and tell the franchisor about their planned sale at the last minute, which can create problems.

“I think it’s important to have key players involved in the process so there aren’t any surprises in the end,” Geller said.

She also recommends giving a heads up to any vendors and suppliers to reduce the



▲ Dave Allsman



▲ Morgan Geller



▲ Michael Ackerman

risk of interruption in operations and make sure the ownership transition is seamless.

Dave Allsman represents franchisors at Fisher Zucker based in Philadelphia. The best advice he can give to franchisors who are selling is to “have their house in order,” i.e. make sure franchise agreements are signed, all documents are in order and all sales were conducted in accordance with Federal Trade Commission guidelines.

“You want to clarify if there are inconsistencies with any sales provided to a franchisee, and that it’s clearly reflected in the purchase agreement,” Allsman said.

Another key component for sellers is to have a competent counsel draft your franchise disclosure document and regulatory agreements.

“I’ve seen franchisors who had counsel at one point in the first couple years they started franchising where they didn’t have a compliant FDD,” Allsman said. “That franchise agreement contained all sorts of clauses and terms not beneficial for franchisors that could be problematic for sale,” which is why it’s imperative to have experts all the way through the process, he added.

Michael Ackerman, a founding partner of Paris Ackerman, represents small and large multi-unit franchisees, namely those in QSR systems such as Dunkin’, Wendy’s, Taco Bell and Popeyes. Ackerman lists sick pay laws and minimum wage as legal difficulties that seem to pop up time and time again.

“The minimum wage increase is very scary to certain buyers,” Ackerman said. “They have to value the deals a bit differently because their labor costs are going to be higher.”

Sick pay laws vary from state to state, which needs to be taken into account and analyzed during transactions. At times, the buyer will need to pick up the costs for employees’ sick days.

“It adds up when you’re talking thousands of employees,” Ackerman said.

For buyers, Ackerman recommends making sure there aren’t any pending lawsuits against the sellers. If there are, make sure you know what they are and that you won’t be responsible for handling them.

“Make sure you’re not inheriting anything that could impact your business negatively going forward,” Ackerman said. “We have ways of writing contracts where we could still seek out the seller on that, but it’s difficult. Nobody wins in that situation.”

If possible, buyers should develop a good relationship with their landlords, which will make for a smoother transfer. Buyers also need to have a plan in place for the transition process.

“Really mundane stuff like setting up credit card processing and bank accounts, knowing how to do health inspections, hiring employees, setting up payroll,” Ackerman said. “Those little details make the transition so much easier.” [ET](#)

“Make sure you’re not inheriting anything that could impact your business negatively going forward ... Nobody wins in that situation.”

—Michael Ackerman, founding partner at Paris Ackerman