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The Franchise Lawyer

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Franchise Agreement Provisions That Affect Eligibility for SBA Loans

By Dennis E. Wieczorek

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Establishing Diversity Jurisdiction in Franchise Disputes: The Value of Injunctive Relief

By Susan E. Tegt

The value of preliminary or permanent injunctive relief may be properly included to reach the jurisdictional threshold for diversity jurisdiction in federal courts. Currently, however, the circuits are split on whether the value of the injunctive relief should be measured solely by the benefit to the plaintiff (regardless of the cost to the defendant), or by the greater of the benefit to the plaintiff or the cost to the defendant, but not the sum of both. Read more...

Healthcare Franchises: Just What the Doctor Ordered, or Prescription for Trouble?

By Roger M. Quinland

Seasoned franchise lawyers are familiar with the many issues that must be considered when developing more “conventional” franchise systems, such as restaurants, tutoring services and automotive care concepts. Those same lawyers may be surprised to learn that the patchwork of federal and state laws controlling the sale of franchises is just the tip of the iceberg when it comes to regulations that govern franchises offering healthcare services. Read more...

10 Things You Need to Know About the FTC's New Biz Op Rule

By Keith J. Kanouse

On March 1, 2012, the FTC’s new Business Opportunity Rule became effective. It replaces the FTC’s Interim Business Opportunity Rule and the business opportunity provisions in the FTC’s old Trade Regulation Rule. This article describes 10 things you need to know

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about the New Biz Op Rule. Read more...

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By L. Seth Stadfeld

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FORUM NEWS & EVENTS

Message From The Chair

By Joseph J. Fittante, Jr.

As an organization, we have been fortunate to have excellent leadership over the past 30 plus years. Our leaders' diversity of opinion and thought combined with their passion has helped this organization establish and maintain itself as the preeminent organization for the study of franchise law. It is against this very formidable backdrop that I ask for nominations for the future leaders of this organization. We have once again established a Nominating Committee that will select my successor as well as four individuals who will serve on the Governing Committee, all beginning in August of 2013. Read more...

2012 Nominating Committee Selected

Joseph J. Fittante, Chair of the Forum, is pleased to announce the appointment of the 2012 Nominating Committee. The committee, which is headed by the Immediate Past Chair, is responsible for recommending candidates to fill open positions on the Governing Committee. Read more...

ABA Forum on Franchising Technology Tips

By Jim Goniea

Since becoming Technology Officer for the Forum I have learned a lot about information and benefits available to Forum members that I had not been fully taking advantage of. Most of these benefits are easy to access from your computer with a few mouse clicks... if you know how. To educate those who may not have been aware of these benefits and to provide helpful tips on how to take advantage of them, I have created a practical, easy-to-use, technology tips document. Read more...

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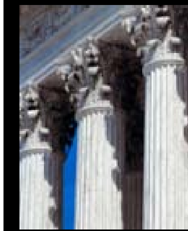
By Leslie Curran and Michael Joblove

Every year in October, the Forum on Franchising offers a three-day legal conference featuring unparalleled educational programs and collegial social events where attendees network with familiar and new franchise bar colleagues, clients and friends. Come out to the Forum in Los Angeles which promises to be one of the finest and most memorable. Highlights that make this an event you do not want to miss. Read more...

New Books from the Forum On Franchising: Franchise Law Compliance Manual, Second Edition

Editor Jeffrey A. Brimer

Designed as a working tool for both corporate franchise lawyers and outside counsel, the Franchise Law Compliance Manual is a practical, comprehensive guide to establishing and maintaining a successful corporate compliance program. Read more...



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- Why Have the Rule? Recent Opinion May Decrease Compliance with FPR Disclosure Requirements
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Franchise Agreement Provisions That Affect Eligibility for SBA Loans

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Vol. 15, No. 2

By
Dennis E. Wieczorek

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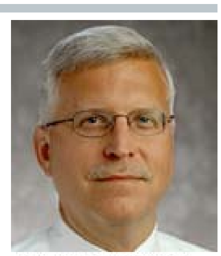
I. Introduction


DENNIS E. WIECZOREK

Franchise systems continue to face significant hurdles in securing lending sources to finance the development and opening of new locations. While access to conventional credit sources remains somewhat limited, loans guaranteed by the Small Business Administration have become a key resource for franchisors and franchisees. But SBA loans are available only under certain conditions and those conditions may be difficult to reconcile with the terms of certain franchise programs.

Basically, an SBA loan is available to a credit-worthy small business. A business is "small" for SBA purposes typically based on revenues or number of employees (e.g., a restaurant concept would qualify if revenues were less than $7-10 million, depending on the type of concept). The critical issue is whether the business is independent enough such that its owner has the right to profit from his/her efforts and bears the risk of loss commensurate with ownership. In evaluating independence in a franchise context (i.e., proving that the franchisee is not "affiliated" with the franchisor), there are difficulties in weighing the degree of control a franchisor exercises over a franchisee. SBA staff are tasked with determining eligibility but, because they are scattered around the country and standards of interpretation vary, historically there has been some lack of uniformity among the SBA offices. In some cases, a franchisor's franchise agreement may pass muster in one SBA regional office while another office will deny eligibility or impose conditions affecting key elements of the franchise program.

II. The SBA Franchise Registry

In 1998, the SBA established an alternative path specifically for the franchise industry to avoid inconsistent eligibility determinations in its regional offices. That alternative is a public/private program called the Franchise Registry. If a franchisor files an application for inclusion on the Registry, its franchise agreement is reviewed by a private program manager, FRANdata, in consultation with the SBA national office in Washington, D.C. As described above, the review focuses on elements of the franchise program indicative of independence from and non-affiliation with the franchisor, i.e., the right to profit and bear losses. There is a cost to file with the Registry (currently $2,500), and the review process can take as long as several months. But once a franchisor is listed on the Registry, the franchise agreement is presumed to be eligible for SBA financing and the borrower's creditworthiness becomes the only material issue on the table for the lender.

Some franchise systems are structured in a way that their programs will never qualify for the Registry without first undergoing significant program restructuring. But most systems, albeit with some modifications to their franchise agreements, should be eligible for inclusion.

The following are the principal issues that are considered by Franchise Registry administrators in

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connection with their review of franchise agreements:

1. Hiring/Firing of Franchisee's Employees. If a franchisor reserves the right to hire or fire a franchisee's employees, that will be a basis for disqualification. However, a franchisor can have a right to approve the manager of the franchised business. A franchisor may also retain an option to take over the franchisee's business, and hence serve as the employer of the franchisee's employees, for a limited period of time (in 90- to 120- day increments, but not exceeding 12 months).
2. Bank Account Control. A franchisor will be disqualified if it requires that the franchisee deposit receipts into a bank account controlled by the franchisor. Similarly, a requirement that the franchisee get franchisor approval for a withdrawal from a franchisee-controlled account will be problematic. But these restrictions do not apply to electronic withdrawals (via EFT or ACH) by the franchisor from an account controlled by the franchisee.
3. Billing Control. If the franchisor controls the billing of the franchisee's clients/customers, the franchise program will not qualify for SBA approval.
4. Step-In Rights. A franchisor may retain the right to take over the operation of the franchisee's business (a/k/a step-in rights) for only a limited period (see #1 above). This right typically would come into play in the context of a franchisee default.
5. Transfer Approval. The franchise agreement will be disqualified if the franchisor is allowed to withhold approval of a transfer "in its sole discretion." Instead, the franchisor cannot unreasonably withhold or delay approval of a transfer.
6. Transfer Pricing. The franchisor cannot unilaterally dictate the price at which the franchisee can sell its business to a third party or to the franchisor in a repurchase. A price based on an appraisal or some other reasonable method will be permissible, as long as both parties participate in the appraiser selection process.
7. Franchisor Purchase Option. Assuming the pricing formula is approved (see #6 above), a franchisor can acquire the franchisee's personal property (upon a termination or expiration). However, the franchisor cannot have the right to acquire the real estate on which the franchise is located, nor can the franchisor demand a lease of such real estate.
8. Real Estate Control. The franchisor cannot impose deed restrictions, covenants or reversionary interests with respect to the real estate owned or controlled by the franchisee.
9. Right of First Refusal. A franchisor may provide for a right of first refusal with respect to the sale of the entire franchised business. But such right of first refusal cannot apply to a partial transfer of ownership in the franchisee entity. By a "partial" transfer, the SBA is focused on situations where, by exercise of its right of first refusal, the franchisor would become a substantial co-owner of the franchise. In such a situation, the business is no longer "small" and therefore would be disqualified from SBA loan eligibility. Partial ownership transfers become more problematic when a franchisee retains a small ownership interest and sells the bulk of the stock or interests to a third party. If this occurs, the franchisor may not be able to exercise its right of first refusal, but the SBA anticipates that the franchisor could reasonably refuse to approve the transfer. That may not solve the problem so additional clarification from the SBA may be necessary.
10. Liquidated Damages. If the franchise agreement provides for liquidated damages in the case of a franchisee breach, the damage formula must be reasonable and damages should be ascertainable at the time of signing.
11. Retail Pricing. A franchisor may not mandate the franchisee's retail pricing structure but is allowed to establish national price advertising programs and limited-time promotional offers. The SBA is currently working on a clarification of its position on this issue.
12. Multi-Unit Arrangements. In general, master franchise, development agent, area representative and similar programs are not eligible for SBA loans. However, area development arrangements (i.e., an agreement by the franchisee to develop and operate multiple units typically in a specified geographic area) may qualify.
13. Fee Issues. If the continuing fees payable by the franchisee are confusingly described or are excessive, there will be a qualification issue. Obviously, the word "excessive" is subject to interpretation so presumably this is not an oft-cited basis for disqualification.

III. Other Matters

A listing on the Registry must be renewed on an annual basis. Any future changes to the franchise agreement with respect to the issues described above must be vetted through FRANdata before implementation.

In summary, listing on the Franchise Registry has a number of benefits, including:

- Once listed on the Registry, the franchise agreement will not be reviewed on an ad hoc basis by SBA regional offices.
- Some lenders view the Registry as an additional badge of legitimacy.
- A franchisor may gain a measure of credibility via a listing on the Registry.

Not all franchise programs will qualify but, for most franchisors, the SBA Franchise Registry is a worthwhile investment.

IV. Recent Developments

Even if a franchisor elects to forego filing on the Franchise Registry and, instead, decides to deal with SBA regional offices on a case-by-case basis, some recent developments may prove beneficial. The SBA has instituted a national franchise appeals program, where a franchisor can appeal an adverse decision by a local SBA counsel. The SBA hopes that the appeals process will result in a greater degree of harmonization throughout its regional offices. While the Franchise Registry may continue to be a better option, the appeals program may help to eliminate major variations in reviews by SBA offices.

Establishing Diversity Jurisdiction in Franchise Disputes: The Value of Injunctive Relief

Establishing Diversity Jurisdiction in Franchise Disputes: The Value of Injunctive Relief

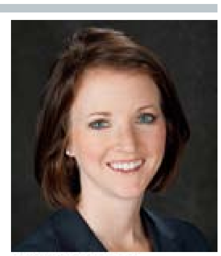
Vol. 15, No. 2

By
Susan E. Tegt

Larkin Hoffman Daly & Lindgren Ltd.

Susan E. Tegt was one of the attorneys representing Novus Franchising, Inc. in the *Novus Franchising Inc. v. Livengood* case described in this article.

I. Introduction



SUSAN E. TEGT

Litigants often seek injunctive relief to limit the damage caused by the breach of a distribution or franchise agreement or to otherwise obtain relief where damages are not easily quantifiable. In doing so, the plaintiff may desire to venue the action in federal court over state court. While there are many different reasons for bringing an action in federal court, parties to a franchise or distribution agreement may find that federal courts are faster moving and consist of a judicial panel with greater expertise in corporate and franchise transactions. Of course, federal courts do not have subject-matter jurisdiction over all disputes. In the absence of a federal question, the plaintiff must plead diversity of citizenship, meaning the parties to the action must be citizens of different states and the amount in controversy must "exceed[] the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a) (2006).

If a complaint alleges in good faith the jurisdictional minimum, jurisdiction is conferred on the federal court. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). But, if the amount in controversy is challenged, a complaint will be dismissed if it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." *Id.* The amount in controversy is measured by "the value of the object of the litigation," meaning, in actions seeking only injunctive relief, the value of the injunction. *Glenwood Light & Water Co. v. Mut. Light, Heat & Power Co.*, 239 U.S. 121, 125 (1915). Thus, the calculation of the value of an injunction may be critical to establishing, and overcoming challenges to, diversity jurisdiction.

The federal courts vary by circuit in their application of the "value of the object" rule. Several circuits, including the Second, Third, Eighth, Ninth and Eleventh Circuits, look strictly at the value of the injunction from the plaintiff's perspective, even if the financial effect of an injunction on the defendant will far exceed the jurisdictional threshold. In contrast, other circuits, including the Fourth, Fifth, Sixth, Seventh and Tenth Circuits, determine the "value of the object" with reference to the greater of the value of the injunction to the plaintiff or the cost an injunction will impose on the defendant, but not the sum of both. This article provides a brief survey of the different applications of the "value of the object" rule in the contexts of the enforcement of post-termination covenants not-to-compete and the valuation of a wrongfully-terminated franchise.

II. The Value of an Injunction Enforcing a Covenant Not-to-Compete

In *Novus Franchising, Inc. v. Livengood*, the United States District Court for the District of Minnesota recently denied the defendant franchisee's motion to dismiss for lack of diversity jurisdiction by

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valuing the injunctive relief pleaded in the franchisor's amended complaint. No. 11-1651 (MJD/TNL), 2012 WL 38580, at *5 (D. Minn. Jan. 9, 2012). In *Novus Franchising, Inc.*, the franchisor filed an amended complaint alleging, in part, that a former franchisee and the former franchisee's shareholders violated, and continued to violate, a post-term covenant not-to-compete by operating a competitive business within the franchisee's former franchised territory. *Id.* at *3. The franchisor's amended complaint sought monetary damages for the franchisee's alleged failure to pay royalties and other fees, preliminary and permanent injunctive relief, costs and attorneys' fees, and prejudgment interest. *Id.* The defendants moved to dismiss the franchisor's complaint on two grounds, one being a lack of subject matter jurisdiction on the basis that the franchisor failed to establish a claim in excess of $75,000. *Id.* at *4. The defendants challenged the factual truthfulness of the franchisor's averments that its damages exceeded the jurisdictional minimum, requiring the franchisor to submit evidence of the value of its claims by affidavit. *Id.* at *4, 6.

Applying Eighth Circuit law, requiring the value of the injunction to be analyzed solely from the perspective of the plaintiff, the court first addressed the franchisor's difficulty attracting a new franchisee to the territory where its former franchisee continued to operate. *Id*. at *5. The value to the franchisor was calculated by adding initial franchise fees, training fees, and profits from the sale of equipment and other materials that the franchisor would collect from the placement of a new franchisee in the territory. *Id*. at *6. The court then added to that figure the minimum monthly royalty fees projected under the franchisor's current franchise agreement over the ten-year term of the agreement and concluded the sum exceeded $75,000. *Id.* The court also acknowledged the amount in controversy may be calculated in a another way, by averaging the royalties paid by the former franchisee, since a new franchisee in the same territory would arguably generate similar sales. *Id.* (citing *Grow Biz Int'l, Inc. v. MNO, Inc.*, No. 01-1805 (DWF), 2002 WL 113849, at *2 (D. Minn. Jan. 25, 2002)).

The Fourth Circuit follows the second approach in determining the value of an injunction for purposes of diversity jurisdiction, taking into account either the benefit to the moving party or the detriment to the party to be enjoined. For example, in *JTH Tax, Inc. v. Frashier, II*, the Fourth Circuit Court of Appeals reversed the dismissal of a franchisor's complaint, holding the district court erred when it determined the amount in controversy failed to exceed the $75,000 requirement for diversity jurisdiction. 624 F.3d 635, 636 (4th Cir. 2010). In contrast to circuits examining only the value of the injunction to the plaintiff, the Fourth Circuit Court of Appeals indicated the value of the injunction may be determined "by reference to the larger of two figures: the injunction's worth to the plaintiff or its cost to the defendant." *Id.* at 639. From the perspective of the plaintiff franchisor, the appellate court valued the benefit of the injunction forbidding competition in the former defendant franchisee's territory by applying the franchisor's standard accounting practice of valuing a franchise using the previous year's net receipts. *Id.* The court added to that figure the loss of goodwill, estimated by the amount spent on advertising in the year the franchise agreement terminated. *Id.* In determining the cost of an injunction to the defendant franchisee, the court found an injunction prohibiting the franchisee from operating in a location subject to a five-year lease would cost the franchisee the monthly rent multiplied by the five-year term. *Id.* Adding this amount to the damages claimed in the complaint satisfied the jurisdictional minimum. *Id.* at 636.

III. The Value of a Wrongfully-Terminated Franchise

A franchisee may seek injunctive relief barring the wrongful termination of a franchise. The federal courts have yet to address the value of a wrongfully-terminated franchise as it may apply to the "value of the object" for diversity jurisdiction. Many courts have, however, addressed the valuation of a terminated franchise for the purpose of assessing damages, and these cases may be useful by analogy when seeking to establish or defend diversity jurisdiction.

However, the valuation of a terminated franchise is never a simple matter. For example, in *Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc.* ("*Cooper I*"), the Third Circuit Court of Appeals held a franchise should be valued on the date of termination using either the "present value of lost future earnings or the present market value of the lost business." 63 F.3d 262, 278, 287 (3d Cir. 1995). In *Cooper I*, a distributor commenced an action for wrongful termination of a franchise agreement and obtained a preliminary injunction, halting the termination of the franchise relationship for approximately two and a half years. *Id.* During the term of the injunction, the manufacturer refused to provide critical support to the distributor, arguably resulting in a loss of profits. *Id.* at 268. More than two years after the injunction issued, a jury held the manufacturer's attempted termination of the distribution agreement violated the New Jersey Franchise Practices Act. *Id.* The district court entered judgment for the distributor and dissolved the preliminary injunction. *Id.* To value the terminated franchise, the district court instructed the jury to value the franchise as of the date the manufacturer first attempted to terminate the franchise. *Id*.at 278; *see also Baur Truck & Equip., Inc. v. Svedala Indus., Inc.*, Bus. Franchise Guide (CCH) ¶ 10,193, at *3 (Wis. Ct. App. Feb. 2, 1993) (valuing a terminated franchise by calculating the distributor's sales figures in the years leading up to the "substantial change in competitive circumstances").

The Third Circuit Court of Appeals initially held this valuation method was in error, stating the proper valuation date is the date when the franchise ceased to operate, or the date of dissolution of the preliminary injunction. *Cooper I* at 278. The court held valuing the franchise on the earlier date would bestow a double recovery because the distributor would recover both the value of the franchise as of the earlier date and also the actual profits derived from operating the franchise during the term of the injunction. *Id.* The appellate court remanded for a new trial on the issue of damages. *Id.* at 285.

On appeal after remand, the Third Circuit Court of Appeals changed its mind. *Cooper Distributing*

Co., Inc. v. Amana Refrigeration, Inc., 180 F.3d 542, 546 (3d Cir. 1999) ("*Cooper II*"). In *Cooper II*, the appellate court held certain pre-termination amounts should have been included in the valuation of the franchise, particularly the profits lost by the distributor when the manufacturer ceased providing sales support to the distributor during the term of the preliminary injunction. *Id*. Thus, even though *Cooper I* held the franchise should be valued as of the date of termination, the *Cooper II* court held evidence of lost profits based upon the distributor's "uncertain status" during the pendency of the preliminary injunction should be included in the valuation. *Id.* at 547 (citation omitted). The *Cooper II* court also rejected its earlier support for alternative valuation methods, holding that a market-value analysis, or the value "hypothetical buyers and sellers" would assign to the franchise, is the appropriate valuation method. *Id.* (citation omitted).

IV. Conclusion

The value of preliminary or permanent injunctive relief may be properly included to reach the jurisdictional threshold for diversity jurisdiction in federal courts. Since the circuits are split on whether the value of the injunctive relief should be measured solely by the benefit to the plaintiff, or by the greater of the benefit to the plaintiff or the cost to the defendant, litigants must be certain to understand the law of their circuit when faced with a jurisdictional challenge. Moreover, given the complexities and vagaries of the methods of valuing a franchise, attorneys representing parties to franchise disputes are advised to retain valuation experts who understand the complexities of the franchise business model and are capable of presenting more than one valuation method to the court.

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Healthcare Franchises: Just What the Doctor Ordered, or Prescription for Trouble?

Healthcare Franchises: Just What the Doctor Ordered, or Prescription for Trouble?

Vol. 15, No. 2

By
Roger M. Quinland

Gordon & Rees, LLP

I. Introduction

According to recent estimates, healthcare spending in the United States will reach $4.5 trillion—over 19 percent of the nation's gross domestic product—by the year 2019. Healthcare is second only to the food sector in franchise growth. This growth may offer remarkable opportunities for franchisors of healthcare concepts, as an aging and longer-living population demands more healthcare services.

Seasoned franchise lawyers are familiar with the many issues that must be considered when developing more "conventional" franchise systems, such as restaurants, tutoring services and automotive care concepts. Those same lawyers may be surprised to learn that the patchwork of federal and state laws controlling the sale of franchises is just the tip of the iceberg when it comes to regulations that govern franchises offering healthcare services.

Healthcare franchises include concepts such as Pearle Vision®, Doctors Express® and Health Mart®. The franchisors of these concepts offer vision centers, urgent care clinics and pharmacies, respectively. There are, of course, many other examples of franchised healthcare businesses, including dental offices, chiropractic clinics and med-spas.

Healthcare franchises are appealing to wellness providers, for the same reasons that conventional franchise concepts are appealing to laypersons. The operational support, established training methods and promotional programs that franchisors offer may help a healthcare franchisee navigate through a daunting array of regulatory issues. Still, the reality is that when a franchised business offers the services of licensed healthcare professionals, an ill-conceived pricing promotion or coupon can result in a substantial financial penalty and a *prison sentence* for unwary franchisors or franchisees.

Healthcare franchisors and their counsel must be aware that practices that seem harmless when performed within the traditional franchise model may create substantial liabilities when applied to a healthcare franchise. A thorough understanding of the interplay of franchise law and healthcare law is essential to avoid such liabilities, and to provide proper operational guidance to franchisees.

Among the most significant regulatory issues that affect licensed healthcare professional franchises are restrictions against the corporate practice of medicine, prohibitions on certain types of payment arrangements and prohibitions against self-referrals.

II. Corporate Practice of Medicine

In broad terms, the prohibition against the corporate practice of medicine means that laypersons and general-purpose corporations may not employ physicians to practice medicine—effectively confining the delivery of medical services to entities owned and controlled only by licensed medical professionals and precluding the sharing of professional fees between physicians and non-licensed entities. The term "physicians" may include optometrists, dentists, chiropractors, podiatrists and, of

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course, medical doctors. The ban on the corporate practice of medicine may be found in state statutes, attorneys general opinions, medical practice acts or a combination of these. The purpose of the prohibition is to ensure that licensed healthcare professionals maintain independence over the care of their patients without the undue influence of unlicensed corporations and laypersons.

The ban on the corporate practice of medicine means that franchised businesses that directly provide healthcare services cannot be owned or controlled by non-licensed persons or general corporations. If healthcare services are to be provided in conjunction with the franchise model, an *independent* licensed professional must provide them, or own the franchise. Further, a licensed healthcare professional may not share a professional fee with a non-licensed franchisor or franchisee. Doing so is considered to be assisting an unlicensed person to practice medicine. For example, a general corporation or layperson may own a vision center franchise and be in the business of selling eyeglass frames and sunglasses. If that vision center also offers optometry examinations, an independent doctor of optometry must provide them. There must be a clear separation of the healthcare services and the retail services offered by the vision center. Of course, this is true whether the vision center is franchised or not.

In some states, such as New York, violating the prohibition on the corporate practice of medicine is a felony. *See* N.Y. Educ. Law § 6512. In California, corporate practice of medicine violations are punishable by imprisonment from six months to five years, and a fine of $50,000 or double the amount of the fraud, whichever is greater. *See* Cal. Bus. & Prof. Code § 2417.5, as amended by Assembly Bill 2566.

A franchise lawyer evaluating a healthcare franchise should consider two threshold questions in connection with the ban on the corporate practice of medicine: (1) do the services furnished by the franchisee constitute a “professional service” subject to corporate practice restrictions, such as optometry or dentistry?; and (2) if so, can the franchise be structured in a manner that preserves the autonomy of the licensed professional?

Courts and government authorities differentiate between the business and the medical elements of delivering healthcare services. By focusing on the delivery of business services and leaving medical decisions to licensed healthcare professionals, a franchise system increases its ability to survive challenges alleging the corporate practice of medicine.

III. The “Anti-Kickback” Statute

42 U.S.C. § 1320a-7b is known as the federal "Anti-Kickback" Statute (“AKS”). The AKS prohibits healthcare providers, whether licensed or unlicensed, from offering or receiving cash payments or anything of similar value in exchange for referrals that are paid for by federal programs. Senior care services, pharmacies and dental franchises are but a few of the categories for which AKS awareness should be a high priority. Providing rebates on professional services, demanding unreasonably high payments for medical support services (such as billing and transcription), furnishing tickets to entertainment events or any other remuneration that can be considered a cash or “in kind” payment may violate the AKS. *See* 42 U.S.C. 1320a-7b(b).

The AKS arose out of government concerns that inappropriate payments made to healthcare professionals might influence those professionals to specify products and services that are medically unnecessary or potentially injurious to patients. Likewise, offering patients any type of payment that encourages the utilization of federal payment programs may have the same effect on healthcare decisions. To protect both patients and the taxpayers that fund Medicaid and Medicare from personal and economic harm, Congress enacted a prohibition against the payment of “kickbacks” in any form. Cash, goods or just about any type of benefit in kind can be deemed a kickback. Statutory exceptions, known as “safe harbors,” set forth acceptable practices not subject to prosecution under the AKS, despite appearing to fall within the statute’s parameters. *See* 42 C.F.R. § 1001.952. These safe harbors apply only to those arrangements that precisely meet *all* of the many requirements contained in each exception.

Thirty-seven states and the District of Columbia have anti-kickback laws. State anti-kickback laws typically apply to all third-party payers, while the federal statute only applies to payments in connection with federal healthcare programs. Some state anti-kickback laws lack the intent requirements of the federal law and may also differ from federal law with regard to the types of safe harbors applied. For example, the federal AKS exempts compensation paid by an employer to a legitimate employee, while Florida’s anti-kickback statute does not. Interestingly, Florida courts have also held that state anti-kickback law is preempted by federal anti-kickback law. *State v. Harden,* 873 So.2d 352 (Fla. Dist. Ct. App. 2004).

Although franchises are independently owned and operated businesses, federal authorities have not hesitated to pursue franchisors in AKS lawsuits arising from the actions of franchisees. In the year 2000, TLC Home Health Services LLC and its affiliates (“TLC”) had approximately 150 franchised units. The franchisees performed home healthcare services and submitted costs to Medicaid for services rendered to Medicaid recipients. TLC agreed to pay a six-figure settlement to resolve its potential AKS liability for the actions of a single franchisee. See Office of the Inspector General Fraud Report, 02 15 2005. TLC’s settlement was offered notwithstanding the fact that its franchisee was separately (and successfully) prosecuted by the Office of the Inspector General for paying commissions to consultants who provided “marketing services.” These consultants were paid a fee for each new homecare patient that their marketing steered to the franchisee. That fee was considered a payment to encourage overutilization of services submitted to a federal program for payment. TLC also paid $1.4 million to settle an action under the federal False Claims Act, which action was brought because of the unlawful activities of yet another franchisee. *See U.S. ex rel. Pina* *et al. v. Staff Builders, Inc. et. al.*, Civ. No. 96-86664 (S.D. Fla. Sept. 23, 1996).

The AKS safe harbors are numerous, subject to change and highly technical. This makes a thorough analysis beyond the scope of this article, but safe harbors may include payments in connection with:

- Space rental
- Equipment rental
- Personal services and management contracts
- Referral services
- Compensation to legitimate employees
- Group purchasing organizations
- Price reductions offered to health plans
- Ambulatory surgical centers
- Electronic health records items and service

Each of the above is described in a separate, detailed section of the AKS. *See* 42 C.F.R. § 1001.952. The complete list of exceptions may be found at: http://goo.gl/GKCAA.

Franchisors and franchisees should ensure that arrangements in which a healthcare franchisee is offering discounts, exchanges or reduced-cost services to a patient, or receiving the same from a supplier, are precisely described in documents that have been reviewed by counsel experienced in both healthcare and franchise law.

The Balanced Budget Act of 1997 provides for civil monetary penalties for violations of the AKS in amounts up to $50,000 per violation and assessments equal to not more than three times the amount of the remuneration paid under the arrangement. *See* 42 U.S.C. 1320a-7(a)(7). Violating state anti-kickback laws may subject a provider to disciplinary action by a state's licensing board in addition to other sanctions. Counsel are well advised to carefully analyze the preferred supplier and discounting aspects of any franchise system that involves reimbursement by any third-party payer.

IV. Franchise Daily Deals

Websites such as Groupon® and LivingSocial® have recently come under scrutiny for offering discounts on healthcare services, including those provided by franchises. A recent deal offered "$50 for $200 credit towards exam and eyeglasses" at locations of a vision center franchise. Another deal offered "$24 for four chiropractic adjustments normally priced at $116" at participating chiropractic franchises. In both cases there is a real possibility that the law was broken. Daily deal sites keep up to half of the payments received from deal offer recipients and, in the above instances, the recipients become patients. These transactions may constitute fee splitting with a non-licensed person or general corporation, which is strictly prohibited by federal and state corporate practice of medicine laws. Moreover, there may be a violation of the AKS, because a payment was made to the deal site for a patient referral, and for goods and services that may be reimbursable under government programs. Adding to the complexity of the issue is that legal standards concerning which procedures constitute the practice of medicine and which healthcare professionals are included in fee-splitting prohibitions vary by jurisdiction. While most states are still grappling with this issue, medical boards in Oregon have advised chiropractors and dentists against participating in daily deal websites. *See* http://www.oregon.gov/OBCE/pdfs/OBCE_Stmt_Groupon_and_Fee_Splitting_7_21_2011.pdf?ga=1.

V. Prohibitions Against Physician Self-Referral

Certain federal and state laws prohibit a licensed healthcare professional from referring patients to designated health service ("DHS") providers if the referring professional or a family member has a financial relationship with that DHS provider. The applicable federal law is 42 U.S.C. § 1395nn, commonly known as the "Stark Law." The law is named for U.S. Congressman Pete Stark, sponsor of the initial bill. Creation of the Stark Law was spurred by studies showing that the number of tests ordered by physicians increased if the referring provider possessed an ownership interest in the testing facility. If the franchise system offers a business that is likely to receive payments from Medicare or Medicaid, the franchisor must structure the system to comply with the Stark Law.

As is the case with the federal AKS, several states enforce their own self-referral laws (or "mini" Stark Laws). While the federal Stark Law only applies to referrals for the service classifications set forth in the statute *and* when the services provided as a result of the referral may be paid by a federal benefits program, some states limit referrals by licensed healthcare professionals regardless of whether the payer is a governmental entity.

Among the 34 states that have statutes against self-referrals are Arizona (Ariz. Rev. Stat. § 32-1401(25)(ff)); California (Cal. Bus. & Prof. Code §650.01–02); Colorado (Colo. Rev. Stat. § 26-4-410.5); Minnesota (2004 Minn. ALS 198 (S.B. 2080)); and New York (10 NYCRR §34.1, *et seq.*). State laws vary widely in several respects. In California, the self-referral prohibition applies not only to persons licensed in the "healing acts," but their immediate family members. *See* Cal. Bus. & Prof. Code § 650.01-02. Arizona's self-referral law applies only to medical doctors and surgeons. *See* A.R.S. § 32-1401(27)(ff). In other instances, application of state law depends on the type of services being referred. For example, Montana's self-referral law specifically prohibits medical practitioners from owning pharmacies. *See* Mont. Code Ann. § 37-2-103.

The following is a partial list of the DHS facilities to which patients must not be referred if a financial interest is present:

- Clinical laboratories

- Physical therapists
- Occupational therapists
- Outpatient speech pathologists
- Radiologists and other providers of imaging services
- Durable medical supplies providers
- Home healthcare service providers
- Pharmacies

Considering the number of franchised medical testing labs, pharmacies and home healthcare businesses currently operating, the relevance of the federal Stark Law and "mini" Stark Laws to franchising should be clear. The consequences of violating the federal Stark Law are severe. They include a $15,000 per referral fine and imposition of a $100,000 civil penalty for each ongoing arrangement considered to be an attempt to evade the law. *See* 42 U.S.C.S. § 1395nn.

VI. Practical Tips

Here are a few guidelines for healthcare franchisors and franchisees alike:

1. The combination of legal issues relating to franchising and legal issues relating to healthcare can create unexpected liabilities if operations and system standards are not clearly established before a single franchise is sold.
2. Franchisors and franchisees should ensure that national and local promotional materials are reviewed by counsel familiar with anti-kickback statutes, as well as franchise advertising law.
3. Supplier and vendor agreements should be carefully analyzed so as to identify any rebate, discount or kick-back that might be considered an impermissible payment given or received by franchisors and franchisees.

VII. Conclusion

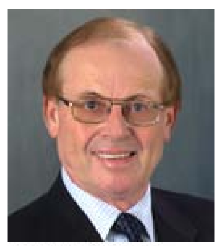
Healthcare businesses account for over 14 million jobs in the United States and are expected to create approximately three million new jobs over the next decade. Ten of the top 20 fastest growing careers are in healthcare. As our population ages and life expectancies increase, the need for healthcare also will increase, thus enhancing the potential opportunity for healthcare franchises to flourish. In order to take advantage of this opportunity, healthcare franchisors, franchisees and their counsel must be prepared to continually monitor and manage the complex array of franchise and healthcare laws and regulations at all levels of the government. While definitely a challenge, the payoff may be well worth the investment.

10 Things You Need to Know About the FTC's New Biz Op Rule

Vol. 15, No. 2

By
Keith J. Kanouse

Kanouse & Walker, P.A.


KEITH J. KANOUSE

On March 1, 2012, the FTC's new Business Opportunity Rule (16 C.F.R. Part 437) (the "New Biz Op Rule") became effective. It replaces the FTC's Interim Business Opportunity Rule (previously codified at 16 C.F.R. Part 437) and the business opportunity provisions in the FTC's old Trade Regulation Rule titled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (the "Original FTC Franchise Rule"). 16 C.F.R. Part 436. Here are 10 things you need to know.

1. Know That the New Biz Op Rule Applies in All States

The New Biz Op Rule applies throughout the United States and its territories, including the 25 states that do not have state business opportunity laws. However, the 25 states having business opportunity laws are not preempted. 16 C.F.R. § 437.9(b).

2. Know the Elements of a "Business Opportunity"

The definition of a "business opportunity" under the New Biz Op Rule involves a commercial arrangement that includes the following elements:

(a) The seller must solicit a prospective purchaser to enter into a new business (one in which the prospective purchaser is not currently engaged or a new line or type of business).

(b) The purchaser must make a "required payment," that is, consideration paid by the purchaser to the seller or an affiliate as a condition to obtaining or commencing the operation of the business opportunity. There remains the exception for payments for the purchase of a reasonable amount of inventory at bona fide wholesale prices for resale or lease.

(c) The seller must represent that the seller or a designated person (such as a locator or lead generating company) will: (i) provide locations for the purchaser's use or operation of equipment, displays, vending machines, or similar devices that the purchaser controls; (ii) provide outlets, accounts or customers to the purchaser; or (iii) buy back any of the goods or services that the purchaser makes, including providing payment for such services such as stuffing envelopes from home or jewelry assembly. *Id.* at § 437.1(c).

3. Know That More Companies Are Now Subject to the New Biz Op Rule

The New Biz Op Rule not only applies to business opportunities that were covered by the Interim Business Opportunity Rule, including vending machines, rack displays (such as greeting cards), payphones and Internet kiosks, but also may apply to work-at-home programs, such a jewelry assembly and envelope stuffing, as the result of its expanded definition of a business opportunity. *Id.* at § 437.1(c). The New Biz Op Rule eliminates the definitional element of the "payment of $500 or

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more on or before the first 6 months of operations" that was a required element of a "business opportunity venture" under the previous rules. *Id.* at § 437.1(p). Franchisors covered by the FTC Franchise Rule and multi-level marketing arrangements, however, are not covered by the New Biz Op Rule. *Id.* at § 437.8.

4. Know That the FTC Disclosure Statement Can No Longer Be Used

The FTC Disclosure Statement under the Interim Business Opportunity Rule and Original FTC Franchise Rule, which required the disclosure of 20 items of information, can no longer be used. *Id.* at § 437.3.

5. Know That the FTC's One-Page Disclosure Statement Must Now Be Used

The New Biz Op Rule requires a business opportunity seller to use a one-page form, titled "Disclosure of Important Information About Business Opportunity" (the "New Biz Op Disclosure Document"), which requires the disclosure of five items of information and possibly certain attachments. *Id.* at § 437.3. The five items relate to:

(a) The seller's identifying information, including its name, business address, telephone number, the name of the salesperson offering the business opportunity, and the date when the New Biz Op Disclosure Document is furnished to the prospective purchaser. *Id.* at § 437.3(a)(1).

(b) Whether the seller makes an earnings claim. The seller is not obligated to make an earnings claim and can check the "no" box. However, if the seller does make an earnings claim, the seller must check the "yes" box and provide the prospective purchaser with a separate earnings claim statement titled "EARNINGS CLAIM STATEMENT REQUIRED BY LAW." *Id.* at § 437.3(a)(2); *see also Id.* at § 437.4.

(c) Whether the seller, any of its affiliates (including a parent or subsidiary) or prior businesses, or any of its key personnel (including seller's officers, directors, sales managers, or any individual who occupies a position or performs a function similar to an officer, director or sales manager of the seller) have been the subject of any civil or criminal "legal action" within the past 10 years that involved "misrepresentation, fraud, securities law violations, or unfair or deceptive practices, including violations of any FTC Rule." *Id.* at § 437.3(a)(3).

(d) The seller's cancellation or refund policies, if any. *Id.* at § 437.3(a)(4).

(e) A list of the 10 purchasers of the business opportunity closest to the prospective purchaser's home or, in the alternative, a list of all purchasers during the last three years. The list must include only each prior purchaser's name, state (not address) and telephone number. *Id.* at § 437.3(a)(5).

6. Know That There is No Filing or Approval Process

The seller does not file the New Biz Op Disclosure Document with the FTC or any state. Neither the FTC nor any state approves it, but the seller has the burden of proving compliance with the New Biz Op Rule.

7. Know the Disclosure and Delivery Requirements

The seller must deliver the New Biz Op Disclosure Document at least seven calendar days (instead of the previous 10 business days) before a prospective purchaser signs any documents with, or pays any money to, the seller. *Id.* at § 437.2. The seller is required to attach a duplicate copy of the New Biz Op Disclosure Document and any attachments to be signed and dated by the prospective purchaser. *Id.* at § 437.3(a)(6). The seller can send the New Biz Op Disclosure Document to the prospective purchaser electronically and allow for an electronic or digital signature of the purchaser. *Id.* at § 437.1(s). If the seller conducts sales of its business opportunities in languages other than in English, the New Biz Op Disclosure Document must be in those same languages. *Id.* at § 437.5.

8. Know That State Business Opportunity Laws May Also Apply

The New Biz Op Rule does not preempt state business opportunities laws. *Id.* at § 437.9(b). A seller cannot include disclosures required by state law in the New Biz Op Disclosure Document. *Id.* at § 437.6(c). If a seller is subject to both the New Biz Op Rule and a state's business opportunity law, it must comply with both and will have to prepare and provide the prospective purchaser with both the FTC and the state's disclosure documents. A state's business opportunity law may apply if: (a) the seller is located in a biz op state; (b) the seller advertises in, or offers a business opportunity in, a biz op state; (c) the prospective purchaser is a resident of a biz op state; or (d) the purchaser intends to operate the business opportunity in a biz op state. As a result, sellers of business opportunities that operate in biz op states will need two types of disclosure statements: (i) the New Biz Op Disclosure Document; and (ii) a state-specific disclosure document. Sellers operating in multiple states may need even more state-specific disclosure documents. Unlike the New Biz Op Rule, the state business opportunity laws have minimum dollar investment thresholds ranging from $200 to $500 that may enable sellers to avoid their application if the required payment amount is below the applicable threshold.

9. Know the Updating Requirements

The New Biz Op Disclosure Document must be updated quarterly (January 1, April 1, July 1, and October 1) except, if the seller has fewer than 10 purchasers, the seller must update the list of purchasers monthly until the seller has at least 10 purchasers. *Id.* at § 437.3(b). If there has been a material change in an earnings claim given to a prospective purchaser before he or she purchases the business opportunity, the seller must disclose the material change to the prospective purchaser before finalizing the purchase. *Id*.

10. Analyze Your Clients' Business Arrangements

You may have clients that were complying with the Interim Business Opportunity Rule and have an FTC Disclosure Statement. These clients must cease relying on this document, however, and begin using the New Biz Op Disclosure Document. You may have other clients that market and sell products or services to persons to enable them to start a business. You need to analyze the elements of their business arrangements to determine if these arrangements now meet the three elements of a business opportunity.

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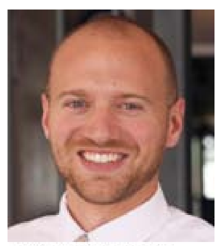
Three Things Outside Counsel Can Do to Impress Their Franchisor Clients

Vol. 15, No. 2

By
Benjamin Mitchell

Manager of Legal/Compliance
PostNet World Headquarters


BENJAMIN MITCHELL

What can outside counsel do to impress their franchisor clients and foster a long-term relationship? It is all about demonstrating your value. Here are three approaches that can help demonstrate value:

1. Offer alternative billing solutions, such as a flat fee or a monthly retainer. These arrangements are a great way to capture repetitive transactional work, such as default letters, cease and desist letters, vendor agreements and franchise agreements. They also manage the franchisor's expectations and allow it to meaningfully budget for future legal work.
2. Present cost, time and quality comparisons to your franchisor clients. In-house counsel should have records of costs and time spent on both in-house and outside legal projects, along with samples of the work. Request this information from your clients and analyze whether it makes sense for them to send certain work your way. If a client does not have this information, work with the client to create and evaluate it in an effort to objectively show your value.
3. Finally, consult with in-house counsel the way you would a billing partner in your firm who is in charge of overseeing the efficient delegation and completion of a client's legal work. Let in-house counsel do what he or she was hired to do -- reduce legal costs, manage projects and apply the franchisor's perspective. Ask for in-house counsel's advice and offer in-house counsel the opportunity to actively participate in the legal work being completed, which may include involvement in the initial drafting process. The more you let in-house counsel shine in his or her position, the more you will demonstrate your value to the franchisor.

While this article focuses on what outside counsel can do to impress in-house counsel at large franchisors, some the same principles apply equally to all attorneys. For example, you will go a long way in endearing yourself to your clients if you are willing to adapt your practices to meet their needs, continually demonstrate your value and involve them in meaningful ways, as appropriate, in the legal work being completed.

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Negotiated Sales in California

Vol. 15, No. 2

By
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Armstrong Teasdale LLP

MATTHEW J. KREUTZER

One of the unique-to-California features of its Franchise Investment Law is its regulation of negotiated sales. Cal. Corp. Code §31109.1 (the “statute”) and Cal. Code of Regs., § 310.10.2 (the “regulation”). These provisions require a franchisor (which is otherwise registered in California) to make available to certain California-based prospective franchisees any terms different from those contained in the franchisor’s disclosure document that have been negotiated with franchisees in the state during the previous twelve months.

The interplay between the statute and regulation can be confusing to even experienced franchise practitioners. The statute requires a franchisor to disclose to prospective franchisees with whom it wishes to negotiate “a summary description of each material negotiated term that was negotiated for a California franchise during the 12-month period.” This summary description does not have to be included as an exhibit to the FDD but, instead, can be given to a prospect as a “separate appendix.” The franchisor must also provide to the prospective franchisee a statement that copies of the actual negotiated terms (as opposed to the summary description) are available on request. Importantly, the statute does not require the franchisor to file either the summary description *or* copies of the actual negotiated changes with the California Department of Corporations (the “DOC”). In addition, if a franchisor does not negotiate with a prospective franchisee, the requirements of the statute do not apply to that prospect.

The regulation is different from the statute in two ways. First, under the regulation, a franchisor is required to file a “Notice of Negotiated Sale of Franchise” with the DOC within fifteen business days after a negotiated sale is consummated. Second, the franchisor is required to amend its FDD to state that it has made negotiated changes and to attach all negotiated sales notices as an exhibit to the FDD it uses with *all* prospective franchisees in California, including those with which it does not intend to negotiate.

A franchisor is required to comply with the more rigorous requirements of the regulation where the negotiated terms, taken as a whole, *do not* confer additional benefits to the franchisee. If the provisions *do*, on the other hand, confer additional benefits to the franchisee, the franchisor has two separate and distinct paths available for compliance – it can follow either the statute or the regulation. Most franchisors will prefer to follow the statute, since the regulation’s filing requirement creates more work and (due to the state’s publicly-available filing system) makes the negotiated provisions visible even to franchisees who do not live in the state.

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The Importance of Reviewing the Notes to a Franchisor's Audited Financial Statements

The Importance of Reviewing the Notes to a Franchisor's Audited Financial Statements

Vol. 15, No. 2

By
L. Seth Stadfeld

Weston Patrick, P.A.


L. SETH STADFELD

Frequently, in addition to the statements themselves, the notes to a franchisor's audited financial statements in its franchise disclosure document ("FDD") may contain a treasure trove of useful information for prospects. This is because, typically, the notes are written by accountants and not filtered by counsel. Counsel for prospective franchisees should study the financial statements and notes with care. Conversely, in the process of FDD drafting, franchisor counsel should alert their clients to this potential "pitfall," with a view toward making certain the notes do not disclose "too much" and are consistent with the rest of the FDD.

Some areas to focus on include:

1. Litigation matters that are not disclosed in Item 3 but are referenced in the notes, perhaps with the caveat that management does not consider them material.
2. Financial performance representations that are not disclosed in Item 19, such as supplemental revenue and expense information for one or more corporate units or other numbers from which unit gross sales information can be extrapolated.
3. References to franchise statistics, such as units open at the end of fiscal years, that are not consistent with Item 20 disclosures.
4. Statements about dealings between the franchisor and related parties (e.g., its principal owners or corporate affiliates, such as its parent) which indicate that the franchisor's economic viability or net worth may depend materially on the decision of a related party to pay the franchisor and/or not drain the franchisor of much of its assets. For example, the right of a related party to call a demand note owing by the franchisor at any time, to increase the franchisor's rent or to simply refuse to pay a receivable owing to the franchisor, may potentially render the franchisor worthless or without capacity to perform.
5. References to revenues (e.g., vendor rebates) received by the franchisor from suppliers to franchisees that are not disclosed (or are disclosed inadequately) in Item 8.
6. References to the fact that the franchisor does not own the trademarks (and perhaps other intellectual property) but simply has a license from an affiliate to use them, even though this licensing arrangement is not properly disclosed in Items 1 and 13.
7. References that call into question a franchisor's ability to continue as a going concern, which are definite red flags that, among other things, may prevent the franchisor from registering its franchise offering in some registration states.

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Message From The Chair

Message From the Chair

Vol. 15, No. 2

By
Joseph J. Fittante, Jr.

Forum Chair

JOSEPH FITTANTE

As an organization, we have been fortunate to have excellent leadership over the past 30 plus years. As other organizations have struggled, our organization has flourished, even in the face of a blizzard (1997 Forum), an earthquake (1999 Forum), a terrorist attack (2001 Forum) and the recent downturn in the economy (take your pick of Forum years).

Our leaders come from our membership. Some were involved with the Forum for many years before coming into leadership, while others ascended the ranks to leadership on a faster pace. Our leaders run the gamut of our members' specialties and have included inside and outside counsel, franchisee and franchisor counsel, and litigation and transactional counsel. They have been located throughout the country, as well as from outside the country. They have brought different perspectives to leadership formed by their prior experiences. Notwithstanding their differences, all of these leaders have one thing in common – a passion for this organization and its continued success. It is this diversity of opinion and thought combined with that passion that continues to help this organization maintain itself as the preeminent organization for the study of franchise law.

It is against this very formidable backdrop that I ask for nominations for the future leaders of this organization. We have once again established a Nominating Committee that will select my successor as well as four individuals who will serve on the Governing Committee, all beginning in August of 2013. This year's Committee will be headed by Ron Gardner, immediate past chair. Jamila Granger of Krispy Kreme Doughnut Corporation, Peter Klarfeld of Gray Plant Mooty, Rebekah Prince of Eisner Kahan & Gorry PC, and Dennis Wieczorek of DLA Piper round out the Nominating Committee. If you wish to recommend candidates to fill these positions, you should email your choices to Ron no later than May 15, 2012. Ron's email address is rkgardner@dadygardner.com. Ron, along with the other members of the Nominating Committee, will then make recommendations for individuals to fill these positions. The election of these individuals will take place at the Forum's annual business meeting held in conjunction with the 35th Annual Forum on Franchising, which will occur in Los Angeles, California.

Speaking of the upcoming Forum, the co-program chairs, Mike Joblove and Leslie Curran, along with the remainder of the Forum's Governing Committee, as well as those individuals who will be speaking at the Forum, are all working hard to make sure this year's event upholds the tradition of excellent legal programming combined with plentiful networking opportunities. This year's Forum will be held at the premier luxury hotel in downtown LA, the JW Marriott. The JW is a part of LA Live, an entertainment complex in downtown Los Angeles adjacent to the world-class Staples Center and the Nokia Theater. The LA vibe will be on full display, starting with the unique hotel environment of the JW and continuing with the networking events Mike and Leslie have planned. To that end, the Thursday night event will be held at the historic Belasco Theater, a newly repurposed relic of the early 1900s. Although renovated, the venue has maintained its original architecture and design, but now also has a distinctly LA feel with state of the art sound and lighting technology. Leslie and Mike

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are busy working on entertainers for this event so, for the moment, we will keep them secret.

Friday evening promises to be truly special with the networking event to finish up the Forum slated to be held at the Grammy Museum, which is within walking distance of the hotel. For those of you not familiar with the Grammy Museum, it is four floors of cutting edge exhibits and interactive experiences, all paying homage to the music and recording industry. Make sure you sign up for this event quickly, as spots will go fast and attendance is limited.

Even in the face of a down economy we have continued to have great success when it comes to attendance at our annual Forum. LA promises to be another smashing success, and I look forward to seeing you there.

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2012 Nominating Committee Selected

Vol. 15, No. 2

In accordance with the Forum's By-Laws, the annual Governing Committee election process begins with the appointment of a Nominating Committee by the Forum Chair. The committee, which is headed by the Immediate Past Chair, is responsible for recommending candidates to fill open positions on the Governing Committee.

Joseph J. Fittante, Jr., Chair of the Forum, is pleased to announce the appointment of the following members to the 2012 Nominating Committee:

Ronald K. Gardner, Chair
Dady & Gardner P.A.

Dennis E. Wieczorek
DLA Piper

Peter Klarfeld
Gray Plant Mooty

Rebekah Prince
Eisner Kahan & Gorry PC

Jamila Granger
Krispy Kreme Doughnut Corporation

This year's Nominating Committee will recommend candidates for the Chair of the Forum, and four Member-at-Large positions on the Governing Committee, all beginning August 2013, when Joe Fittante, as Chair, and Mike Joblove, Leslie Curran, Michael K. Lindsey and Diane Green-Kelly, as Governing Committee members, complete their terms.

An election to fill these positions will take place at the Forum's Annual Business Meeting, which will be held in conjunction with the 35th Annual Forum on Franchising. This meeting will take place on Thursday or Friday, October 4th or 5th, 2012, in Los Angeles, California. Forum members wishing to recommend candidates to fill these positions should convey their comments to Ron Gardner **no later than May 15, 2012.** Ron's email address is rkgardner@dadygardner.com.

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ABA Forum on Franchising Technology Tips

ABA Forum on Franchising Technology Tips

Vol. 15, No. 2

By
Jim Goniea

Technology Officer
ABA Forum on Franchising

Dear Forum member:

JAMES GONIEA

Since becoming Technology Officer for the Forum, I have learned a lot about information and benefits available to Forum members that I had not been fully taking advantage of. Most of these benefits are easy to access from your computer with a few mouse clicks... if you know how. The link below takes you to a document that provides tips on, among other things, how to find past copies of the *Franchise Law Journal* and *The Franchise Lawyer*, how to access previously posted Forum Listserv threads, how to adjust when you receive Forum Listserv emails, how to adjust the type of electronic communication you receive from the ABA and how to access Forum social media sites. The goal of the document is to educate those who may not have been aware of these benefits and to provide helpful tips on how to take advantage of them. This is the same document that was recently sent to Forum members via regular mail and, depending on current electronic communication restrictions, email.

If you have not already done so, I encourage you to take a moment out of your busy day to review the tips and suggestions in the linked document. Hopefully you will find them helpful at improving your ability to access the many benefits the Forum on Franchising offers to its members.

http://www.americanbar.org/content/dam/aba/administrative/franchising/forum_technology_tips_030212.pdf

About Franchise Lawyer

The Franchise Lawyer is published by the ABA Forum Committee on Franchising. It is available to members online.

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Forum on Franchising
The Franchise Lawyer
American Bar Association • Forum on Franchising

35th Annual Forum on Franchising -- Franching: Your Backstage Pass

Vol. 15, No. 2

By
Leslie Curran and Michael Joblove

Program Co-Chairs

October 3-5, 2012
JW Marriott at L.A. Live

Every year in October, the Forum on Franchising offers a three-day legal conference featuring unparalleled educational programs and collegial social events where attendees network with familiar and new franchise bar colleagues, clients and friends. Come out to the Forum in Los Angeles which promises to be one of the finest and most memorable. Highlights that make this an event you do not want to miss:

~ A Forum Primer -- on Wednesday, October 3, a five-hour intensive program on representing the franchisor from inception, and throughout, with a focus on designing the system, drafting disclosure documents, obtaining registration and providing ongoing counseling. This is a must for the new and experienced.

~ A Forum Tradition -- also on Wednesday, October 3, some of the most experienced franchise attorneys will present **Fundamentals of Franchising®**, the finest course available on the basics of franchise law. This five-hour intensive program covers structuring the franchise relationship, registration and disclosure requirements, trademark and other I.P. issues, antitrust, franchise litigation, and the franchisee's perspective.

~ A Forum Essential - Twenty Four Engaging, Unparalleled Workshops -- on Thursday and Friday, October 4 and 5, these workshops (each presented twice by experienced speakers) cover a variety of legal developments and business challenges facing the franchise industry, whatever your practice -- in-house or outside counsel, transactional lawyer or litigator, franchisee or franchisor lawyer -- you will have many thought-provoking and worthwhile choices.

~ A Forum Signature Focus -- two plenary sessions, including the Annual Developments survey of the key cases and decisions in franchise law over the last year, as well as the latest from a world renowned expert on time management skills for lawyers in an electronic media age.

~ A Forum "Don't Miss It" Location - The Historic Belasco Theater --on Thursday night, enjoy top-notch LA entertainment and connect with familiar and new Forum colleagues, clients and friends at the Historic Belasco Theater, one of only a few stops by Prince William and Kate Middleton in their recent L.A. tour.

~ A Forum "Once In a Lifetime" Occasion - The Grammy Museum -- view the city from the outside patio and then explore the legacies of all forms of music and the creative process Friday night at the Grammy Museum with its four floors of cutting edge interactive exhibits on a night that the Museum will belong exclusively to the Forum.

~ A Forum Legacy -- on Saturday morning, give back to the community that serves as our host as we head out to the local food bank.

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We look forward to greeting you on Wednesday at one of the intensive programs, interacting and learning with you at the educational workshops and networking with you at the Belasco Theater and the Grammy Museum. Don't miss this opportunity to join your franchise bar colleagues, clients and friends from across the country and abroad at America's premier franchise law event!

Watch for more detailed information on how to register later this month.

Forum on Franchising

The Franchise Lawyer

American Bar Association • Forum on Franchising

New Books from the Forum On Franchising: Franchise Law Compliance Manual, Second Edition

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Vol. 15, No. 2

Editor
Jeffrey A. Brimer

NEW: Franchise Law Compliance Manual, Second Edition

Jeffrey A. Brimer, Editor

Designed as a working tool for both corporate franchise lawyers and outside counsel, the *Franchise Law Compliance Manual* is a practical, comprehensive guide to establishing and maintaining a successful corporate compliance program. From intellectual property to termination, this updated and expanded guide covers every aspect of franchise law and will help you protect the franchisor's property, limit liability, and prepare for and limit the inevitable tensions of a franchise system. Includes CD-ROM of checklists and forms.

http://apps.americanbar.org/abastore/productpage/5620137

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