



Focus **on** Franchising

Published by the Franchise and Distribution Practice Group of Farrell Fritz, P.C., Attorneys at Law

Welcome!

This Spring, we look forward to great things in the franchise community. Many companies are poised to grow and maybe, just maybe, we will see the FTC Rule change implemented! We hope that you all enjoy this issue, as we have some very timely and interesting articles for your reading pleasure. We encourage feedback. Please contact us with your comments and suggestions at franchise@farrellfritz.com.

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Inside

Franchise Briefs
Page 2

Litigation Notes:
How To Avoid Runaway Juries
Page 2

To Become World-Class,
Ask The Right Questions
Page 3

Farrell Fritz Briefs
Page 4

Events Calendar
Page 4

How To Successfully Brand, Market & Sell Your Franchise

By Ben Cerrone



(This is part 1 of a two-part series. Part 2 will appear in our next issue.)

"The most important key to the future of America or any country is entrepreneurship. And it's not just entrepreneurship, it's entrepreneurs. A successful entrepreneur creates an average of eight jobs. There are 25 million entrepreneurs in the U.S., 80% of whom are failing today." – Brian Tracy, Motivational Speaker and Developer of the Focal Point Franchise (www.briantracy.com)

As franchisors, you know that franchising is a way to significantly reduce the failure rate and that it's your obligation to franchisees to help them be successful. With over 5,000 franchise concepts, a franchisor must employ all means at its disposal to reach prospective franchisees and be a profitable franchisor. Following are some suggestions and tips to help promote your franchise and enhance the opportunity for success.

If You Are A New Franchise Company. . .

DO

- Promote, Promote. Sell, Sell.
- Use all the publicity you can get free.
- Negotiate the best media rates and then negotiate again.
- Consult professionals in their specific areas.
- Join the local Chamber of Commerce and other service organizations to gain exposure for your franchise.
- Secure and allocate as many dollars to your promotional budget as possible.
- In all of your promotions, marketing, advertising, etc., make sure your logo and brand name are always included.

DON'T

- Don't try to do it all yourself. Get expert advice. It may cost you a few dollars extra, but it will save you substantial dollars in the long term.
- Don't open a franchise in an area that you cannot easily support with media, supply it with goods, etc.

(Continued on page 4)



By Harold L. Kestenbaum, Esq.

Remembering Byron Fox

Since our last newsletter, not much has happened in the franchise world, except, however, we franchise attorneys suffered a significant loss in December. One of the true pioneers of the franchise bar, Byron Fox, passed away unexpectedly. It was particularly saddening for me since Byron was an early mentor of mine during my beginning years as a young attorney trying to grasp the nuances of the vast area of franchise law. He was helpful and compassionate as I learned the “ropes,” so to speak. All of us in the small fraternity of franchise lawyers will greatly miss Byron.

FTC Rule Still Far Off

We have nothing new to report on progress with respect to the final passage of the revised FTC Rule. I will go out on a limb and say that this will not happen until the third or fourth quarter of 2006, and that might be wishful thinking. It isn't a priority of the FTC at this point in time, which leads me to believe that the FTC is quite satisfied with what is happening in the franchise world today.

An Encouraging IFE

During December, a traditionally slow time for franchise sales, I witnessed a flurry of franchise sales activity. This was very encouraging, indeed. In February, the IFA had nearly 2,600 attendees at its 46th annual convention in Palm Springs; this was up significantly from approximately 2,000 attendees last year. In addition, the IFE scheduled for the weekend of June 2-4 seems to have more exhibitors than last year and should be an excellent show.

LITIGATION NOTES

How To Avoid Runaway Juries

By Michael J. Healy, Esq.



Franchisors often fear “runaway juries” – the possibility that a jury with an agenda of its own, and motivated by little more than an anti-corporate/pro-little-guy bias, will award an adverse and potentially ruinous verdict. To avoid just such a risk in litigation with franchisees, franchisors often include in their franchise agreement a covenant providing for the franchisee's waiver of its right to a jury trial. But a recent ruling by the California Supreme Court gives franchisors reason to consider other ways of dealing with the issue.

This past August, in *Grafton Partners v. Superior Court of Alameda County*, the California Supreme Court ruled that pre-dispute contractual jury waivers, like those typically found in franchise agreements, are unenforceable. The Court's ruling was sweeping, applying retroactively to contracts entered into before the case was decided, and even where both parties to the contract are sophisticated commercial entities represented by counsel. Concern over *Grafton's* impact has even sparked moves in the California legislature to overrule the decision.

Courts in New York generally enforce pre-dispute contractual jury trial waivers, and it remains to be seen whether the approach followed by the California Supreme Court in *Grafton* will be adopted by courts in other states. Even so, *Grafton* serves as a clarion call for all franchisors to review and assess their franchise agreements to ensure they do all they can to mitigate against litigation risks in general and ruinous jury verdicts in particular. Options to consider include:

Arbitration. By having the parties' dispute decided by an arbitrator rather than a court or jury, a properly drafted arbitration clause can be an effective way for avoiding litigation risks and costs, including the risks posed by runaway juries. Some franchisors swear by arbitration. Others, however, despise it. Still others believe that, despite its shortcomings, arbitration still beats litigation and is an effective tool for managing litigation risks. While generally enforceable, whether an arbitration clause makes sense in the end for a particular franchisor depends on a number of factors that the franchisor and counsel should carefully consider.

Choice of Law and Forum Selection Provisions. By specifying in the franchise agreement that the law of a particular state will apply – for example New York, where pre-dispute jury trial waivers are generally enforceable – a franchisor might avoid jury trial issues in franchisee disputes, but only if it is willing to agree to a mandatory forum selection clause as well; for example, mandating that the parties must bring an action only in a New York state court or United States District Court for the Eastern District of New York. Care must be taken to ensure that the clause is not merely permissive. With a permissive forum selection clause, a franchisee could still bring an action in a state like California, which even though obligated to apply New York law to the contract, would still require a jury trial. Because the California Supreme



Court in *Grafton* described the right to a jury trial as “inviolable,” merely choosing to apply the law of another state may not effectively permit the franchisor to avoid a jury trial if the lawsuit is brought in California state court. Franchisors with operations in California, or with plans to expand into that state, need to pay special heed to these types of provisions, particularly since some states (including California) consider choice of forum provisions in franchise agreements to be against public policy and, thereby, void.

Damages Caps and Disclaimers. In disputes with franchisees, limiting the amount of damages that a franchisee may recover is an easy way to protect against a ruinous verdict, whether imposed by a judge or jury. The problem, however, is that such damages-limiting clauses are not enforceable in some states.

Of course, no franchisor – whether doing business in California or not – should omit jury waiver clauses from its franchise agreement just because of the *Grafton* decision. At the same time, in response to *Grafton*, franchisors should review the other types of litigation risk management clauses they include in their franchise agreements, and consider adding others – such as judicial forum selection clauses, damage caps and damage disclaimers, and arbitration clauses – to act as back-up protective mechanisms for avoiding the risks of runaway juries. Properly drafted, these clauses can offer the franchisor near perfect control over litigation risks – at least in theory. The real world, of course, can always be a different story.

To Become World-Class, Ask The Right Questions

By Jeff Johnson



“Common traits of World Class Franchises come as no surprise.”

We at FranSurvey are approaching the milestone of our 100th franchise client, and we’ve surveyed thousands of franchisees about their experiences with franchisors. What we’ve learned isn’t surprising. It’s actually something we should have known years ago: character and integrity never go out of style, and quality is number one. Let’s take a look at why this is so crucial to your success.

Consumer research is an effective business tool when making advertising decisions, new product introductions, or simply keeping in touch with customers. We constantly find comment cards in hotel rooms and restaurants as executives are desperate to either capture a greater market share or simply protect the niche that each brand has so carefully worked to carve out for themselves. Everyone is constantly trying to uncover what the consumer thinks.

But franchisors have two separate and distinct consumers. The obvious consumer is the end user of the products and/or services. The other consumer, the forgotten one, is the franchisee: the buyer or investor in the franchise “product.” We go to great lengths to learn about our end users, but for some reason, we’re content with over-simplified “franchisee satisfaction” surveys

when it comes to our investors. It’s as if our goal was to keep our franchise family from having a coup instead of maximizing the value of the brand.

This is where we need to change our way of thinking. As Thomas Berger stated, “The art and science of asking questions is the source of all knowledge.” If we were to use the Consumer Reports or Zagats Survey model of research, it would follow that we need to first measure the level of **investment enthusiasm** of our existing franchisees, then work on the identified issues so that the dial can be moved higher on the satisfaction scale.

Why change? Because it’s already successful. Prospects contact existing franchisees as a part of their due diligence. Truly world-class organizations are obsessed about the level of satisfaction they hear from their existing franchisees. When a company is led by people of character and integrity, individual franchisees gladly volunteer that information to prospects. It is important to these franchisees that they work with individuals they can respect.

Secondly, these companies have been built on a foundation of successful and profitable franchisees. Everyone involved understands that perfection is unattainable and that every deal doesn’t always work. But, these franchisees do expect a long future with a company that cares about the success and profitability of its franchisees; and they are very proud to tell this to everyone.

So as a franchisor, look at your relationships with your franchisees and how you measure their franchisee satisfaction. Are you thinking like a world-class organization? Or are you just holding off a coup? It’s not too late to change.

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Farrell Fritz Briefs

Our firm is pleased to welcome **Domenique Camacho Moran** as a partner in our Labor & Employment practice group and **Sandra Cirincione** and **Jessica N. Martin** as associates in our Commercial Litigation practice group. Jessica is also a member of the firm's Bankruptcy & Creditors' Rights practice group.

Welcome also to **Frank Santoro**, joining us as a Trusts & Estates litigation associate, and to **Andrea Rodriguez**, a first year associate.

Events Calendar

June 2-4 - 15th Annual International Franchise Expo, Washington, D.C.
For further information, go to www.franchiseexpo.com.

June 9 - Farrell Fritz Quarterly Franchise Forum, Uniondale, NY
To reserve a place, contact Helen Rajcoar: phone, 516-227-0641; email, hrajcoar@farrellfritz.com

www.farrellfritz.com

(Continued from page 1)

If You Are An Existing Franchise Company. . .

DO

- Be consistent in your marketing.
- Make sure your message is clear and concise.
- Utilize all the media you can afford.
- Invest in expanding your brand.

Stretching Your Advertising Dollar

- Make sure your ROI (return on investment) in advertising/promotion is getting a maximum return. Negotiate, get multiple bids and use barter when you can. Join a barter service such as www.barternews.com.
- Create a blog. Get your franchisees to talk about your franchise. Get testimonials from customers, clients, users of your product/services and discuss the positives of your franchise.
- Utilize guerrilla marketing techniques to get your message out there. Use mass promotion to saturate the market using every means available from word of mouth to mass media. For an excellent resource on guerrilla marketing techniques, visit www.gmarketing.com.

How To Get FREE Coverage in Newspapers, Magazines, Radio and TV

- Send out press releases – using the proper formats – as often as possible regarding new employees, new locations, and new innovations.
- Write articles as often as possible about your industry. Make them newsworthy and interesting.
- Run promotions such as contests at your location, give-aways or charity drives, and notify the media of specifics.

What About Trade Shows – Yes or No?

YES! They're a must for any franchise company. Utilize national and local trade shows when applicable. "Trade shows give you the opportunity to showcase your company, create great public relations, have people sample your product, talk to the principals of your company, give brochures and qualify leads," says Tom Portesy, president of MFV Expositions, a national trade show organization (www.mfvexpo.com).

Getting Professional Advice

This is not an area where you should cut corners. Consult seasoned professionals on the following: accounting, advertising, branding, legal, media, real estate, marketing and promotions. Remember, you must be very careful about how and where you advertise. As nationally recognized franchise attorney Harold Kestenbaum of Farrell Fritz says: "Franchisors need to be careful of two things when advertising on a national level. A franchisor should be careful not to make inadvertent earnings claims or financial forecasts and should not solicit prospective franchisees from states in which the company is not registered." So, it pays to work with an expert!

Ben Cerrone is president of Multi-Mediagroup, Inc. and produces a national television show, "Let's Talk Franchise" (www.letstalkfranchise.com), which profiles franchisors. Ben can be reached at 631-271-0037 or at bencerrone@aol.com.