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LAW UPDATE

Florida Franchise



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Business Documents in the Digital Age

Richard B. Graves III, Esq.

Litigation is evil. It is unpleasant. It is intrusive. It is expensive. It is something to be avoided whenever possible. Business people, I think, have this attitude encoded in their DNA.

But you can learn from others' mistakes. Good document management procedures may help a business prevent litigation. Or, if litigation does arise, good document management procedures may save both time and money in resolving the lawsuit.

Documents in the Digital Age

Electronic storage is now so reliable, cheap, and fast, that many businesses keep electronic documents indefinitely. In fact, many businesses do not destroy electronic documents unless there is some specific reason to do so, like a document retention policy.

But even when electronic documents are destroyed, there is a big difference between "delete" and "erase." Pressing the "delete" key is not terribly helpful. This kind of "deleting" usually does not make a document irretrievable. The only way you can do that is by erasing the material.



But "erasing" can also be misleading. You think in terms of being able to "erase" a tape or a hard drive. But for technical reasons too extensive to discuss here, "erasing" a drive will not destroy a document, either. In fact, in most businesses, even over-writing data with new data will not make the old information ir-

retrievable or permanently "erased."

The Danger of Deleting

If you are involved in litigation, or if litigation is threatened, there is no easy and ethical way to make a distasteful electronic document go away. Attempting to delete or erase electronic documents may be considered destruction of evidence or tampering with evidence.

Improperly attempting to destroy information under these circumstances is not only illegal – but, as discussed above, probably futile. The consequences of improperly deleting documents also may be severe. Under current court rules, punishments may range from money sanctions to prison.

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Digital Age, from page 1

If you are destroying electronic documents for legitimate reasons, however, pursuant to a policy and when there is no threat of litigation or dispute, you must address how to make the data irretrievable by ordinary efforts as opposed to extraordinary ones.

Document Retention Policies

A qualified attorney can make suggestions about what your electronic document policy should contain. You and your lawyer also should talk about how to simplify your document retention policy. If a policy is too complicated, people may not understand it. Or people will expend more effort trying to comply with policies than doing their actual paid work.

Keep your policy to a length that can be actually observed. Keep it to a level of simplicity so that it can be readily understood and applied. That means that it will leave uncovered, no doubt, some contingencies that the writer, or your lawyer, would probably like it to cover.

Finally, having a policy that you do not enforce is a very bad idea. Rather than trying to take a snapshot of a perfect policy, consider a system of periodic reviews and adaptations. If your policy stays abreast with the latest means of electronic document storage, you may save yourself and your lawyer a great deal of headache (and wallet-ache) if a business dispute ever arises.

Dagwood's Indigestion

For 75 years Dagwood Bumstead has tickled the fancy of sandwich lovers on the comic page of newspapers around the world. Dagwood's Sandwich Shoppe was created in 2005 in Palm Harbor, Florida by Dean Young, the son of Blondie comic strip creator Chic Young, and others. Less than 3 years later the development rights had been sold for 27 territories for as much as \$450,000 each, propelling the company into major franchisor status. The company filed for bankruptcy protection in April, 2008. A lawsuit was filed in federal court in the previous month by franchise developers alleging the founders made off with "millions of dollars".

The suit contends that "unlike other cases, where franchisor fraud arises out of specific misrepresentations made to specific franchisees by a few unscrupulous franchise salesmen, this case involves the conspiracy designed by the very founders of Dagwood's to commit wholesale unrestrained and continuous fraud on unsuspecting investors." ■■

This article is adapted from Mr. Graves' recent Continuing Legal Education presentation sponsored by the St. Petersburg Bar Association In-House Counsel Section.

Rick Graves joined Robbins Equitas as a Litigator after nine years on the faculty of Stetson University College of Law in Florida. Rick holds a Master of Laws degree in Intellectual Property and another in International Law and Business. Before teaching, he litigated in Houston, Texas, where his practice areas included contracts, appeals, intellectual property, products liability, and insurance. He is a graduate of Tulane Law School, where he served as an editor of the Tulane Law Review. His publication Globalization, Treaty Powers, and the Limits of the Intellectual Property Clause, won the 2003 Charles B. Seaton award of the Copyright Society of the USA. ■■



Richard Graves

Quiznos Class Action

A class action lawsuit filed by franchisees against Quiznos has been dismissed by a federal judge in Illinois. The suit claimed that the chain failed to disclose payments from vendors that franchisees are required to use, and they signed their franchise agreements through misrepresentations and omissions. Similar suits have recently been dismissed in Wisconsin and Canada. Several lawsuits remain, including two in Denver that allege the company refused to return franchise fees when prospective owners were unable to find sites. ■■



Artwork by Dean Young

Courting Franchisees

Bradford A. Patrick, Esq.

When most people fall in love and think they might want to spend the rest of their life with someone, they typically invest a considerable amount of time learning about that person before making the decision ‘till death do us part.’ Awarding a franchise for your business should involve a similar courtship to make sure you’re making the best possible selection in bringing a new franchisee into your business family.

A frequent claim from franchisees that can lead to litigation is they were misled when deciding to buy a franchise. An obvious, but often overlooked, aspect of selling franchises is to structure an internal program to monitor the sales process. Compliance should be driven by upper management so that everyone in the organization understands the importance of adherence. Franchisors should have an attorney set up and review their compliance programs to make sure the disclosure and related materials are complete and not misleading. An internal system should be in place to monitor the steps of the sale along the way.

When selling franchises, the goal should not be to rush out and sell as many as quickly as possible, without regard to the qualifications of the candidates. Instead, the process should be a continual screening mechanism to determine if the candidate is qualified on several levels to be a good fit for your business. Successful franchisors have a profile of the skills and resources they expect to see in franchisees. If an applicant misses deadlines or fails to provide accurate and complete information, these could be warning signals that the business relationship may run into problems down the road.



Throughout the sales process the franchisor should not create unrealistic expectations in the mind of the franchisee. The mediation and court systems have heard numerous cases involving franchisees that file complaints against franchisors when results differ from what they were told to expect during the sales process.



Brad Patrick

Whether it’s marriage or selling a franchise, it’s always good advice to develop a thorough understanding of your potential partner, be methodical in your evaluation, and be honest.

Brad Patrick is a Senior Litigator at Robbins Equitas. Prior to joining the Firm, Mr. Patrick served as interim Executive Director and General Counsel for the Wikimedia Foundation, the non-profit organization which runs Wikipedia, one of the top websites in the world. Mr. Patrick has a wide range of civil litigation experience in the fields of intellectual property, internet law, software and computer issues, technology licensing, complex tort litigation and many other areas. Mr. Patrick’s prior employment includes AV-rated law firms in Seattle, Washington and Tampa, Florida. He held positions in state government and with a publicly traded international software company. He graduated from Boston College Law School and Colgate University, cum laude with Honors in Political Science. Mr. Patrick is admitted to the Florida and Washington State bars, numerous United States District Courts, and the United States Courts of Appeal for the Ninth and Eleventh Circuits. He serves on The Florida Bar Media and Communications Law Committee. ■■

New Franchise Rule Now Mandatory

After 13 years of hearings, workshops and industry comment the Federal Trade Commission Franchise Rule became mandatory July 1, 2008. Some of the new rule requirements are that franchisors provide additional information about: lawsuits they initiate against franchisees; contact information

for former franchisees who left the franchise in the past year; franchise turnover; the dangers of buying non-exclusive territories; and information for independent franchisee groups.

The initial reaction to the new rule is mixed. Susan Kezio, the president of

the American Franchise Group which represents the interests of franchisees, wrote in an industry trade publication, “The FTC labored a dozen years to revise its Franchise Rule — only to give birth to a mouse.” ■■

Florida Franchise News

The National Franchise and Business Opportunities Expo returns to the Florida State Fairgrounds in Tampa, Florida September 6 & 7, 2008. Robbins Equitas will again have an exhibit booth at the exposition to meet with participants in the franchise industry. The show will feature exhibits from dozens of companies and vendors to the industry, as well as seminars all covering government regulations, legal issues, lease negotiations and marketing. Robbins Equitas Attorney Brad Patrick will be a featured speaker at the Expo. His remarks will focus on "The Franchise Contract — Things To Consider Before You Sign." ■■

Bradenton, Florida-based restaurant chain *First Watch* operates 76 company owned stores in eleven states and is now

venturing into franchising. The company has hired Greg Michael as VP of Franchising. Michael has previous franchising experience with Hooters, Dunkin' Brands and T.G.I. Fridays.

In a recent interview with *Florida Franchise Law Update*, Michael said that *First Watch* is currently

Michael said the company, founded in 1983, is focusing on franchising in the southeast and Midwest initially.

**The Impact of Franchising
on the Florida Economy**
1.25 million jobs
\$32.9 billion payroll
\$105 billion economic output



pursuing multi-unit franchisees in 35 states with a minimum of five units.

In Florida the company will reserve the west coast for company stores and sell franchises in the panhandle and Jacksonville. *First Watch* is the largest, privately owned, daytime-only restaurant company in the country, and serves traditional breakfast, brunch and lunch favorites in addition to signature dishes. ■■

Florida Franchise Law Update



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Franchisor *Law Update*

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FTC Order Requires All Franchisors to Update Offering Documents

All franchisors who file or renew after July 1, 2008 must comply with new rules. This may be in addition to state registration guidelines.

By Bradford A. Patrick, Esq.
Franchise Law Attorney

For the first time since the 1970s, the Federal Trade Commission (FTC) has changed its Franchise Rule (16 C.F.R. 436).

As a result of the changes, the familiar UFOC is obsolete. A new Franchise Disclosure Document (the "FDD") has taken its place.

The FDD format, which tracks the requirements of the new FTC rule, is optional at this time. But the federal government will require FDDs from everyone starting on July 1, 2008.

Who is Affected?

Any franchisor or potential franchisor may be affected. The FTC Rule also has new definitions and disclosure requirements. Therefore, even if someone once told you that a UFOC was not required, you should now ask if an FDD is required.

The Old Law

Before the change, you could choose your format for making the required disclosures.

FTC Rules, continued on Page 2



Advertisement

The Penny-Wise, Pound-Wise Franchisor

You have a business and want to expand it. Your Google search for "franchise consultant" yields 322,000 hits . . . and within the first 100, not a single one is a lawyer. Does this mean you don't need a franchise lawyer? The Florida Attorney General's Office advises, "Get professional advice if you need it. Don't lose your life savings just because you failed to spend a few hundred dollars to talk to a lawyer, an accountant or other expert."

Pound-Wise, continued on Page 2

FTC Rules . . .

Continued from Page 1

You could choose between the FTC Rule format (sometimes called the Franchise Disclosure Document or “FDD”) prescribed by the Federal Trade Commission or the Uniform Franchise Offering Circular (“UFOC”) format prescribed by the North American Securities Administrators’ Association (“NASAA”). Many franchisors preferred the UFOC, because they felt it was more likely to be accepted by state regulators in states where registration was required.

Registration After the Change

All franchisors who file or renew after July 1, 2008 must use the new FDD guidelines. The FDD is different from the UFOC in several ways. The new FTC Rule requires, among other things:

- New State Cover Page
- New Franchisor Advertising and Operations Assistance Disclosure
- New Financial Performance / Earnings Projections Disclosures
- New Sponsorship or Endorsement Disclosures for Franchisee Associations

In addition, the new FTC Rule may allow individual states to require additional, or different, disclosures that are not covered by the FDD.

Next Steps for Franchisors

If you are a new franchisor, you should talk to counsel about setting up the new FDD immediately and should not use the UFOC. If you already have a UFOC, you should talk to counsel about when to start using the FDD.

Every new and prospective franchisor should discuss with counsel whether their state is a registration state and whether it accepts the FDD at this time. ■■

Pound-Wise . . .

Continued from Page 1

Both franchise consultants and franchise lawyers have their places. Knowing what a franchise lawyer can do will help you be both penny-wise and pound-wise.

Know What You Need

When you walk into a shoe store, you know what kind of shoe you need. Likewise, when you search for franchise advice, you should know what kind of advice you need.

Some of the basic steps of setting up your franchise include: determining whether franchising is for you (as opposed to licensing, distribution agreements, or another arrangement); choosing an appropriate corporate structure; creating an operations manual and sales plan; identifying future expansion opportunities; documenting your internal management operations; registering with the U.S. Government; and, if applicable, registering with your state government.

Along the way, you need to learn the rules and regulations that govern your new business. You are about to become a seller of business opportunity. That means, in many cases, your product is heavily regulated by both the state and the federal government. If you are investing your hard-earned money into the process, you also should invest in an expert to help you through it.

Know What You are Buying

You are purchasing a professional service, and you should know exactly what is included. Most franchise consultants focus on your marketing plans. But many are not prepared to be a “one-stop-shop” to protect your business interests and help you comply with applicable law. By

contrast, a franchise law firm may offer many services under one roof:

- Evaluating franchise agreements
- Discussing your employee arrangements
- Identifying non-disclosure and non-competition concerns
- Protecting customer lists and leads
- Negotiating leases
- Drafting your agreements with vendors and suppliers
- Organizing your partnership agreements, if you are in business with partners

Also, as your legal representative, a franchise lawyer can handle negotiations on your behalf. This includes everything from prospective franchisees to a prospective landlord.

Plan Your Spending Wisely

You might be surprised to find that many franchise lawyers will help you set your priorities and will work within your budget. A franchise lawyer in a full-service law firm can offer you a number of options to help you complete all the above steps and more.

In contrast, many franchise consultants will ask you for a one-time payment. They may promise a number of up-front services without a continuing relationship. If something goes wrong in the future, you want to be sure you have the support you need.

In the best of all worlds, a franchise consultant and a franchise lawyer will work together to meet your legal and business needs. Carefully read the claims and offerings from various franchise consultants. Then carefully research the services a legal professional can offer. Commit only when you know what you are purchasing, and you will be a pound-wise buyer. ■■



Meet Bradford A. Patrick, Esq.

Brad Patrick is a senior attorney in the Franchise Law practice at Robbins Equitas. Prior to joining the firm, Mr. Patrick served as litigation counsel for Dunkin’ Donuts and as interim Executive Director and General Counsel for the Wikimedia Foundation, the non-profit organization which runs Wikipedia. Mr. Patrick has a wide range of corporate and intellectual property experience including trademark litigation, corporate formation and governance, technology licensing, Internet law, technology litigation, and complex tort litigation. His prior employers include AV-rated law firms in Seattle, Washington and Tampa, Florida. He graduated from Boston College Law School and Colgate University, cum laude, and is admitted in Washington as well as in Florida’s state and federal courts. Brad is available to speak to you if your company needs franchise counsel or has a legal matter or project to discuss. E-mail Brad at bpatrick@robbinsequitas.com or call him, toll free, at (800) 934-5999.

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