

# Legal perspective

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## Dispute Resolution: Protecting the Franchisor

Keep your brand out of costly lawsuits

**D**espite the best intentions and *bona fide* efforts of reasonable clients, not every lawsuit is avoidable. Certainly not in these litigious times. Franchisors must be prepared to defend their companies wisely, tenaciously, and efficiently.

In franchise systems it can go like this. A mistake was made, or might have been made. Well, at least, it's alleged to have been made, and the allegations come from one or more disgruntled franchisees. Despite your objective review of the situation and face-to-face meetings with these franchisees, they simply won't accept your very reasonable conclusion that nothing wrong occurred or, if it did, that no one was damaged. Why are they being unreasonable?

It could be they're acting in good faith and things simply appear very different from their perspective. It could be there's so much emotion behind their claim that they've lost all objectivity. Or, it could be they believe there to be more leverage against the franchisor than actually is there. Of course, it could be something else, too. In any event, they're not settling. You're not interested in paying tribute. And the battle begins.

### The law suit cometh

Franchisors should consider the following checklist in determining an initial course of action to minimize the possibility of conflicts escalating into litigation or, where the lawsuit has already been filed, to quickly assess their options before getting deeper into the litigation.

- Early assessment of the dispute: identify and evaluate favorable and unfavor-

able facts and available legal arguments and procedures.

- What is the potential for good or bad publicity? What impact will this type of publicity have on your business, customers, and employees?

- What would be the likely effects on your business of sustained litigation, e.g., monopolization of internal resources, distraction of key employees, and costs, both hard and soft.

- Financial capabilities of the plaintiff and legal expertise of opposing counsel.

- Settlement potential, given your business priorities and objectives and the anticipated wants and needs of plaintiff and plaintiff's counsel.

- Your ability to convey a clear message to plaintiff that you are fully prepared to defend to the end; this includes hiring defense counsel with a history of significant jury trial success.

By having an experienced trial lawyer on your side from the outset, you unambiguously communicate to the plaintiff that you are prepared to go the distance, unless plaintiff offers very attractive settlement terms. With experienced trial counsel representing you, the option to proceed to trial or settle is yours every step of the way, and your negotiating position gets stronger as the trial date approaches.

### Alternative Dispute Resolution

Over the past decade the use of mediation and arbitration (together called Alternative Dispute Resolution, or ADR) has grown significantly as an alternative to litigation. ADR can offer several distinct advantages, including more focus on the merits of the dispute (by keeping

it confidential and out of the public's view), more control over scheduling, and more say in the selection of the decision-maker over the dispute. Let's take a quick look at their respective pros and cons:

- **Mediation** (using a neutral party to facilitate settlement discussions) is faster and less expensive than arbitration or litigation, but it functions well only when both parties desire a fair resolution and are dealing in good faith. You should be able to determine in short order whether your opposition is there to find a fair resolution, or instead is seeking unwarranted settlement terms or informal discovery, or simply playing for time.

- **Arbitration** (hiring a private individual to decide the outcome of the dispute) can be faster and less expensive than litigation (no guaranty though). However, arbitration generally comes at considerable sacrifice: potentially less rigor in the legal analysis of the case and very restricted rights to appeal. With those assets that matter most to the franchisor's success (trademarks, trade secrets, etc.), you need all the protection available, including appeal rights. So for disputes involving those items, steer clear of arbitration. For disputes that are significant but don't involve the family jewels (for example, certain franchise terminations), arbitration may work best.

As a franchise executive, you have a business to run. Don't let disputes distract your team unnecessarily. Get disputes resolved quickly, reasonably, and without creating a reputation for your company as an easy target. To make that happen, you'll want to be prepared and well represented by experienced counsel. ■

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