

**American Bar Association
35th Annual Forum on Franchising**

**USING FRANCHISE ATTORNEYS AS EXPERT WITNESSES—
NOT JUST FOR LEGAL MALPRACTICE CASES ANYMORE**

**Rupert M. Barkoff
Kilpatrick Townsend & Stockton LLP**

**Charles G. Miller
Bartko Zankel Tarrant Miller, P.C.**

**Trishanda L. Treadwell
Parker Hudson Rainer & Dobbs LLP**

October 3-5, 2012
Los Angeles, CA

© 2012 American Bar Association

Table of Contents

I.	INTRODUCTION.....	1
II.	DECISION TO USE AN EXPERT.....	1
	A. Do You Need an Expert?	1
	B. Do You Need a Lawyer As an Expert?.....	2
	1. Benefits of Using a Lawyer As an Expert.....	3
	2. Drawbacks of Using a Lawyer as an Expert	4
III.	WHAT IS APPROPRIATE TESTIMONY?.....	4
	A. Expert Testimony Prerequisites and Procedure	4
	B. Interplay Between Admissibility and Discovery	7
	1. Consulting Expert.....	7
	2. Testifying Expert	9
	C. Permissible Bases for Expert Testimony in Franchise Context ...	11
	1. Regulatory Scheme Governing Franchises, Purpose, and History.....	11
	2. Custom and Practice in the Industry.....	12
	3. Market Definition	14
	4. Whether the FDD or Franchise Agreement Permits Certain Actions	14
	5. Likelihood of Confusion	15
	6. Competitive or Anti-Competitive Effects	15
	7. Causation and Damages.....	15

	D.	Impermissible Bases for Expert Testimony and Other Attacks	16
		1. Flawed Methodology	16
		2. Legal Conclusions	17
IV.		STRATEGIES FOR DEPOSITIONS AND TRIAL.....	18
	A.	Preparing Lawyers As Witnesses.....	18
		1. Depositions	18
		2. Trial.....	19
	B.	Does Arbitration Make a Difference?	21
V.		WAR STORIES OF FRANCHISE LAWYERS WHO HAVE BEEN EXPERT WITNESSES	22
	A.	Background of Survey.....	22
	B.	The Results	23
		1. Malpractice Cases.....	23
		2. Awards of Attorney Fees	25
		3. Testimony About “The Law”	25
		4. Explaining the Regulatory Scheme in Franchising.....	26
		5. Custom of the Trade.....	26
	C.	Other Observations.....	27
VI.		CONCLUSION	27
		EXHIBIT A	
		BIOGRAPHIES	

USING FRANCHISE ATTORNEYS AS EXPERT WITNESSES— NOT JUST FOR LEGAL MALPRACTICE CASES ANYMORE

I. INTRODUCTION

Making decisions relating to the use of expert witnesses has always presented multiple challenges. This has been true in all areas, and, as franchising has matured, so have the practices of franchise attorneys. Many attorneys now have decades of experience, representing a variety of franchise companies and franchisees. For years, they have been called as expert witnesses in legal malpractice lawsuits involving franchise matters. At times, some have been called upon to provide expert testimony in cases between franchisors and franchisees.

This workshop will address when it may be beneficial to hire one of your peers as an expert, whether it is appropriate, and circumstances where the attorney/expert's testimony may be excluded or struck. The workshop will also discuss strategies in the depositions of such experts, including how to prepare lawyers as witnesses, how to get the most of their testimony on direct, areas of attack on cross-examination, and mistakes that are made by litigation counsel in handling such witnesses. It will also present a summary of experiential research from interviews with franchise attorneys who have served as experts or hired lawyer-experts in franchise or other cases.

II. DECISION TO USE AN EXPERT

A. Do You Need an Expert?

The decision to use an expert will turn on a number of factors. Not every case on its face calls out for the use of an expert. For example, a “simple” case to collect past-due royalties may not at first blush appear to need an expert witness. It is simply a case of proving how royalties are computed and then calculating how much is owed. Yet, a franchisee might defend non-payment on the ground that the amount of the royalty or franchisee fee was not calculated according to the franchise agreement. In that case, it might be worth considering retaining an expert to prove the royalty was calculated correctly, in line with royalties charged in that particular franchised business or that the calculations were in accord with industry custom and practice.

Other cases may appear on their face to cry out for the use of expert testimony. This is true in antitrust cases (economists), cases seeking lost future profits (accountants), trademark infringement (marketing experts on likelihood of confusion), encroachment cases (marketing experts), or non-compete cases (reasonableness of restraint). An important driver in the decision to use an expert is cost. Not every case justifies the expense. And the costs of an expert may sometimes not be recoverable by the prevailing party, which may depend on applicable state law.¹

¹ For example, in California, expert witness fees are normally not recoverable as costs to a prevailing party. Cal. Code Civ. Proc. §1033.5(b)(1). However, expert witness fees may be recovered in California, in the discretion of the judge or arbitrator, under a special statute governing the consequences of recovering or obtaining a judgment for less than an unaccepted settlement offer. See Cal. Code Civ. P. §998(c)(1). See also Tex. Civ. Prac. & Rem. Code Ann. § 31.007(b) (not including expert witness fees as recoverable costs); *In re Slanker*, 365 S.W.3d 718 (Tex. App. 2012) (expert witness fees are incidental to trial and generally not recoverable, but citing examples of family law matters permitting recovery); Fla. Stat. Ann. § 92.231; *Winter Park Imports, Inc. v. JM Family Enterprises, Inc.*, 77 So. 3d 227, 232 (Fla. Dist. Ct. App. 2011) (trial court has discretion to award expert witness fees that were reasonably necessary to defend the action); Del. Code Ann. tit. 10, § 5101 (West) (permitting costs for prevailing party); *Jardel*

Counsel should also consider the nature and identity of the fact-finder when determining whether an expert is needed. A case tried to a knowledgeable arbitrator or judge may not need an expert to enlighten the decider. The same case tried to a jury or an inexperienced arbitrator may call for the use of expert testimony if the fact-finder is unfamiliar with the subject matter. The intricacies of franchise law may still be a mystery to most arbitrators and judges, and while franchise agreements often require matters to be arbitrated before someone having an in depth-knowledge of franchising, it is not always easy to find an arbitrator familiar with the particular issues raised by the case at hand.

The basic question counsel needs to ask is whether there are issues in the case that could be better explained by an unbiased third party whose opinion will be respected by the fact-finder and permitted by the arbiter of the law. The testimony of the parties and witness participants will cover most of the issues raised in a franchise case. But parties are naturally biased, and thus, the weight of their testimony may vary. For example, in an encroachment case, a franchisor can produce its marketing officer or field representatives to testify that an area had sufficient potential business to support two franchises. That testimony sounds and is markedly more credible to the average fact-finder, and therefore given greater weight, when presented by a marketing professor at a local university who conducted independent studies on industry competition and market saturation.

B. Do You Need a Lawyer As an Expert?

This question raises slightly different issues than whether to use an expert at all, and the answer depends largely on the issues involved. Without a doubt, some cases require lawyer-experts. Obvious examples include attorney malpractice cases or cases involving the reasonableness of attorneys' fees. In *Hall v. Sullivan*, for example, the Fourth Circuit held that, under Maryland law, a plaintiff in a malpractice action was required to present competent expert testimony "establishing that the structure of the franchise transaction . . . was a breach of the standard of care."² There, the court affirmed summary judgment in favor of the defendant-attorneys accused of malpractice because plaintiff failed to present evidence of the proper standard of reasonable care by an attorney in structuring a franchise transaction.³ Expert testimony was important and persuasive in *Sickler v. Kirby*.⁴ In that 2011 appellate court decision reversing the grant of summary judgment, a lawyer-expert, admittedly not a franchising expert, opined that counsel committed malpractice by failing to advise the franchisor to seek advice from a franchise attorney when the poorly-drafted disclosure document was challenged. In this and similar matters, a lawyer-expert witness provides critical and necessary testimony.

The subtler question is whether to use a lawyer-expert in more substantive circumstances. As discussed below, there are both benefits and drawbacks to the use of a lawyer-expert in a franchise case. Initially, counsel should begin the analysis with the case-specific dynamics in mind. Ideas to consider at this stage:

Co., Inc. v. Hughes, 523 A.2d 518, 533 (Del. 1987) (decision awarding costs, including expert witness fees, is within sound discretion of trial court).

² *Hall v. Sullivan*, 272 F. App'x 284, 288 (4th Cir. 2008).

³ *Id.* at 288-89.

⁴ *Sickler v. Kirby*, 19 Neb. App. 286, 295-96, 805 N.W.2d 675, 684 (2011), *review denied* (Mar. 14, 2012).

- Do you need an “industry” witness with hands-on experience or someone with academic or research-based knowledge of the applicable laws, regulations, and procedures?
- Would a lawyer-expert be viewed as an “industry” person or an academic?
- How important is it whether the expert has actually worked in the particular industry for either a franchisor or franchisee in an operating capacity?
- How important is it whether the expert has experience advising companies on business issues as opposed to legal issues?

As discussed in more detail in Part III.C, there are many topics on which a lawyer-expert is competent to testify so long as he or she establishes a proper foundation for the testimony regarding experience with or knowledge of the issues at hand. Custom and practice in a certain industry is often the subject of expert testimony, and if the lawyer-expert can establish his or her familiarity with the custom and practice in the industry, a trier of fact may find it powerful and persuasive.

1. **Benefits of Using a Lawyer As an Expert**

Franchising has grown tremendously since it became regulated in the 1970’s. Lawyers have been actively involved in the franchising arena since that time, representing franchisees, franchisors, and franchise associations. There are many franchise lawyers with over 20 years of experience representing the key players in each industry. They draft the operating documents, deal with the various state and federal regulators, testify before legislative bodies, teach franchise courses, speak at general franchising and industry-specific conferences, advise clients in difficult situations, and represent clients in litigation, often requiring mastery of industry-specific or franchise-system knowledge. Thus, some franchise lawyers have developed a breadth and depth of expertise as to both franchising and franchise law that counsel should, at the very least, consider as a possible resource.

Counsel may glean particular benefit from using lawyer-experts well-known to arbitrators or judges by reputation or from prior, positive appearances. It may be beneficial to use a lawyer for certain issues, including the meaning in the trade of certain words or provisions often found in franchise agreements, through testimony on custom and practice in the industry. A lawyer also may be a very persuasive witness on the custom and practice of disclosing certain matters in a franchise disclosure document (“FDD”) if an issue in the case is whether certain information should have been disclosed. While it may be desirable to have a lawyer-expert testify about required disclosures and whether the information at issue was a required disclosure, a court is unlikely to permit that testimony to the extent it calls for a legal opinion—one reserved for the court.⁵ The best way to get that lawyer-expert’s legal opinion testimony included in the record is to use it to establish the custom and practice of franchises within the industry, but leave out the expert’s conclusions that would not aid the trier of fact’s determination. Arguably, testimony regarding standard industry customs could assist the trier of fact in determining whether a franchisor should have disclosed the information.

⁵ See *infra* Part III.D.

2. Drawbacks of Using a Lawyer As an Expert

To the authors' great chagrin, franchise lawyers should not always be hired as experts. In fact, the concern that lawyer-experts may invade the province of the judge or jury results in the common exclusion of their testimony. A lawyer-expert may be vulnerable to attack for his or her lack of business experience. Thus, in deciding whether to use a lawyer-expert, counsel must give careful consideration to whether business or operational experience is more important to the expert witness's credibility than overall industry knowledge or academic knowledge. However, while a lawyer-expert may be technically qualified to testify based on his or her experience in the industry through client representation, trade conferences, and generally keeping abreast of industry trends, the practical, hands-on experience of business operations is persuasive and irreplaceable.

Another potential disadvantage of using a lawyer-expert is the lawyer's demeanor. It is often said that lawyers make bad witnesses because they are prone to lecture and speak in legalese. This drawback can be overcome, as discussed in Part IV.A, *infra*, but it takes a good witness. And, as with any expert witness, there is the perceived industry bias. It is no secret that most of the franchise law bar have picked a side and identify themselves either with franchisors and franchise systems or with franchisees. As discussed more fully in Part IV.A, *infra*, this can pose a problem to credibility, undermining even the most frank and fact-based testimony.

Finally, one of the most significant drawbacks to the use of any expert, including a lawyer-expert, is cost. Many clients are simply unwilling to put up with the additional cost if the testimony could be covered by lay witnesses. Determining compensatory damages in a franchise dispute frequently involves a complex lost-profit analysis that requires the use of expert testimony. A franchisor will seek lost profits, typically in the form of revenues that it would have received over the life of the parties' agreement had the franchise agreement not terminated due to the franchisee's breach. Leaving aside the question whether the use of expert testimony is necessary (e.g., simply using a lay witness to testify about damages pursuant to Fed. R. Evid. 701), the practical reality is that most litigants will rely on expert testimony to establish (or refute) lost profits. This, like any other use of experts, can dramatically increase the cost of litigation. Experts themselves often carry a high hourly rate and need to spend time to review the case, prepare a report, and appear for deposition and trial. The use of experts also will necessitate significant, additional attorney time and increase the costs associated with motion practice, trial preparation, and the trial itself.

III. WHAT IS APPROPRIATE EXPERT TESTIMONY?

A. Expert Testimony Prerequisites and Procedure

Rule 702 of the Federal Rules of Evidence governs the use and admissibility of expert testimony and states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods,

and (3) the witness has applied the principles and methods reliably to the facts of the case.⁶

Whether a witness is considered an expert is viewed broadly to include any person qualified by “knowledge, skill, experience, training or education.”⁷ Thus, within the scope of the Rule are both scientific or technical experts (e.g., physicians, physicists, and economists), and skilled experts (e.g., bankers or lawyers) testifying regarding respective areas of expertise. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and later in *Kumho Tire Co. v. Carmichael*, the Supreme Court shaped the scope and application of Rule 702 and charged trial judges with the responsibility of acting as “gatekeepers” to exclude irrelevant, unreliable expert testimony.⁸ The Court in *Kumho Tire* clarified that this gatekeeper function applies to all expert testimony, not just scientific testimony.⁹ Thus, the trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before admitting the testimony.

While *Daubert* sets out certain factors for the trial courts to use in assessing the reliability of expert testimony, the factors are not mandatory or exclusive.¹⁰ The burden of establishing the admissibility requirements by a preponderance of the evidence rests with the party offering the expert testimony.¹¹

⁶ Fed. R. Evid. 702.

⁷ Fed. R. Evid. 702, Advisory Committee Notes to 2000 Amendments.

⁸ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S. Ct. 1167, 1174 (1999).

⁹ *Kumho Tire*, 526 U.S. at 147-148.

¹⁰ As summarized by the 2000 Advisory Committee Notes to the 2000 Amendments to Fed. R. Evid. 702:

The specific factors explicated by the *Daubert* Court are (1) whether the expert’s technique or theory can be or has been tested—that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

Daubert, 509 U.S. at 592-94; Fed. R. Evid. 702, Advisory Committee Notes to 2000 Amendments. In addition, other factors that may be considered include:

- (1) Whether the expert’s testimony is an organic growth from research independent of the litigation or is an opinion developed expressly for testifying;
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
- (3) Whether the expert has adequately accounted for obvious alternative explanations;
- (4) Whether the expert employs the same care and intellectual rigor in his or paid courtroom testimony and opinions as in his or her outside practice in the relevant field; and
- (5) Whether the expert’s field of expertise is known to reach reliable results.

Fed. R. Evid. 702, Advisory Committee Notes to 2000 Amendments (citations omitted).

¹¹ *Id.* (“proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence”) (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)).

When considering an attorney expert, it is important to remember that Rule 704 permits an expert to testify regarding the “ultimate issue” to be decided by the trier of fact. But an expert cannot simply tell a jury how to decide a case; the determination of purely legal issues is the “exclusive purview of the court.”¹² Thus, expert testimony that merely states a legal conclusion will be excluded. On the other hand, expert testimony is similarly excluded as impermissible where the trier of fact is capable of understanding the primary facts and drawing correct conclusions without special knowledge.¹³ For example, in *United States v. Cross*, the Court precluded an attorney expert witness from testifying that the video gaming devices at issue were illegal gambling devices under state law.¹⁴ “The opinion would not be helpful to or assist the trier of fact in deciding any issue before it, [] particularly since the undersigned will instruct the jury on the law to be applied to the facts of this case.”¹⁵

In *W.O. Burgers 1, L.L.C. v. Watsonburger of Okla., Inc.*, the testimony of a franchise attorney was ruled inadmissible because it was “unnecessary to aid the trier of fact.”¹⁶ In the offer of proof, the attorney provided a definition for “franchise” and explained the elements of a franchise.¹⁷ The attorney also expressed what was not required for a franchise (*i.e.*, a franchise agreement does not have to be in writing).¹⁸ The court disallowed this testimony as “unnecessary to aid the trier of fact” and duplicative of jury instructions. In *Palazetti Import/Export, Inc. v. Morson*, the testimony of a franchise attorney offered to interpret the franchise agreement was rejected because “neither of the elements of a franchise agreement requires knowledge beyond the ken of the average juror.”¹⁹ Further, the testimony of the franchise attorney expert was not allowed to discuss industry custom because “there [was] nothing to suggest that there [was] any ambiguity in the Palazzetti-Morson contract or that industry custom [was] relevant to the question of whether it was, in fact, a franchise agreement.”²⁰

¹² *Palazetti*, 2001 WL 793322 at *2 (excluding testimony by attorney regarding conclusion that contract was not a franchise agreement).

¹³ See *Andrews v. Metro North Commuter R.R.*, 882 F.2d 705, 708 (2d Cir. 1989) (excluding expert testimony that railroad platform had unsafe conditions in light of ice and trash); *Palazetti*, 2001 WL 793322 at *3 (excluding proposed expert testimony from attorney regarding simple elements of franchise agreement).

¹⁴ *United States v. Cross*, 113 F. Supp. 2d 1282, 1285 (S.D. Ind. 2000).

¹⁵ *Id.* See also *RJLCS Enters., Inc. v. Professional Ben. Trust Multiple Empl. Benefit Plan*, 487 F.3d 494, 498 (7th Cir. 2007) (excluding testimony of two attorneys as to meaning and impact of an IRS private ruling letter and finding that “[a]rgument about the meaning of trust indentures, contracts, and mutual-to-stock conversions belongs in briefs, not in ‘experts’ reports.”).

¹⁶ 05-09-00397-CV, 2011 WL 989051 (Tex. App. Mar. 22, 2011), review denied June 17, 2011.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ No. 98 Civ. 722 (FM), 2001 WL 793322 at *3 (S.D.N.Y. July 13, 2001).

²⁰ *Id.*

B. Interplay Between Admissibility and Discovery

While Rules 701 through 704 govern the admissibility of expert testimony, the question of how to use a potential expert must be determined first because some experts may provide an immeasurable benefit without ever seeing the courtroom. As counsel, the decision regarding what use to make of your expert may be significantly impacted by the discovery obligations contained in Rule 26 of the Federal Rules of Civil Procedure (or similar state court rules).

The provisions of Rule 26 dealing with expert disclosure requirements and the scope of expert discovery were amended in 2010.²¹ The amendments sought to balance the 1993 and 2000 amendments' permissive expert discovery allowances with the need to promote frank and open communications between counsel and experts without fear of creating discoverable correspondence. The 2010 amendments changed the required disclosures regarding expert witnesses, affecting how counsel should treat those experts prior to and throughout litigation. As a result, at an early stage in any situation that may be approaching litigation, counsel should determine not only whether the use of an expert will be sufficiently beneficial, but in what way an expert might best be used.

Following the 2010 amendments to Rule 26, counsel has three options on how to use an expert: (1) not to testify at trial, but retained only in an advisory or consultative capacity in anticipation of litigation or to prepare for trial; (2) to testify at trial as someone retained or specially employed to provide expert testimony or someone regularly involved in giving expert testimony; or (3) to testify at trial and provide expert testimony, but not someone retained for the litigation or not someone who regularly gives expert testimony (e.g., an employee with specialized knowledge). The decision on how to handle each expert witness is a critical early decision because, as discussed below, it impacts the content of communications with that expert and the subsequent disclosure or protection of those communications in discovery.

1. Consulting Expert

Depending on the nature and value of a particular case, a non-testifying or consulting expert can be an invaluable resource. Clients may be less interested in retaining a consulting expert for cost reasons if a testifying expert also will be necessary (particularly a consulting attorney-expert), but it is of obvious benefit to have the opportunity to freely communicate with an expert without concern about the disclosure of those communications. Under Fed. R. Civ. P. 26(b)(4)(D),²² the facts known or opinions held by a consulting expert remain undiscoverable; this rule has not changed. Consulting experts can be used to develop a litigation strategy, analyze the facts and evidence, and to test legal theories before dispositive motions or trial. In a franchise case, a consulting expert with specialized knowledge or experience in the relevant industry or system can identify industry standards and customs to trim legal arguments and focus on the most critical issues. This early intervention can streamline the process of

²¹ See *Civix-DDI, LLC v. Metropolitan Regional Information Systems, Inc.*, 273 F.R.D. 651, 652-53 (E.D. Va. 2011) (finding 2010 amendment to Rule 26(b)(4) applied retroactively to case filed in August 2010 because did not begin until after amendment went into effect); *Republic of Ecuador v. Bjorkman*, No. 11-cv-01470, 2012 WL 12755, at *5 (D. Colo. Jan. 4, 2012) (applying the 2010 amendments and finding "information constituting facts or data considered by the expert may not be withheld simply because it was used and/or prepared in anticipation of litigation by or for an attorney").

²² Formerly, Fed. R. Civ. P. 26(b)(4)(B).

preparing a testifying expert and help shape the cross-examination (either in a deposition or at trial) of the opposing party's expert witness.

The prime reason for protecting consulting expert opinions and communications with counsel is that their disclosure is unwarranted, *i.e.*, the revelation of the consulting expert's opinions are not needed to conduct a cross-examination or prepare for trial.²³ Additionally, permitting discovery regarding consulting experts could deter thorough preparation of the case because counsel will have fewer exchanges with the consulting expert and provide less information.²⁴ And, finally, it would make parties and their counsel reluctant to consult any experts for fear that any opinion given following a consultation will haunt them at trial and cause unfair prejudice due to the weight likely given to the opinions of an identified expert who was consulted and then deliberately not used at trial.²⁵

On the other hand, a party may make offensive, sometimes bad-faith, use of the blanket protection provided to a retained consulting expert witness to prevent opposing counsel from retaining the expert thereby "cornering the market."²⁶ The broad protection also limits the consulting expert's ability to talk and work with others after even a brief consultation. These risks, inherent to the grant of such blanket protection of the relationship between counsel and consulting experts, generally do not outweigh the benefits of promoting and protecting communications by disallowing discovery regarding consulting experts. As a result, discovery regarding consulting experts is available only in the rare instance that the opposing party establishes a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship.²⁷ The Advisory Committee stated that it "will be rare for a party to be able to make such a showing."²⁸ Even if some discovery of a consulting expert is permitted, the court will not order the disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). In fact, most courts protect from disclosure even the

²³ See Wright & Miller, 8A Fed. Prac. & Proc. § 2032 (3d ed.).

²⁴ See *Durflinger v. Artiles*, 727 F.2d 888, 891 (10th Cir. 1984); *Moore U.S.A. Inc. v. Standard Register Co.*, 206 F.R.D. 72 (W.D.N.Y. 2001).

²⁵ *Peterson v. Willie*, 81 F.3d 1033 (11th Cir. 1996); see also *Ferguson v. Michael Foods, Inc.*, 189 F.R.D. 408 (D. Minn. 1999) (disallowing use of expert originally hired by defense because of danger of unfair prejudice); *Rubel v. Eli Lilly and Co.*, 160 F.R.D. 458, 460 (S.D. N.Y. 1995) (finding allowing use of the fact that the expert was previously retained by the other side would be explosive). Arguably, counsel's decision to consult with an expert but not to use him or her at trial is attorney work product and protected from disclosure. See *In re Pizza Time Theatre Secs. Litigation*, 113 F.R.D. 94, 98 (N.D. Cal. 1986).

²⁶ See *Kelly McDonald, Gimme Shelter? Not If You Are a Non-Witness Expert Under Rule 26(b)(4)(A)*, 56 U. Cin. L. Rev. 1027, 1047 (1988); compare *Rocky Mountain Natural Gas Co. v. Cooper Industries, Inc.*, 166 F.R.D. 481 (D. Colo. 1996) (allowing depositions of consulting experts retained by plaintiff after settlement with defendant that had retained the expert initially because purpose was only to insulate experts from discovery and information acquired was before retention by plaintiff); *Seven-Up v. United States*, 39 F.R.D. 1, 2 (D. Colo. 1966) (finding the intentional "purchase" and silencing of an expert inconsistent with the basic assumption that a trial is a search for truth and not a tactical content which goes to either the richest or to the most resourceful litigant").

²⁷ Fed. R. Civ. P. 26(b)(4)(D)(ii) ("on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means").

²⁸ Advisory Committee Notes to 2010 Amendments to Fed. R. Civ. P. 26.

identity of consulting experts.²⁹

2. Testifying Expert

The 2010 amendments to Rule 26 largely narrowed the scope of required disclosures for testifying experts, but expanded the field of witnesses required to make at least some disclosure.³⁰ Under Rule 26(a)(2)(A), a party must disclose the identity of any expert witness that it may use at trial to present evidence. For testifying experts retained or specially employed to testify, a party is required to produce a written expert report.³¹ For any expert witness not required to produce a written report—not retained or not specially employed for testimony, a party must provide a written disclosure summarizing the anticipated opinion testimony and the facts supporting that opinion.³² Because of these differing disclosure requirements, it is important to determine early which expert will serve what function. The risk of failing to make a necessary disclosure could result in a court’s exclusion of the witness’s testimony at trial.³³

a. Retained Testifying Expert

Fed. R. Civ. P. 26(b)(4)(A) provides that identified “testifying” experts may be deposed, but that their draft reports and certain communications with counsel are exempt from discovery. The 2010 Amendments provide that the draft expert reports of a testifying expert are no longer subject to disclosure in discovery. The required disclosures under Fed. R. Civ. P. 26(a)(2)(B) further limit disclosure to only “facts or data” considered by the testifying expert in an effort to exclude the theories or mental impressions of counsel.³⁴ This aspect of Rule 26 was narrowed by the 2010 amendment, but the Advisory Committee also intended to broaden the applicable disclosures by requiring not only factual material on which the expert relied, but also any factual material that the expert “considered . . . in forming the opinions to be offered.”³⁵ Another significant limitation that the 2010 Amendments created is the work-product protection for communications between counsel and a testifying expert, except for communications regarding the testifying experts’ compensation, the facts or data that counsel provided to the expert and that the expert considered in forming the her opinions, or any assumptions that counsel provided to the expert and on which the expert relied in forming his opinion.³⁶

²⁹ See *Ager v. Jane C. Stormont Hosp. and Training School for Nurses*, 622 F.2d 496, 503 (10th Cir. 1980). *But see Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135 (S.D.N.Y. 1997) (rule does not prohibit identification of experts where exceptional circumstances exist).

³⁰ Ritch & Eppensteiner, *Seismic or Snooze-Worthy? Year-Old FRCP Amendments on Expert Requirements*, 54 No. 4 DRI For Def. 28 (Apr. 2012).

³¹ Fed. R. Civ. P. 26(a)(2)(B).

³² Fed. R. Civ. P. 26(a)(2)(C).

³³ See *Am. Prop. Constr. Co. v. Sprenger Lang Found.*, 274 F.R.D. 1, 4 (D.D.C. 2011); *Downey v. Bob's Discount Furniture Holdings, Inc.*, 633 F.3d 1 (1st Cir. 2011); *In Saline River Properties, LLC v. Johnson Controls, Inc.*, No. 10-10507, 2011 WL 6031943 (E.D. Mich. Dec. 5, 2011); *Chesney v. Tennessee Valley Auth.*, Nos. 09-09, 09-48, 09-54, 09-64, 2011 WL 2550721, at *2 (E.D. Tenn. June 21, 2011).

³⁴ Advisory Committee Notes Regarding the 2010 Amendments to Subdivision (a)(2)(B).

³⁵ Fed. R. Civ. P. 26(a)(2)(B) and related Advisory Committee Notes.

³⁶ Fed. R. Civ. P. 26(b)(4)(C) and related Advisory Committee Notes.

b. Other Testifying Expert

For witnesses that are not retained as experts or not specially employed to provide testimony (e.g., a current employee), no expert report is required, but the party must provide a summary of the anticipated opinion testimony and the facts supporting that opinion.³⁷ These expert witnesses often provide “hybrid” testimony as both an expert and percipient witness. For many reasons, counsel may want to use a witness as a Rule 26(a)(2)(C) expert—it avoids the lengthy expert report, it saves the cost of retaining a Rule 26(a)(2)(B) testifying expert, and it limits the opposing parties’ insight. One caveat when identifying an expert witness as a Rule 26(a)(2)(C) expert is that the limitation on disclosures of attorney-expert communications does not expressly apply to those expert witnesses. Rule 26(b)(4)(C) states that communications between a party’s attorney and “any witness required to provide a report under Rule 26(a)(2)(B)” are protected from disclosure.³⁸ The Advisory Committee Notes offer no further explanation that would extend the work product protection or to require the disclosure of any and all communications to Rule 26(a)(2)(C) experts.

Failure to produce a written report for an expert later determined to be a Rule 26(a)(2)(B) expert has consequences. An opposing party may move to exclude the expert testimony based on a failure to provide a timely, written report. Courts have deemed this to be a proper sanction.³⁹ To keep the types of experts and their respective requirements straight, the chart below summarizes the required reports, the treatment of communications between the expert and counsel, and other notable issues regarding that particular type of expert.

³⁷ Fed. R. Civ. P. 26(a)(2)(C).

³⁸ Fed. R. Civ. P. 26(b)(4)(C).

³⁹ See *Campbell v. United States*, No. 11-1554, 2012 WL 34445 at (4th Cir. Jan. 9, 2012) (holding exclusion of proposed medical expert was automatic sanction for failure to submit expert report in compliance with report requirements); *Malone v. Ameren UE*, 646 F.3d 512, 515-16 (8th Cir. 2011) (excluding affidavits containing expert opinions not disclosed as required); *but see Downey v. Bob’s Disc. Furniture Holdings, Inc.*, 633 F.3d 1, 7 & n. 4 (1st Cir. 2011) (permitting expert testimony because no expert report was required from an expert who was both an expert and a fact witness because of his ongoing involvement that led to the development of his expert opinions). See also Ritch & Eppensteiner, *Seismic or Snooze-Worthy? Year-Old FRCP Amendments on Expert Requirements*, 54 No. 4 DRI For Def. 28 (Apr. 2012) (identifying district court cases holding expert witness opinions excluded for failure to comply with Rule 26(a) disclosures).

Type of Expert	Fed. R. Civ. P.	Expert Report	Communications with Counsel	Other Issues
Retained Testifying Expert	26(a)(2)(A), 26(a)(2)(B)	Written report of facts or data considered and anticipated opinions	Protected, except regarding expert's compensation, facts or data counsel provided to expert and that expert considered, or assumptions counsel provided and that expert relied on	-Draft expert reports are not required to be produced -Work product is protected
Non-Retained Testifying Expert	26(a)(2)(C)	Limited summary of anticipated opinion testimony and supporting facts	Arguably same as with Retained Testifying Expert, but Rule is unclear	-Drafts and work product generally protected -Could be a company employee who is also fact witness
Consulting Expert	26(b)(4)(D)	No discoverable reports	No discoverable communications	-Can be used (arguably in bad faith) to corner market -Some discovery permissible if substantial need can be shown

Fig. A. – Summary of Discovery Treatment for Different Types of Experts

C. Permissible Bases for Expert Testimony in Franchise Context

Expert testimony is admissible when it assists the fact-finder in understanding the evidence or in determining a fact in issue. To assist the trier of fact, a lawyer-expert must offer opinions that provide guidance on a fact at issue, not a pure conclusion of law. Below is a discussion of some of the permissible bases for expert testimony in franchise cases.

1. Regulatory Scheme Governing Franchises, Purpose, and History

Most judges, juries, and arbitrators are unfamiliar with the technical workings of franchise law, so it is helpful to have expert testimony to explain the regulatory scheme. For instance, in a case that involves a failure to register (because, for instance, the issue is whether or not the business at issue was a franchise), it might be helpful to explain that the law was enacted to regulate the sale of franchises so that the buyer would get accurate information and the statute was designed to insure that and insure that the regulatory agency had an opportunity to review the disclosures.

In *Sam's Wines & Liquors, Inc. v. Wal-Mart Stores, Inc.*, the Northern District of Illinois allowed an attorney to testify in a trademark case about the technical process of acquiring a

trademark and on her opinion of the similarities shared by the trademarks in issue based on her experience as a trademark attorney.⁴⁰ While defendants sought to exclude the testimony in a motion in limine, arguing that the lawyer-expert would “render opinions primarily on legal issues and thereby usurp the court’s role in instructing the jury,” the plaintiff fought back, contending:

Ms. [Jena] Noel will not in any way define governing law or suggest she is instructing the jury on the law. Rather, she will confine her testimony to explaining the procedures, standards, customs, usage and practices in the United States Patent & Trademark Office and among in-house trademark counsel and the trademark bar, and explain how these procedures, customs, and the like bear upon resolution of the factual issues at bar.⁴¹

After a review of additional cases, the court determined that the proposed expert testimony could aid the jury, but excluded any testimony on the legal standards applicable to the case or any legal research on the ultimate issue of trademark infringement or likelihood of confusion.⁴²

Similarly, in *United States v. Parker*, the court admitted expert testimony from a government lawyer and Franchise Program Coordinator for the Federal Trade Commission.⁴³ His expert testimony summarized the scope and substance of the Federal Trade Commission’s “Franchise Rule,” including the necessary disclosures.⁴⁴ The Eighth Circuit affirmed the admissibility of the expert testimony to show the defendant’s intent to deceive in conjunction with prior evidence of the criminal defendant’s awareness of the rules.⁴⁵ This is clearly an area where an experienced franchise lawyer could provide superior knowledge and added value. In this situation, the expert would not be expressing an opinion, so the court or arbitrator would have the discretion to allow the testimony, under Rule 702(a) if it would improve the fact-finder’s understanding of the regulatory scheme.⁴⁶

2. Custom and Practice in the Industry

This is probably the area where expert testimony is used most frequently in franchise cases. While it is tempting to call an expert to testify that a franchisor complied with the disclosure rules, for example, courts may find that such testimony is inadmissible since it may

⁴⁰ *Sam’s Wines & Liquors, Inc v. Wal-Mart Stores, Inc.*, No. 92 C 5170, 1994 WL 529331 at *8-9 (N.D. Ill. Sept. 27, 1994).

⁴¹ *Id.* at *8.

⁴² *Id.* at *9.

⁴³ *United States v. Parker*, 364 F.3d 934, 940 (8th Cir. 2004).

⁴⁴ *Id.*

⁴⁵ *Id.* at 942; see also *Marx & Co., Inc. v. Diners’ Club Inc.*, 550 F.2d 505 (1977) (finding attorney competent to explain step-by-step practices ordinarily followed by lawyers and corporations to get through registration statement process with the Securities and Exchange Commission; but excluding attorney’s testimony that delay before registration statements became effective was unreasonable).

⁴⁶ This could fall into the allowable basis for expert testimony set forth in Rule 702 (a) of the Federal Rules of Evidence: Expert opinion will be allowed if: “(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”

not help determine the facts in issue and consists of nothing more than legal opinions.⁴⁷ Most lawyers attempt to circumvent this issue of providing unhelpful legal opinions by relying on custom and practice and then arguing that their clients were essentially complying with the law by observing the custom and practice in the industry. In *TCBY Systems, Inc. v. RSP Co., Inc.*, following a jury verdict in favor of the franchisee on a breach of contract claim for the franchisor's failure to provide sufficient site selection assistance, the franchisor appealed that issue unsuccessfully.⁴⁸ The court upheld the admission of a franchise expert's testimony about industry customs and practices and also TCBY's site review and evaluation process.⁴⁹ The court even found that the expert's testimony that, in his professional opinion, TCBY's site review process was inadequate was admissible and helpful to the jury to understand what is reasonable in the franchise industry.⁵⁰ Similarly, in *RWJ Management Co., Inc. v. BP Products of North America, Inc.*, the Northern District of Illinois denied a motion to exclude testimony that defendants failed to meet industry standards in disclosures, trade practices, and franchise operations.⁵¹ The court held that the proposed testimony could assist the trier of fact to understand the evidence or determine a fact in issue.⁵² The court did exclude as legal conclusions any testimony regarding the duty of good faith and fair dealing and whether defendants breached the contract.⁵³

When postured properly, lawyers familiar with a particular franchise industry should be qualified to testify on custom and practice based on their long-standing experience in representing clients in the industry. This kind of experience could play a major role where, for example, a franchisee or potential franchisee alleges a franchisor's FDD did not comply with disclosure rules. While rules governing the FDD disclosures are clear in some areas, they do not and cannot cover every possible scenario. A franchisee could assert that a franchisor did not disclose a prior, failed business deal involving an officer of the franchisor. As an area not specifically covered by the disclosure rules, custom and practice in the relevant industry could become critical evidence.

Custom and practice can also be admissible where a contract is ambiguous or uses words that have a certain meaning in the trade that is not necessarily obvious to the average

⁴⁷ See, e.g., *Traumann v. Southland Corp.*, 858 F. Supp. 979, 985 (N.D. Cal. 1994) (disallowing testimony of a lawyer on the applicability of the California Franchise Investment Law). See also Fed. Rules of Evidence 702 (setting forth Daubert requirements) and 704 ("ultimate issue" testimony not automatically objectionable).

⁴⁸ *TCBY Systems, Inc. v. RSP Co., Inc.*, 33 F.3d 925, 929 (8th Cir. 1994).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *RWJ Mgmt. Co., Inc. v. BP Products N. Am., Inc.*, 09 C 6141, 2011 WL 87444 at *1 (N.D. Ill. Jan. 10, 2011).

⁵² *Id.* at *2.

⁵³ *Id.* But see *In re Vylene Enters., Inc.*, 105 B.R. 42 (Bky. C.D. Cal. 1989) (in determining whether a franchisor had a duty to negotiate in good faith for the renewal of the franchise agreement in light of an offer of a new offer, bankruptcy court permitted without discussion a franchise expert's testimony that the renewal of a franchise does not involve a new and different franchise document).

juror.⁵⁴ In these instances, a lawyer should be able to testify as to the meaning of certain terms or phrases used in a particular industry.

3. Market Definition

Another obvious use of expert testimony comes in cases where it is necessary to define a particular market. This happens frequently in antitrust cases, where parties usually hire an economist to testify about market power, market definition and the like. However, market issues arising in franchise cases do not always require the services of an economist, and a lawyer knowledgeable on franchise issues may qualify as an expert. For example, a lawyer might be able to testify regarding whether there has been an encroachment of the franchisee's territory, or whether the industry views a trade area as a separate product market based on his or her knowledge of the industry. Starbucks Cafés provide a great example. The cafes are often very close to each other, and a layperson may be susceptible to the argument that there is significant encroachment. An expert familiar with the geographic draw of a Starbucks Café could testify, however, that the actual market area is very small since people generally walk to such cafes and patronize the cafes that intersect their specific walking or driving paths. Thus, in some large cities, there is no encroachment even when cafes are across the street from each other. The fact-finder would not necessarily come to this conclusion, so expert testimony regarding market definitions could be helpful. Use of lawyer-experts in this area will depend on the nature of the testimony and the lawyer's background in the market and industry.

4. Whether the FDD or Franchise Agreement Permits Certain Actions

Generally, franchisors will interpret their agreements broadly to require upgrades and other expenditures and liberal competition with franchisees. On the other hand, franchisees will want to limit what actions are *required* under the franchise agreement (e.g., requiring the franchisee to carry certain products, update its computer system, remodel the premises, direct advertising fund expenditures, or compete with the franchisee in new marketing areas). This area is rife with contention and often the source of litigation. In this context, a franchise lawyer can opine on these issues, but the testimony needs to be focused to avoid objections that the expert should not be permitted to testify as to the meaning of the FDD or franchise agreement, a determination that the court, arbitrator, or jury must decide.⁵⁵

Further, to admit any extrinsic testimony of the meaning of franchise agreement terms, the court or arbitrator would have to find that the provisions were ambiguous. In *Palazzetti*, the Southern District of New York found that there was "nothing to suggest that there [was] any

⁵⁴ See, e.g., Cal. Civ. Code §1644 ("The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."); see also Cal. Civ. Code §1645 ("Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."). See also *Craig Food Indus., Inc. v. Weihing*, 746 P.2d 279, 283 (Utah Ct. App. 1987) (admitting non-attorney expert testimony on "proper construction of standard language in fast-food franchise agreements").

⁵⁵ See, e.g., *Palazzetti*, 2001 WL 793322 at *2 (court disallowed expert testimony of franchise attorney on the interpretation of the franchise agreement because "neither of the elements of a franchise agreement requires knowledge beyond the ken of the average juror"); but see *Craig Food Indus., Inc. v. Weihing*, 746 P.2d 279, 283 (Utah Ct. App. 1987) (where expert testimony from someone with a Ph.D. in business administration and a background in fast-food franchise operations was admissible "on the proper construction of standard language used in fast-food franchise agreements").

ambiguity in the . . . contract or that industry custom [was] relevant to the question of whether it was, in fact, a franchise agreement.”⁵⁶

Counsel could assist the lawyer-expert to frame his or her testimony to include the custom and practice of FDD drafters of using certain language to convey certain rights and obligations. The lawyer-expert also can frame the testimony to address the meaning attributed to the use of certain phrases in a particular industry, especially where a term or phrase is technical and not susceptible to a standard interpretation.

5. Likelihood of Confusion

In trademark and trade dress infringement cases, a key issue is whether customers or the general public are likely to be confused by the use of similar trademarks or trade dress. Often, the parties will hire competing marketing experts to testify on the likelihood of confusion, and the marketing experts may support their testimony with customer surveys, something lawyers normally do not compile.⁵⁷ While marketing experts seem to be the most logical choice for this task, a franchise lawyer, in the right case, could offer competent testimony. His or her industry knowledge and experience could provide the foundation for testimony regarding the types of customers who frequent the franchise business and whether they would or would not be confused by the competing marks or trade dress. Additionally, counsel could use a lawyer-expert to testify regarding the nature of the franchised business. For example, two businesses may use similar names, but an expert can testify that there is no likelihood of confusion because of the distinct nature of the businesses, products, or industries.

6. Competitive or Anti-Competitive Effects

The need for testimony regarding competition or anti-competitive effects obviously comes up in antitrust cases and non-compete cases. The most likely types of cases in franchising that could involve an assessment of the competitive effects are in the covenant not to compete area. In those states where courts assess a covenant based on whether it consists of a reasonable restraint of commerce or trade, expert testimony could be useful. A lawyer familiar with a particular industry could testify as to whether a restraint was reasonable or not. A covenant might be tested, for example, on the degree of restraint it imposes on the franchisee and a lawyer familiar with the industry might be able to testify that based on his or her knowledge it would not have a serious restraining effect. A lawyer-expert also might be able to testify about the purposes of the restriction as evidence of its reasonableness.

7. Causation and Damages

Issues of causation often arise in franchise cases when a franchisee claims damages based on failures or unfair or improper conduct by the franchisor. A franchisor may contend, in response, that the franchisee or some third party caused the claimed damages. Normally, this type of testimony would come from a non-lawyer expert such as an accountant or someone

⁵⁶ *Id.*; see also *Interim Healthcare of Ne. Ohio, Inc. v. Interim Services, Inc.*, 12 F. Supp. 2d 703, 707 (N.D. Ohio 1998) (the expert testimony of a franchise operations expert was inadmissible regarding interpretation of a contract provision because the franchise agreement was not ambiguous).

⁵⁷ See *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 979 n.23 (11th Cir. 1983) (noting that defendant's expert, a trademark lawyer, testified at trial that there was no likelihood of confusion between the two products, but according it little weight because lawyer admitted he had no background in the business and had not conducted any survey among consumers).

familiar with the workings of the business.⁵⁸ However, a lawyer-expert familiar with the industry might be able to qualify to testify on whether the challenged conduct could have caused the claimed damages. For example, if a franchisee alleges that a franchisor's required advertising fund contribution left it with unsustainable revenues, expert testimony may be permitted to demonstrate that the cause of the claimed damages was not the advertising fees but the franchisee's hiring of too many employees or food costs that exceeded the franchise system or industry average. And, certainly, the franchisee will have an expert in the industry to prove otherwise. Similarly, where a franchisee experiences a loss, a lawyer-expert with knowledge of the market and industry and principles of causation can provide compelling testimony about changes in the territory or market (e.g., a key local business closed) that contributed to a loss of revenue or customers.⁵⁹

While counsel traditionally use forensic accountants for damage calculations, a lawyer-expert might offer competent and helpful testimony even in some questions regarding damages. A franchisee might claim, for example, that the franchise agreement or simply the relationship obligated the franchisor to provide a minimum amount of leads and that the franchisor failed to provide the leads. Assuming no express provision in the FDD or franchise agreement required the franchisor to provide those leads, counsel for the franchisor may consider using a lawyer-expert familiar with the industry to testify that it was unnecessary for the franchisor to provide leads because the market and industry were sufficiently open such that anyone could generate leads. Another area where damages are at issue, but not necessarily a specific accounting calculation, is the loss of sales or customers. A party could experience a loss and allege damages. For example, sales or customers could have been lost because a key business in the territory closed, something someone familiar with the territory might be able to testify to.

D. Impermissible Bases for Expert Testimony and Other Attacks

1. Flawed Methodology

Most of the subjects that a lawyer-expert would testify to would not involve the use of any methodology. However, the testimony would still be subject to scrutiny as to the methods that the lawyer used, for example, to determine custom and practice and whether he or she took into account all relevant customs or practices. Similarly, opposing counsel should question the methods that the lawyer-expert used to determine trade usage of phrases or words.

⁵⁸ See, e.g., *Hetrick v. Ideal Image Dev. Corp.*, No. 8:07-cv-871-T-33TBM, 2011 WL 672344 (M.D. Fla. Feb. 17, 2011) (permitting testimony from non-attorney expert that losses proximately caused by failure of third party and not statements from defendant's representatives).

⁵⁹ In *Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff and Kotkin*, 247 Conn. 48, 717 A.2d 724, 743-744 (1998) (dissenting opinion), it was noted that Harold Brown, a franchise lawyer, had been called to testify on causation issues in a legal malpractice case where the client was not registered. He testified on such issues as whether the client should have survived a rescission order or would have been able to comply with certain filing or post-filing requirements. He also testified that the client would have been able to settle the matter were it not for the lawyers' advice.

2. Legal Conclusions

Universally, courts will not permit an expert to invade the court's province by testifying on issues of law, which makes the job of a lawyer-witness akin to a tightrope walk. Determining whether an expert's testimony crosses the line can be difficult.⁶⁰

a. Determination of Whether Business Relationship Is a Franchise

This is clearly a topic that most lawyers would like to use an expert on in those cases where there is a "hidden" franchise situation. It is anticipated that most courts would disallow such testimony, finding that the issue is for the court or jury to decide.⁶¹ In *W.O. Burgers*, a Texas court found that the proffered testimony of the lawyer-expert was nothing more than a restatement of the court's proposed jury instructions regarding what constitutes a "business opportunity" and a "franchise."⁶² In contrast, in 2003 a Texas court allowed a lawyer-expert's testimony regarding "ultimate issues which are mixed questions of law and fact."⁶³ There, the City of Edinburg alleged that a gas supplier used various corporate forms to evade a franchise agreement.⁶⁴ The court noted that the city's lawyer-expert's testimony "consisted primarily of interpretation of various corporate documents" and her opinions "regarding the degree to which these documents indicated that [the defendants] were being operated as one unit rather than as separate entities."⁶⁵ Accordingly, to the extent that the legal issues can be couched as questions of mixed law and fact, generally impermissible testimony may be admitted. An expert also could offer testimony concerning the attributes of companies that are registered as franchises to show either that the company at hand is or is not a franchise. This would include, for example, a discussion of the components of the marketing plan or franchise fee. Further, the expert might be able to testify as to whether something is treated as a marketing plan, or a franchise fee, in the industry, although such testimony could still be attacked as calling for a legal opinion on the "ultimate issue" that would be unhelpful to the fact-finder.

b. Whether Franchisor Actions Constitute a Termination

An issue often comes up in franchise cases whether certain actions taken by the franchisor amount to a constructive termination. Also, issues arise as to whether a termination was proper either procedurally (*i.e.*, notice) or substantively (*i.e.*, cause). A lawyer-expert could testify as to whether the effect of a franchisor's actions were equivalent to a termination. In

⁶⁰ In analyzing the admissibility of lawyer-expert testimony in securities cases, one author noted that experts may testify on certain mixed questions of law and fact, "but the testimony must remain focused on helping the jury or judge understand the particular facts in an issue and not opine on the ultimate legal conclusions." Michael J. Kaufman, *Expert Witnesses: Securities Cases* § 6:3 (2011).

⁶¹ See *W.O. Burgers 1, L.L.C. v. Watsonburger of Okla., Inc.*, 05-09-00397-CV, 2011 WL 989051 (Tex. App. Mar. 22, 2011), *review denied* June 17, 2011 (disallowing attorney's testimony as "unnecessary to aid the trier of fact").

⁶² *Id.* at *2.

⁶³ *Rio Grande Valley Gas Co. v. City of Edinburg*, 59 S.W.3d 199, 212 (Tex. App. 2000) *aff'd in part, rev'd in part sub nom. S. Union Co. v. City of Edinburg*, 129 S.W.3d 74 (Tex. 2003).

⁶⁴ *Id.*

⁶⁵ *Id.*

AAMCO Transmissions, Inc. v. Baker, a wrongful termination case, the court allowed a non-lawyer expert to testify about the validity of the undercover inspection procedures performed during the franchisor's investigation of the franchisee's store to show that there were no adequate grounds for termination.⁶⁶

While it is tempting to seek to have an expert testify that certain conduct by the franchisor was oppressive or burdensome, it is unlikely that a court or arbitrator will allow that testimony. However, a lawyer-expert could testify as to the custom and practice in the industry with regard to the conduct at issue so that the trier of fact could then conclude that the conduct was so far removed from the norm that it would be considered unreasonable or oppressive.

In a similar vein, a party may try to present expert testimony of the reasonableness of a franchisor's or franchisee's conduct. Such direct testimony is most likely impermissible. This issue could arise in the context of the implied covenant of fair dealing or in connection with contractual provisions requiring the franchisor to act reasonably. As set forth above, testimony should be allowed regarding the custom and practice in the industry, which sets the stage for the fact-finder to determine whether the conduct was reasonable or in good faith.⁶⁷

c. Disclosure Violations and/or Franchise Law Compliance Issues

As noted above, whether there was compliance with the applicable franchise law would normally be considered an issue to be decided by the court as opposed to something to which an expert should be permitted to testify on. An arbitrator may be more prone to allow such testimony. In any event, an expert should be permitted to testify on custom and practice in disclosing or not disclosing certain items, or in the manner in which certain items are disclosed. Then, it is up to the fact-finder to determine whether there was compliance with the law.

IV. STRATEGIES FOR DEPOSITIONS AND TRIAL

A. Preparing Lawyers As Witnesses

1. Depositions

The principal difference in preparing a lawyer for deposition from preparing a lay witness is simply that the lawyer needs to be coached on how not to act as a lawyer. The lawyer needs to testify so as to be a teacher to the jury and not a pundit.⁶⁸ Lawyer witnesses need to be stripped of legalese. Deposition fundamentals require that the lawyer be carefully briefed and rehearsed into simply answering the question asked. Lawyers have a tendency to expound on

⁶⁶ *AAMCO Transmissions, Inc. v. Baker*, CIV.A. 06-CV-05252, 2008 WL 5245768 at *4-5 (E.D. Pa. Dec. 16, 2008).

⁶⁷ See *D'Amato v. Lillie*, CV-06-0314-EFS, 2008 WL 5428748 (E.D. Wash. May 30, 2008) (franchise case, where the court allowed expert testimony from two other salon owners regarding employee compensation in the industry to prove the reasonableness of the compensation of this salon's employees).

⁶⁸ See *JMJ Enterprises v. VIA Veneto Italian Ice, Inc.*, 97-CV-0652, 1998 U.S. Dist. LEXIS 5098 at *15-28 (E.D. La. Apr. 15, 1998). *JMJ* illustrates that, in the real world, a trial judge's rulings on whether to exclude expert testimony can be affected by the expert's performance on the stand. There, according to Judge Kelly, the damage expert "was not objective" and "argued with defense counsel and made gratuitous remarks" during the *Daubert* hearing, behavior that reinforced the judge's view that the expert "was acting as an advocate, and not as an objective evaluator of evidence." *Id.*

their answers or argue the case. They should be told to save that for the ultimate trial or hearing. Lawyers love to talk and thus need extra coaching. In fact, when called as witnesses themselves, many lawyers tend to forget the admonitions they give to their own clients. The lawyer may say that he or she understands this maxim, but may be proven wrong by a thorough walk-through of the questions and answers.

To the extent that the purpose of his or her deposition is to create a path to settle the case, more leeway should be given to the lawyer-expert to argue his or her position on the record. A lawyer-expert may have more of an impact on the other side than the lawyer-litigant. This is something that needs to be determined before the deposition.

2. Trial

There should not be much of a difference between preparing the lawyer-expert for trial and for deposition, except that at trial, depending on the fact-finder, counsel may want to expand the testimony covered during the cross-examination at the deposition. Further, unless the parties videotaped the deposition, testimony at trial presents the first time that counsel has to be concerned, not only with the lawyer-expert's language, clarity, and responsiveness, but also with his or her tone, demeanor, and appearance. This may require rehearsal for some. As counsel, make certain that the lawyer-expert witness does not act like a lawyer—leave the façade at home. The witness needs to appear like he or she is talking with the jurors, not at them. He or she needs to convey that he or she is just like them and speak in their language. Legal opinions and any legal concepts or terms must be conveyed in plain language. He or she needs to answer questions in a straightforward and clear manner—teach, but not lecture. The witness needs to be reminded that the goal is to win the confidence of the jurors, not to prove that he or she is smarter than everyone else in the room or the other side's expert. Again, do not assume that because the witness is a lawyer, he or she needs no preparation.

a. Direct Examinations

Putting a lawyer on the stand could confuse a jury because it may not seem normal or appropriate.⁶⁹ Start with the lawyer's background and experience in the industry and market to answer those questions in the jurors' minds first. Then, as necessary, develop the testimony regarding the lawyer-expert's educational background and legal expertise. Use the introduction as an opportunity to tackle head-on potential areas of concern, such as the lawyer's identification with franchisor or franchisee representation. Just by asking the lawyer whether he or she has represented franchisors or franchisees gives the jury or other fact-finder the impression that there is no real concern and that nothing is being hidden.

It is important to bring out the amount of research and study given to the issue so the fact-finder is left with the impression that, regardless of the expert's historical affinity with one side or the other, the expert is basing this opinion on objective research, knowledge, and experience. To the extent a lawyer-expert can buttress his or her testimony by testifying about the results of consultations with other lawyers or representatives who typically represent the other side, that would help diffuse his or her identity with one side of the controversy.

⁶⁹ Confusion is lessened where the fact-finder is an arbitrator or judge who already would have been exposed to the expert's qualifications and had sufficient forewarning of the testimony.

b. Areas of Attack on Cross-Examination

i. Prior Cases, Writings, Testimony

This is the most common area where a lawyer-expert might be impeached. The expert is often selected based on reputation and writings. Today, this information can be easily obtained by way of internet search. Most lawyers post their published works on their websites as well. Both the lawyer using the expert and the lawyer challenging the expert must review everything the lawyer has written that could impact his or her testimony. Any potential problems discovered should be carefully reviewed with the lawyer expert and adequate explanations must be prepared. It is even possible that a review of the expert's writings will cause him or her to be withdrawn or not hired in the first place, so this is something that should be done at the outset, especially since the courts impose strict time-lines on expert disclosure and limit the right to supplement the disclosure list.

The lawyer's prior cases should also be carefully reviewed. These can be found by a simple search on-line. Briefs can usually be obtained on-line as well, or by simply obtaining them from the lawyer. Taking a position in prior litigation opposite to the proffered testimony will need to be explained. While one obvious explanation would be that the lawyer was simply advocating for his client and does not personally have that opinion, a fact-finder will need more to separate the lawyer from his or her prior position. If the lawyer has advocated an opposite position in the past, serious consideration should be given whether to retain that lawyer as an expert. He or she would need to convince the fact finder that there was a change of mind based on careful study or that he or she was taking that position in his or her role as advocate but did not have an opinion one way or the other, which is a hard point to sell to a jury or other fact-finder.

Also it is essential to obtain from the lawyer any transcripts of testimony he or she has given as an expert. While this material is not available on-line, there is little doubt that the opposing party will request it and go so far as subpoenaing it from a party to the litigation if not forthcoming from the witness. Counsel who hires the expert should carefully review the prior testimony to make sure there is nothing that could impeach the expert lawyer, or if there is, that it can be explained.

ii. Generally Representing Franchisors or Franchisees

This is where the testifying lawyer expert is most vulnerable. Franchise lawyers are often identified with one side or the other. Thus, a lawyer who normally represents franchisors will face credibility challenges when he or she testifies on behalf of a franchisor. It helps deflect such attacks if the lawyer has also on occasion represented franchisees. However, it is difficult to find lawyer-experts who divide their time equally between representing franchisors and franchisees. How then can this patent bias be overcome? In certain cases, it might be possible to find a lawyer normally identified with one side to testify for the other. It may be possible to frame the issue for which expert testimony is needed in a way that may appeal to a lawyer-expert who usually represents the other side. "We decided to ask you to be our expert because we are sure you will agree once you see the facts that the conduct of X cannot be condoned."

A lawyer who normally represents the side on which he is being called to testify obviously needs to persuade the trier of fact that, despite his or her prior representation, his or her opinion or testimony is based on an unbiased view of the evidence. One idea is for him or her to confer with experts and lawyer-experts who generally represent the opposing side, then

testify that they agreed with his or her assessment. Expert testimony can be based on hearsay, so this would be permissible.⁷⁰ Another approach is to demonstrate to the trier of fact that the lawyer-expert has no stake in the outcome of the case in the sense that his or her practice would not be affected by it. Still another approach is to take the trier of fact through the analytic process the expert used in an effort to demonstrate the analysis, and therefore the testimony, was unbiased. When all is said and done, even the greatest amount of damage control cannot erase the hint of bias if a lawyer-expert has a history of representing only one side.

Testimony of custom and practice could easily be challenged if given by an “industry insider” with a perceived bias. The basis for the testimony needs to be laid out so that it does not appear that the witness is crafting the testimony to support an industry position. It is always helpful if there is contemporaneous documentary evidence of some kind that was not created to make the point advocated. By way of example only, a testifying lawyer could ask a number of franchisors for samples of termination letters written to franchisees to show that the franchisor in the case at hand acted properly in terminating the franchise. Or the testifying lawyer could ask a number of franchise companies for their encroachment policies to show that the franchisor in the case at hand did not encroach. When the evidence is contained in contemporaneous writings, it is difficult to challenge it as an expert’s biased fabrication.

A common mistake made in cross-examining a lawyer-expert is to ask questions that allow the expert to expand and emphasize the points of the party retaining him or her. An experienced trial lawyer should be able to exploit such openings and can make a case with that testimony if handled appropriately. While a polished and experienced expert witness may be able to handle testimony similarly, it is less likely that the expert would understand when a door has been opened for certain testimony during cross-examination. One way for opposing counsel to prevent this situation is to keep the lawyer-expert boxed in with concise but loaded leading questions requiring “yes” or “no” responses.

Of course, the more experienced a lawyer is with testifying, the less preparation is needed. This raises another issue as to the “professional” witness. To overcome the perception that the lawyer-expert is a hired gun or testifies for a living, effort must be made to convince the fact-finder that the lawyer-expert is a leader in the field and extremely knowledgeable, which explains why the lawyer is so often called to testify in the area.

Finally, a potential lawyer-expert has to be prepared to deal with the repercussions of testifying for “the other side.” The fallout could include other clients who are or could be negatively impacted by published decisions citing to their counsel—a designated expert—who provides critical testimony that now runs counter to their legal theory.

B. Does Arbitration Make a Difference?

As many federal courts have noted, the gatekeeping function of the court is relaxed in the context of a bench trial because a court is better equipped than a jury to weigh the probative value of expert evidence.⁷¹ A district court conducting a bench trial may admit evidence during

⁷⁰ See, e.g., Fed. R. Evid. 703 (“An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.”).

⁷¹ *Warner Chilcott Laboratories Ireland Ltd. v. Impax Laboratories, Inc.*, 2:08-CV-06304 WJM, 2012 WL 1551709 (D.N.J. Apr. 30, 2012); *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) (“There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.”).

the trial, subject to the understanding that the court may later exclude it or disregard it if it turns out not to meet the standards for reliability and relevancy established by Rule 702.⁷² As set forth in a recent Seventh Circuit decision, “[T]he court in a bench trial need not make reliability determinations before evidence is presented, [however], the determinations must still be made at some point.”⁷³ In a similar vein, an arbitrator may allow such testimony for two reasons: one, like a judge in a bench trial, the arbitrator sits as the sole finder of both facts and law; and two, the arbitrator is not required to follow strict rules of evidence and is only loosely bound by the law at all.

Additionally, arbitration is an advantageous arena for cases involving expert testimony because the parties can select an arbitrator who possesses a level of expertise in the industry, which will lessen the time (and, therefore, the cost) of preparation and testimony for a party’s expert. In fact, hiring a franchise attorney as an arbitrator could alleviate the need for experts on either side because the decision-maker would be familiar with the law and franchising issues generally. Also, because an arbitrator is not bound by the evidentiary rules and prevailing case law, the parties are able to control the construction of a process to qualify experts and present their testimony.⁷⁴

V. WAR STORIES OF FRANCHISE LAWYERS WHO HAVE BEEN EXPERT WITNESSES

Now that we have the framework for analysis in place, what do we see happen in the real world?

A. Background of Survey

In order to address this question, we decided to survey a number of attorneys asking whether they had served as expert witnesses and whether they had had the opportunity to select expert witnesses in situations where an attorney might make a good witness.

Our surveying techniques were far from scientific. Initially, we developed a list of questions that would be posed to each interviewee. However, it became obvious after only one or two interviews that our selected questions would not lead to answers that could be cut and sliced to give meaningful responses that could be neatly put into boxes that would lead to categorized answers. Thus, early in the process, we switched to using more open questions. For example, as we progressed in this interview process, rather than asking, “How many times have you served as an expert?”; “What were the specific topics?”; “Did you prepare a report?”; “How was the case resolved?”; “And did your participation affect the ultimate outcome of the proceeding?,” we began the interviews with the request, “Tell us about your experiences in serving as an expert witness or in hiring expert witnesses who were lawyers,” and from there went to more specific questions. The limitation on time and the number of interviews we could conduct, and the breadth of the subject, we believed, had previously not been giving us data

⁷² See *In re Salem*, 465 F.3d 767, 777 (7th Cir.2006) (“[W]here the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702.”).

⁷³ *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010); see also *Seaboard Lumber Co. v. U.S.*, 308 F.3d 1283, 1302 (Fed. Cir.2002).

⁷⁴ See generally Norman Brand, *When Experts Testify—Exploiting the Advantages of Arbitration* (1999).

that could be meaningfully catalogued. Our revised approach gave us data that was more informative, but anecdotal, not empirical. In other words, the information was not helpful in the sense that it told one “how to successfully use lawyers as expert witnesses,” but it gave us a range of the types of subjects on which lawyers have been asked to testify and what happened in the particular cases described. Stated differently, the results were food for thought rather than “how to.”

Our method of selecting interviewees was also far from scientific. First, we asked on the ABA’s Forum on Franchising ListServ for volunteers.⁷⁵ About 25 people responded. Given the time necessary to conduct these interviews, we—somewhat randomly—contacted about fifteen of these. We eliminated a few who were Canadian because we were not aware of how similar the Canadian rules relating to experts were to those in the United States. We also concentrated on those who indicated that they had more than one experience as or with respect to lawyers as expert witnesses. We then supplemented our pool of volunteers by solicitations to several practitioners whom we knew to be experienced in franchise litigation and particularly in the use of expert witnesses—although we did not specifically require them to limit their answers to franchise situations.

Because of our amateurish data-collection method, our interpretation of what we learned is highly subjective, and the importance of several of the observations we describe below have been filtered through our eyes. While we believe the factual information we note below is objective, the way we have interpreted it, and in some instances extrapolated from it, is subject to questioning.

B. The Results

So, what did we learn?

As an overall observation, the answers to the question of whether a lawyer would be a good choice as an expert were primarily a function of the nature of the needed testimony, and the historical limitations on what lawyers can opine on about the law, as described above and to a much lesser extent based upon personal attributes of the lawyer—knowledge of the field, ability to communicate, ability to relate to the fact-finders, etc.

1. Malpractice Cases

The most common cases in our data involved lawyers being used as experts related to malpractice proceedings. This, of course, is not surprising, given that the implementation of legal procedures and techniques were at issue. Our interviewees had participated in proceedings in a variety of malpractice cases, including both franchise and non-franchise cases. The most common situation was where the lawyer was being sued by his client for failure to represent the client as is generally specified in Model Rule 1.1.⁷⁶ None of our interviewee’s cases involved claims by third parties (i.e., franchisees suing franchisor’s counsel), but there have been several cases brought in recent years where the franchisee claimed that the

⁷⁵ See Exhibit A, which contains a copy of the posting on the ABA Franchise Forum ListServ.

⁷⁶ Model Rules of Prof’l Conduct R. 1.1 (2004) (“A lawyer shall provide competent representation to a client.”).

franchisor's lawyer's failure to represent its client with competence gave him or her the right to sue the lawyer.⁷⁷

What is the rationale for selecting a lawyer to serve as an expert in malpractice cases? As they used to say on Madison Avenue, who knows more about cats than Puss'n'Boots (at the time the world's largest cat food manufacturer). Who else would know what the standards might be when representing a franchise client than another franchise lawyer who had been in the trenches, so to speak, on multiple occasions? Presumably, the lawyer, as an expert witness, and using his or her experience, could delineate how to best represent the client and also, from experience, opine on whether the defendant lawyer had used methodology that would have been recognized as being "acceptable" within the franchise legal community. For example, failure to adequately advise the client on how financial performance representations should be presented (i.e. as part of a franchise disclosure document) was one subject of expert witness testimony mentioned by one of our interviews in a malpractice case. Disclosures of commissions was also the subject of another malpractice case where a lawyer was an expert witness. Note that in these situations the lawyer was not asked to testify as to the law, but only about how compliance with the law was generally implemented by lawyers who practice in this field.

One observation from our interviews: the lawyers sued for malpractice were not ones who one might say were, on the whole, those known within the franchise lawyer community. Rather, the cases mostly emanated from acts or non-action by lawyers who did not purport to be knowledgeable in franchise law and made the mistake of straying into an area with which they lacked familiarity, and who failed to recognize the issues and to do appropriate research into franchise law or bring in someone who was educated and experienced in the field.⁷⁸

An interesting extension of our research was how lawyers, and particularly franchise lawyers, feel about testifying against lawyers. At least one person noted that as a matter of principle, he would not testify against another lawyer. When pressed, he conceded that if the malpractice was irrefutable, he might be persuaded to serve as an expert. One might speculate that in this situation, he could rationalize testifying as being a task necessary to protect the public from attorneys giving franchise advice when they simply were not competent.

We also sensed from these interviews a particular reluctance by lawyers to testify as experts where issues of judgment in advising a client were involved. As for the experienced lawyers who may have made bad judgments in advising clients, perhaps there was a "There but for the grace of God go I" feeling. While it did not specifically come out in the interviews, we also sensed that there was a hidden feeling that it is easy to be a Monday morning quarterback; or, stated differently, recognition that people should not be judged harshly by those with 20-20 hindsight.

⁷⁷ See *Turner v. Dream Diners, Inc.*, No. 08-2-02623-8 (Wash. Super. Ct. Shohomish Cnty., filed Oct. 9, 2008); *Tyszka v. Make & Take Holding, LLC*, 72 A.D.3d 1620, 1621 (N.Y. App. Div. 2010).

⁷⁸ See *State of Neb. ex. rel. Counsel for Discipline v. Orr*, 759 N.W.2d 702, 709 (Neb. 2009) (finding an attorney who represented clients in connection with the franchising of their business committed misconduct because he was not competent in franchising law).

2. Awards of Attorney Fees

Using lawyers as experts to testify as to the reasonableness of attorney fees is a second area where lawyers are frequently used as experts, in this case to justify premium legal fee rates. There is at least one reported case in the franchise field where a victorious franchisor used experts to justify calling in a firm that specialized in franchise law to testify that franchising is a specialized area requiring an attorney to have skills beyond those of general practitioners and thus the party petitioning to recover legal fees should be reimbursed for fees that were above the level often awarded in the community as reasonable fees.⁷⁹

As in the case of malpractice claims, it seems obvious here that attorneys would be the best witnesses. But is lawyer expert testimony the only source of statistical information that could support a claim for higher rates? We doubt that anyone has done an investigation as to what are the prevailing rates for franchise attorneys in a given community, and it appears to us that this would be a more complex and expensive process to prove the point in issue. But one might contend that an objective study of this nature would have more credibility than the testimony of a lawyer who might be rationalizing his own higher rates. Such a survey could be conducted by an accounting firm, a franchise consultant, or even by another lawyer.

3. Testimony About “The Law”

Earlier in this paper, we noted that lawyers were not supposed to testify as to what the ultimate outcome in the dispute at hand should be. Rather, the expert is to provide guidance to the judge, jury, or arbitrator, in reaching this ultimate outcome.

One of our interviewees felt that it was totally inappropriate to use a lawyer in any respect to aid a judge, jury or arbitrator in the decision making process. These feelings emanated not only from his view of the law governing the use of expert testimony, but also because of his belief that the lawyer will be perceived as being nothing more than a second advocate for the party who has procured his testimony; thus the testimony will be viewed with a high degree of skepticism.

However, numerous interviewees recounted stories where they had in fact testified on the law, or seen others try to offer such testimony. For example, one interviewee was asked to testify whether a particular business model was a franchise. Another told about a situation where a lawyer opined on whether a specific fact pattern involved the making of a financial performance representation. A third interviewee told of a situation where the lawyer was brought in to testify whether commissions needed to be disclosed under Item 8 or otherwise in a franchise disclosure document. To us, these all seemed to be situations where the expert testimony should not have been allowed.

BUT in practice, litigators frequently try to have this type of expert testimony submitted and accepted as evidence, with results that were difficult to tabulate. Several interviewees were involved in situations where the evidence was excluded. In most situations, the cases did not go to trial, thus leaving the admissibility of this evidence up in the air. At least one interviewee felt that his testimony in a case that went to trial was very effective in resulting in a win for the

⁷⁹ *Bores v. Domino's Pizza LLC*, Civ. No. 05-2498 (RHK/JSM), 2008 WL 4755834 at *5-6 (D. Minn. Oct. 27, 2008) (reducing award of requested attorneys' fees, in part, because of high rates charged for out-of-state counsel as compared to local counsel with extensive franchise expertise, and because defendant failed to substantiate hours or fees).

party that had retained him. In another case, one attorney noted that the case settled very quickly after his testimony. And in one other situation, the testimony was rejected, but trial counsel expressed an opinion that the testimony, even though rejected, clearly affected the judge's decision, from whose eyes it did not escape, in his client's favor.

We learned two things from our interviews on this subject. First, there is no way to readily predict whether this type of testimony will be admitted because so many cases never go to trial, and the settlement agreements are kept confidential. Thus, the expert does not know how helpful or harmful he was to the cause for which he was retained.

Second, the success of using a lawyer as an expert in a situation calling, effectively, for a conclusion of law, depends in large measure on the type of proceeding. In an arbitration, the comments we received from our interviewees were that an arbitrator is more likely to allow the expert to testify, in part, because there is virtually no risk of reversal. In contrast, judges are frequently watching their backs and thus are more reluctant to allow lawyers to testify as experts when there is fear that the lawyer is usurping the fact-finder's role--the judge fearing a reversal on appeal. And when the situation involves a jury, some of the interviewees expressed a sense that judges would be even more reluctant to allow expert testimony of this type in as evidence.

4. Explaining the Regulatory Scheme in Franchising

While testimony by lawyers giving legal conclusions seemed suspect, lawyers providing guidance to the judge, jury or arbitrator as to why and how franchising is regulated seemed to have the blessing of many of the interviewees. At least one noted that he had seen cases outside of the walls of franchising where the court accepted testimony as to the complex regulatory scheme for banking or securities regulation. Even the most vocal adversary against the use of lawyers as experts (referenced above) conceded that testimony of this nature might be acceptable and useful as long as the lawyer did not draw any legal conclusions. At least one interviewee observed that he has been in situations where the court did not have a clue about or any experience involving franchise regulation and he welcomed testimony about the regulatory scheme. This interviewee did not give any indication of whether the court's welcome of this testimony was the result of a need for education, or simply laziness on the part of the judge.

5. Custom of the Trade

The last area where lawyers are often called on to testify as experts involves customs in the trade. One interviewee recalled a situation where a franchisor had implemented a policy in its three-level franchise system of notifying nearby franchisees of its intent to put a new store in what might be considered an encroachment into their marketing areas, even though the franchisee legally had no contractual right to object to the new location. The area developer objected because the notification process delayed the area developer's ability to quickly lock down possible sites. The lawyer-expert testified that this was not an uncommon practice; it had become an accepted mode of development in at least a part of the franchise community; and demonstrated that the franchisor was making what he considered to be a rational business decision in the best interest of the franchise system, as well as a decision in the best interest of the franchisees with stores near the proposed new location.

Are lawyers the best source of testimony on customs in the trade? Not necessarily. One might also consider franchise brokers and industry experts to provide the requisite testimony. We believe that in order to provide credibility, the lawyer must be very experienced and able to present a wide range of situations where he has observed what industry does in a

particular situation. An experienced franchise consultant might be able to present the same testimony and avoid presenting the image that he is simply a second advocate for the client for whom he is testifying. A person familiar with the industry might also make a credible witness, but may not be able to testify on a question about franchising, as opposed to a question about how the industry itself operates.

One of the more interesting stories that entered our data base was one where a third party anonymously called up a corporate store and falsely represented that he worked for corporate, and informed the manager that a store employee was selling drugs on the premises and should be strip-searched. The manager did so, only to find out later that not only did the employee not possess any drugs, but the call was not from corporate. Corporate was seeking an expert who could testify on what would typically be done by a store restaurant manager in these circumstances. One attorney turned down the request to serve as an expert witness, confessing that he had no expertise in dealing with customs in the trade dealing with strip searches, but recommended another attorney, who had formerly been employed by a major quick service food franchisor, had served as franchise counsel to his employer and had been actively involved in system operations. However, we sense this was a rare situation where the attorney was selected not primarily because of his legal knowledge and experience, but because of his-in-the-trenches experience.

C. Other Observations

We had one other observation that we felt would be appropriate to include in this paper. Several of our interviewees did not like to serve as expert witnesses, not so much because of their lack of experience, but because of a fear of cross-examination. How ironic. At least one interviewee confessed that the counsel cross-examining him led him down a primrose path and thus he felt that he had not helped his client's cause any. Another told a story, where his testimony was subject to three days of cross-examination.

VI. CONCLUSION

While our mission in putting this presentation together was to focus upon the use of lawyers as witnesses, we were able to gather little conclusive evidence that lawyers make good or bad witnesses, or about how to engage one to act as an expert and how to be involved in the presentation of his testimony. Nevertheless, we feel that we have gathered information that can help lawyers make their selections. While we cannot say definitively whether a lawyer's testimony will be accepted, or what are the factors that may or may not make a lawyer a good expert, we can say affirmatively that these are issues that can be quickly glossed over. They can make the difference between a win and a loss.

EXHIBIT A

Wilkins, Janie

From: Barkoff, Rupert

Sent: Tuesday, May 08, 2012 8:01 PM

To: 'FRANCHISING@MAIL.AMERICANBAR.ORG'

Chuck Miller, Trish Treadwell and I have been tasked with moderating a workshop at October's Forum on Franchising. Our subject is something like "Using attorneys as expert witnesses, including in non-franchise and non-malpractice lawsuits. It is our impression that not very many of us have thought about lawyers as being somewhat peculiar when it comes to serving as expert witnesses except in the two roles I mentioned above.

If you have served as an expert or have hired other lawyers to serve as experts, especially in franchise cases, but in any other area, we would like to speak with you. The call should not last more than 10-15 minutes. If interested, please let me know off-line.

Any anonymity requirements will be honored. Thank you in advance

Rupert Barkoff

Kilpatrick Townsend & Stockton LLP

Suite 2800 | 1100 Peachtree Street | Atlanta, GA 30309-4528 office 404 815 6366 | cell 770 630 5521 | fax 404 541 3122 rbarkoff@kilpatricktownsend.com | My Profile | vCard

Rupert M. Barkoff
Kilpatrick Townsend & Stockton

Rupert Barkoff has been practicing franchise, distribution and corporate law with Kilpatrick Townsend & Stockton in Atlanta, Georgia since 1973. His franchise practice emphasizes solutions to registration and structuring issues and developing individual and collective solutions to franchisor-franchisee relationship problems. He is recognized as one of the United States' leading franchise attorneys by *The Best Lawyers in America*, published by Woodward/White; ranked in the top seven U.S. franchise attorneys by *Chambers*; and was selected the Atlanta franchise lawyer of the year for 2011 by U.S. News & World Report/Best Lawyers in America. He has also been recognized as one of the ten most respected franchise lawyers in the world.

Mr. Barkoff served three years as Chair of the American Bar Association's 2000 member Forum on Franchising and served six additional years on its Governing Committee. He is the Editor of *Fundamentals of Franchising*, has written over 200 published pieces on franchise law, currently serves as a columnist on franchise law for the *New York Law Journal*, and Franchise UPDATE magazine, and serves on the editorial boards of two franchise publications. He has testified before the U. S. Congress and spoke at numerous programs sponsored by the American Bar Association's Forum on Franchising, the International Franchise Association, Practising Law Institute and the Southeast Franchise Forum, among others. In 2010, Mr. Barkoff received the Lew Rudnick Lifetime Achievement Award from the American Bar Association's Forum on Franchising for his contributions to the forum and franchising in general.

Mr. Barkoff attended the University of Michigan for both his undergraduate and legal educations, receiving his undergraduate degree with High Distinction in 1970 and his J.D. degree *magna cum laude* in 1973. He was a member of Phi Beta Kappa and the Order of the Coif, and served as the Articles Editor of the *Michigan Law Review*. He is a native of New Orleans, Louisiana.

Charles G. Miller

Charles G. Miller graduated from the University of California at Berkeley in 1963 and Berkeley School of Law [Boalt Hall] in 1966. He is a shareholder with Bartko, Zankel, Tarrant & Miller, a San Francisco, California law firm of approximately 30 attorneys which specializes in general litigation, real estate, and franchise matters. Following graduation from law school, Chuck spent two years as a clerk for the Honorable Albert C. Wollenberg, a federal district judge in San Francisco. He is a member of the State Bar of California, the ABA Forum Committee on Franchising, the ABA Section of Litigation, the ABA Section of Antitrust, the State Bar of California Section of Litigation, and the IFA Legal/Legislative Committee. He also has been ranked by Chambers & Partners Global 2012 for his franchise work. Chuck has served on the Franchise Law Committee of the Business Law Section of the State Bar of California as Co-Chair of the Committee and the State Bar's Franchise and Distribution Law Advisory Commission. He has handled a wide variety of franchise problems over the years, and has litigated a number of important issues affecting the franchise industry. Chuck has spoken on franchise issues at various meetings of the ABA Forum Committee on Franchising, the International Franchise Association, and the State Bar of California, and has authored numerous articles on franchise subjects. He served as a Ninth Circuit Lawyer Representative for the U.S. District Court for the Northern District of California from 2004 through 2007. Chuck also acts as a mediator and arbitrator on franchise matters, is on the Franchise Arbitration Panel of the American Arbitration Association, and is a neutral member of the Mediation and Early Neutral Arbitration program of the U.S. District Court, Northern District of California.

Trishanda L. Treadwell
Parker Hudson Rainer & Dobbs LLP

Trish is a partner with the firm's litigation practice group. As an expansion to her existing practice in general commercial litigation, including financial services and employment law, for the last several years, Trish has represented and advised franchise systems (except for representation of her mother—a former daycare franchisee). Along with co-authors Ron Coleman and Elizabeth Loyd, Trish's article on the applicability of the presumptions of irreparable harm in franchise cases following the 2006 Supreme Court decision in *eBay v. MercExchange* decision will be published in an upcoming issue of the *Franchise Law Journal*. She finds the time spent delving into other areas of the law, like unemployment benefits, Title VII sexual harassment claims, and even bank fraud, greatly aids and positively influences her ability to advise her franchise clients as well because it helps keep her thinking fresh and flexible.

In addition to her involvement in local and national general litigation and affinity bar associations, Trish is currently a member of the Forum on Franchising's Diversity Caucus Steering Committee, the Forum Conference's Community Service Committee, and the ABA's Diverse Speakers Database Task Force.

Trish graduated from Atlanta-based Oglethorpe University with a Bachelor of Arts in English. She is serving her sixth year as a member of the Board of Trustees for the University, as well as serving on the Board's Executive Committee and as chair of the Academic Affairs Committee. After a three-year stint teaching middle school and high school English, she attended and graduated from Georgia State University College of Law.