

by Rochelle Spandorf

Practice Tips

Attorneys Serving as Expert Witnesses in Franchise Disputes

Rochelle Spandorf, a partner in the Los Angeles office of Davis Wright Tremaine, chairs the firm's national franchise practice.

Using expert witnesses in franchise disputes is a trend that continues to rise.¹ It has been observed that “[t]here is almost no facet of franchising that does not lend itself to expert witness testimony, and almost any you can identify has probably been the subject of such testimony.”² Against this backdrop, lawyers for franchise parties often ask if it is ever advisable to engage an experienced franchise attorney as a testifying expert witness and, if so, for what possible issues. While attorneys have long served as testifying experts in franchise disputes involving legal malpractice claims, might they also be effective as testifying experts in cases involving breach of contract, fraud, or substantive franchise law claims?

Engaging a testifying expert—lawyer or not—always depends on the particular issue at stake. While franchising may lend itself to expert witness testimony, not all franchise disputes require an expert witness. Actions to collect past-due royalties or terminate a franchise agreement after a franchisee shut-

ters the business typically do not require an expert. Other disputes cry out for an expert, like disputes over the valuation of a franchise, lost future profits, best practices in franchise relationships, or the discharge of a party’s contract obligations.

Once a party determines that their case would benefit from expert testimony, the question of whether an attorney experienced in franchise law would make a better expert than a non-attorney similarly depends on the particular issue at stake. Some advocates, however, never consider using other lawyers as testifying experts based on their misconception that attorneys are categorically ineligible to serve as expert witnesses in non-legal malpractice cases. This miscon-

ception emanates from the assumption that, since they are lawyers, their testimony would necessarily constitute conclusions of law, which are inadmissible under the Federal Rules of Evidence and similar state laws. In fact, neither the Federal Rules of Evidence nor any state rules of evidence categorically disqualify attorneys as expert witnesses. This applies as well in the less regulated arbitration arena where parties may write their own rules for the admissibility of expert testimony.

Federal Rules of Evidence 702 is the guidepost for the use and admissibility of expert testimony.³ It states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evi-



dence 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.

Attorney-experts, like their non-attorney counterparts, may testify regarding the ultimate facts in a dispute based on their specialized knowledge, training, or experience as long as their testimony offers guidance on a fact in issue and steers clear of expressing an opinion or conclusion about the state of the law, which is the province of others (the judge or arbitrator). Admittedly, it is not always easy to separate testimony about facts from legal conclusions to be drawn from particular facts. Under settled U.S. Supreme Court authority, including *Daubert v. Merrell Dow Pharmaceuticals* and *Kumho Tire Co. v. Carmichael*,⁴ trial judges have the sole authority to decide these admissibility questions. Assuming the proffered expert has suitable credentials, a judge's willingness to admit the expert's testimony often hinges on how much the judge feels he or she or the jury need help understanding the evidence, particularly in a specialized field like franchising.

Some federal courts have articulated a narrow exception "in exceptional circumstances" allowing expert testimony about the proper interpretation of technical statutes.⁵ While there are no reported decisions holding that franchise laws qualify for this special treatment, expert testimony about securities laws has been allowed in complex cases to help a jury understand unfamiliar terms and concepts.⁶ Since franchise laws are patterned after securities laws, it is reasonable that this narrow exception should also apply to attorney-expert testimony about the proper meaning of and nuanced concepts embedded in franchise laws.⁷

Choosing the right expert is key

When a franchise dispute is ripe for expert testimony, engaging the right expert can win the case. This does not mean that attorney-experts and non-attorney-experts are always equal choices. The right choice of expert depends not only on the expert's knowl-

edge about and personal experience with the subject matter but also the credibility the expert can be expected to have with the trier of fact. It is impossible to categorize the numerous demeanor and non-verbal cues that mysteriously influence a trier of fact's overall impression about a witness, but suffice it to say that credibility impressions about an expert are based on more than just what happens during a hearing or deposition.

franchise rights lawfully promulgated. Some jurisdictions regulate a franchisor's ability to change a franchise program materially during the term of an existing franchise agreement or the conditions that may be imposed on franchisee transfers regardless of what the parties write into their contract. Topics like whether a franchisor's conduct amounts to a constructive termination or constitutes "good cause" under franchise law seem well-suited for an

Engaging an attorney-expert may offer various strategic benefits to a party that outweigh the cost of the expert's engagement and the possibility of having to defend an admissibility challenge.

In a case involving franchise customs and practices, a non-attorney expert who has held management-level roles at one or more franchise companies or been an outside franchise business consultant to multiple franchisors may be perceived as having greater real-world operational experience and, therefore, as potentially more credible than a franchise attorney whose expertise may be regarded as academic. Even though the franchise attorney may have extensive practical experience through years of representing clients (particularly if clients are clustered in the same industry as the one central to the case), the trier of fact may discount an attorney's experience because it is a step removed from street-level experience and formed by solving problems for others through a legal lens. An attorney-expert who has built a career by only representing franchisors may be perceived as biased if testifying as an expert for a franchisor party and unsuitably credentialed if testifying as an expert for a franchisee party. Additionally, some franchise attorneys may simply make bad witnesses, prone to hedging and long-winded answers laced with legalese.

There are some franchise disputes, however, when an experienced franchise attorney may be better suited to testify as an expert than a non-attorney-expert. Franchisors are subject to various regulatory technicalities, including pre-sale disclosure and registration requirements before a franchise relationship may be legally formed and rules for terminating or not renewing

attorney-expert's testimony.

Based on their everyday work, attorney-experts have substantial personal knowledge about prevailing customs and practices of franchisors in disclosing or not disclosing certain matters in franchise disclosure documents or in the scope or substance of mandatory disclosures. Most triers of fact are unfamiliar with these technical statutes and the customs and practices that franchise parties classically observe vis-à-vis one another and may welcome a qualified franchise attorney-expert's help with evaluating evidence supporting regulatory-based claims. On these subjects, an attorney-expert's testimony may be more credible in aiding the fact-finder's understanding of a technical regulatory scheme than a non-attorney-expert's testimony.

United States v. Parker, a criminal fraud case, addressed the ability of an attorney-expert to testify as to franchise statutory requirements.⁸ The district court admitted expert testimony from a government lawyer who served as the Federal Trade Commission's "Franchise Program Coordinator" for the federal franchise sales law. The Eighth Circuit affirmed the admissibility of the attorney-expert's testimony summarizing the federal rule's pre-sale disclosure requirements, which was presented to show the defendant's intent to defraud when other evidence had already established that the franchisor's president knew about the federal Franchise Rule.

In *Parker*, the attorney-expert was not asked to opine on whether the fran-

chisor's distributorships were franchises but on whether the defendant intended to commit the statutory violation.⁹ Regardless, franchise status cases are clearly the kind in which an attorney-expert's testimony might be beneficial to both the plaintiff and defendant as well as to a trier of fact. The question of whether a particular trademark license, distributorship, or dealership is a franchise often is the dispositive issue in a dispute.¹⁰ Franchise status is entirely a matter of statute as there is no such thing as a common law franchise, and parsing franchise licenses from non-franchise licenses requires an awareness of the unique attributes that define a franchise. Authority is well-settled that franchise status is a mixed question of law and fact, making room for an attorney-expert's testimony.¹¹ The attorney-expert's challenge is to deliver testimony by elevating the facts supporting or disproving franchise status over reciting the statutory definitional elements.

Strategies

One strategy that attorney-experts employ is to offer testimony about the practices and attributes of competitors that are, or are not, complying with franchise sales laws to support an opinion on whether the distinctive attributes of a defendant's licensing program are comparable, drawing on the attorney-expert's specialized knowledge. Another strategy is to pursue the narrow exception for areas of law that are highly technical and argue that an attorney-expert's testimony about the proper meaning of unfamiliar, nuanced concepts like "marketing plan," "community of interest," and "required payment," which differentiate a franchise from other types of commercial arrangements, will immeasurably help triers of fact do their job. Attorney-experts with experience helping companies structure licensing and distribution programs to avoid franchise status or defend against franchise status claims may be more credible than non-attorney-experts to deliver testimony that aids a fact-finder's understanding of what the law identifies as a franchise and which facts tend to prove or disprove the existence of each franchise definitional element.

The dispute arena can make a difference when it comes to using an attorney-expert. Arbitrators with little familiarity with franchising tend to be more hospitable overall than trial judges to allow-

ing attorneys to testify on franchise status and other regulatory subjects since their admissibility decisions have virtually no risk of being reversed on appeal. A significant percentage of franchise agreements today adopt arbitration as the method for resolving disputes between franchise parties. As the trend of using experts in franchise disputes continues to climb, the popularity of arbitration should produce more attorney-experts who are well-practiced at delivering effective expert testimony. Attorneys who have served as testifying experts in franchise cases anecdotally report that their opinions about a party's compliance with franchise laws are being admitted into evidence more often than one might assume, not just in arbitrations but even in courtroom settings.¹²

Engaging an attorney-expert may offer various strategic benefits to a party that outweigh the cost of the expert's engagement and the possibility of having to defend an admissibility challenge. A party may gain tactical momentum and settlement leverage by sharing an attorney-expert's opinion with opposing counsel and putting an adversary on notice about the expert with whom the adversary must reckon. If an advocate is uncertain whether an attorney-expert's opinion will withstand an admissibility challenge, the advocate can incorporate the attorney-expert's conclusions and analysis into the advocate's own arguments and briefs and use the attorney-expert's knowledge in this way to convince the trier of fact of the advocate's legal position.

Influence of Inadmissibility

It cannot go unmentioned that the process of offering an attorney-expert's opinion into evidence can influence a trier of fact's knowledge even if the testimony is ultimately excluded. There is empirical research that shows that neither juries nor judges are good at disregarding relevant evidence that is ruled inadmissible.¹³ Challenges to a duly credentialed attorney-expert's testimony typically are not over the testimony's relevance but whether the testimony amounts to more than just conclusions about the state of the law. Arbitrators, too, share the same human frailties, an inability to disregard what they know and to place inadmissible legal conclusions into an out-of-reach mental compartment.

The process of ruling on the admissibility of an expert's testimony may leave

an indelible impression on a trier of fact. Evidentiary deliberations over the testimony's substance and admissibility can result in the opposite effect from the one intended, causing the trier of fact to think harder and longer about testimony the trier of fact knows or is told to ignore.¹⁴ That is not, of course, a reason for an attorney or attorney-expert to present testimony if there is no good-faith reason to believe the testimony should be admitted under existing law or under a good-faith argument for the extension, modification, or revision of existing law. However, there is good reason to believe a competent attorney-expert's testimony will continue to be admissible in franchise disputes (as it has been per the anecdotal reports from attorney-experts in franchise cases mentioned here).

Counsel should never engage an attorney-expert solely to influence a trier of fact's views on the law if the attorney-expert is not prepared to connect opinions to a specific set of facts the attorney-expert is told to assume as true.¹⁵ Suffice it to say that conduct that invites inquiry into counsel's motives for using an attorney-expert's testimony raises questions not only about counsel's ethical conduct but also about the testifying attorney-expert's ethical conduct even though the expert is "off duty" and not functioning as a lawyer in the case.¹⁶ Nevertheless, it is fair game to offer the testimony of an attorney-expert on how the law applies to a set of facts that the attorney-expert is told to assume as true.¹⁷

Furthermore, when an attorney experienced in the technicalities of franchise law testifies in a case that hinges on regulatory compliance or franchise status, the attorney-expert's testimony is likely to affect the fact-finder's impressions of the case more profoundly and impressively than a non-attorney's expert testimony could on the same regulatory issues.¹⁸

In franchise disputes involving franchise law technicalities or franchise status issues, it may be highly effective for counsel to hire the right experienced franchise attorney as a testifying expert and resource. ■

¹ See Philip F. Zeidman, *The Rise of Expert Witnesses*, FRANCHISE TIMES, Jan. 2016.

² *Id.*

³ FED. R. EVID. 702.

⁴ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

⁵ See *Aetna Life Ins. Co. v. United States*, 16 Cl. Ct. 364, 375 (1989), *aff'd*, 935 F. 2d 280 (Fed. Cir. 1991); *Principal Mut. Life Ins. Co. v. U.S.*, 26 Cl. Ct. 616, 625 (1992); *Applegate v. U.S.*, 35 Fed. Cl. 406, 425 (1996) (“Nevertheless, expert testimony reaching legal conclusions may be admissible ‘where the testimony concerns state law or a technical provision peculiar to the...industry.’”).

⁶ See *Kay Co., LLC v. EQT Prod. Co.*, No. 1:13-CV-151, 2017 WL 10436073, at *7-8 (N.D. W.Va. 2017) (reviewing the kinds of technical legal issues where courts have allowed experts to offer legal conclusions including securities cases).

⁷ See *Courtney v. Waring*, 237 191 Cal. App. 3d 1434, 1439 (Cal. App. 4 Dist. 1987) (“The Franchise Investment Law is modeled on the federal Securities Act of 1933 (15 U.S.C. §77a *et seq.*).”).

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

⁹ The Eighth Circuit found no reversible error in the lower court’s decision to admit the attorney-expert’s testimony, which was introduced to prove the defendant’s intent and motive (elements essential to the criminal charges against the defendant). The defendant was not charged with violating the federal franchise sales law.

¹⁰ There are numerous published articles on this topic. See, e.g., Robert A. Lauer et al., *Bringing Clarity to the Accidental Franchise Conundrum*, A.B.A., 43RD ANNUAL FORUM ON FRANCHISING, 2020; Paul R. Fransway, *Traversing the Minefield: Recent Developments Relating to Accidental Franchises*, 37 FRANCHISE L.J. 217 (2017); and Rochelle Spandorf, *Structuring Licenses to Avoid the Inadvertent Franchise*, A.B.A. LANDSLIDE MAGAZINE, March/April 2010.

¹¹ See, e.g., Press Release, When Does an Agreement Constitute a “Franchise”?, Cal. Dep’t of Fin.

Prot. & Innovation (June 22, 1994), available at <https://dfpi.ca.gov/commissioners-release-3-f/> (“Whether or not a fee or charge is ‘required’ and whether it is made ‘for the right to enter into a business,’ is a mixed question of fact and law”); *Campbell v. FAF, Inc.*, No. 19-CV-142-WQH-BLM, 2019 WL 2574119, at *3 (S.D. Cal. 2019) (“the determination of whether payments constitute a franchise fee is a mixed question of law and fact”).

¹² See Rupert M. Barkoff et al., *Using Franchise Attorneys as Expert Witnesses – Not Just for Legal Malpractice Cases Anymore*, A.B.A. 35TH ANNUAL FORUM ON FRANCHISING, 2012, at 22-27 (“numerous interviewees recounted stories where they had in fact testified on the law”).

¹³ See Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005). The article concludes at 1323: “The research we report in this Article corroborates that conclusion. Judges are indeed human; like jurors, they are often unable to ‘close the [v]alves of [their] attention.’”

¹⁴ *Id.* at 1253-55.

¹⁵ See W. William Hodes, *Navigating Some Deep and Troubled Jurisprudential Waters: Lawyer – Expert Witnesses and the Twin Dangers Of Disguised Testimony and Disguised Advocacy*, 6 ST. MARY’S J. LEGAL MAL. & ETHICS 180, 191, 214 (2016). The Hodes article discusses the “pernicious influence” of disguised testimony, which is when an expert witness confidentially expresses their opinion about facts as if they are known to the expert to be true (despite having no personal knowledge) instead of assumed to be true in order to sway the factfinder to agree with their side’s version of the case. The Hodes article

goes on to discuss disguised advocacy in the context of “the often blurry, but nonetheless, real lines” separating ethical and unethical conduct. *Id.* at 217. Besides raising ethical issues, it is an ill-conceived strategy for an advocate to encourage their attorney-expert to testify in a way that obscures the distinction between a set of facts that they are told to assume are true and those truly in contest: if the expert’s testimony is admitted and counsel wins the case, the judgment may be appealed on the grounds that the lower court’s admissibility decision is reversible error.

¹⁶ *Id.* at 198 (the rules of professional responsibility, which forbid a lawyer from engaging in conduct prejudicial to the administration of justice, apply regardless of whether a lawyer is acting as a representative or in some other capacity).

¹⁷ *Id.* at 202. The Hodes article offers specific guardrails for using attorneys as testifying experts within the bounds of law. Professor Hodes, a scholar on the law of lawyering, concludes that, within these boundaries “it is perfectly acceptable for [an attorney-expert] to help the jury close the circle and reach a verdict about whether...legal standards have been breached or satisfied.” *Id.* at 206.

¹⁸ *Id.* at 203 (“Lawyer-experts and other experts are fundamentally different. They differ as a matter of practice because lawyer-experts are trained in the arts of communication and persuasion and may make disguised testimony about the facts seem more like actual testimony about the facts; more important, they differ jurisprudentially, because, unlike other experts, lawyers are almost always called upon to give opinions that implicate the content of the law applicable to the case.” (omitting internal citations)).

Reprinted with the permission of *Los Angeles Lawyer*, the magazine of the Los Angeles County Bar Association.