

FRANCHISE LAW – LOSS PREVENTION TIPS

Familiarize yourself with the Acts and legislation requirements

Lawyers acting for franchisors or franchisees should ensure that their clients are aware of the disclosure obligations which the Act (and the courts) place on franchisors. Inadequate disclosure entitles a franchisee to rescind the franchise agreement within two years and to receive extensive damages.

Do not dabble in franchise law

Franchise law is a complex area of law. Lawyers doing work in this area should have sufficient expertise to handle that work, and if not, they should refer the matter to someone who has franchise law expertise. The client should also retain a chartered accountant familiar with franchises. The detailed financial disclosure requirements can be beyond the scope of a lawyer's expertise.

Beware of “franchise in disguise”

A lawyer might fail to identify a commercial transaction as a franchise arrangement when dealing with a new franchise – when the party behaving as a franchisor is not yet fully aware that they are creating a franchise. This goes back to the point about not dabbling – as anyone knowledgeable in the area would immediately recognize a franchise agreement, regardless of what it's called.

Avoid limited retainers

Limited retainers, even if they are reduced to writing, tend to be ineffective in franchise cases. In the context of a franchisee to franchisee purchase in particular, lawyers who think they are just acting on the “closing” may not deal with the franchise aspects of the case, which can lead to disaster. You can't treat a franchise like a typical asset purchase.

Carefully document instructions and advise

Many franchise claims involve allegations that a lawyer failed to advise the franchisor or franchisee regarding proper disclosure. Regrettably, lawyers' files often have little or no documentation that the statutory provisions of the Act and the consequences of non-compliance were explained to the client. As a result, liability is often a foregone conclusion or turns on a credibility contest, which commonly favours the client.