

FRANCHISING

Expert Analysis

Mama, Don't Let Your Babies Grow Up to Be Franchise Lawyers

In 2005, I published in this column an article with an almost identical title, except that the admonition was aimed at securities lawyers, rather than franchise lawyers. The theme of that article was that the securities practice was starting to dry out. What I did not say was that this was particularly true for lawyers who wanted to have large-firm careers in securities law, rather than those interested in going in-house. I would speculate that overall securities law practice at the AmLaw 200 has not been a prominent growth sector for those law firms since my original article was published. I have only hunches to support this, but I do believe that any betting man or woman would take my side if it came to a wager.

I sense that the demise of private practice securities law has resulted from more and more companies, especially the larger ones, finding it economically more effective to handle securities issues, including additional issuances of stock, 10-K filings, and other '34 Act reporting obligations, through their internal legal departments. Thus, securities law practice has not gone away, but if you want to practice securities law, think of in-house as being your long-term career goal.

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By
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Franchise law is starting to follow this same trend. When I began legal practice in the last century, franchise law barely existed. Only in 1970 or so did it become a noticeable area of practice as a result of enactment of state franchise disclosure and relationship laws, and, within the next decade, the entry of the Federal Trade Commission into the regulatory picture.

The newness of this field of law effectively meant that, with the exception of the largest franchisors, private law firms had a monopoly on the market for franchise legal services. And in those days, the number of franchise companies with big franchise systems was not very large. Even today, there appear to be currently only 286 systems with more than 200 franchised operations. In other words, much of the franchise work remained in the hands of outside counsel during this infancy period because the lack of economies of scale and experience by practitioners made it difficult for franchisors to have full-time franchise lawyers on staff. At that time, becoming a franchise lawyer looked like a good opportunity for a career,

whether you would be in-house or outside counsel.

But, as in the securities field, things change. First, the market for franchise legal services has become quite different over the past four decades. Today, there are, in fact, more chains with more units per chain; franchise law has become more complex; there are many more experienced practitioners in the franchise law field; and the roles played by in-house counsel have been expanded and often include additional responsibilities, such as corporate and securities issues. These factors make it economically more attractive for companies to hire their own franchise lawyers rather than outsource their legal needs in the field.

Moreover, for those who want to pursue franchise law in private practice, the competition among franchise lawyers for business has become quite fierce, as the number of lawyers who have become expert in franchise law has outpaced the demands of the marketplace, thus making it more difficult to find clients who outsource their franchise legal work. And, with the advent of the Internet and firms having offices in multiple cities, what were once strictly local franchise practices have gone regional or national in seeking out new business. For example, Los Angeles franchise lawyers, previously content in solely working the California market, now compete with law firms in New York. And vice versa.

This phenomenon applies to both transactional and litigation work.

Another sign of market change is that many companies, particularly private equity funds, often own more than one franchise system. This provides an opportunity for them to achieve economies of scale for their franchise work by consolidating the legal needs of all of the systems they control.

Dismal Picture

None of these trends bodes well for the attorney interested in practicing franchise law in a private firm. But the situation is even worse than the one so far painted, because working in private law firms has itself become less attractive. I have spent my entire legal career—now more than 40 years—with one law firm. That is, today, a rare track record. When I graduated from law school, the career or employer you selected often was a lifetime decision. That is no longer the case.

As Michael Trotter noted in his recent publication, *Declining Prospects* (CreateSpace, 2012), the law firm of the future will look quite different from the law firms of five or more years ago. The law firms will become more competitive; the Darwinian effect—the survival of the fittest—will become more the model in the market place. And internally, legal practice in private law firms will also become less attractive. Firms will be more selective in how many new partners they make, and a lawyer's ability to generate new business will be the primary prerequisite to rise to the top, a most difficult task when the marketplace for outsourced franchise legal services may be shrinking.

Coupling this with a decrease in client loyalty and a limit on how much one lawyer can charge in this highly competitive marketplace, paints a dismal picture for the future. We are already seeing this trend as law firms continue to raise hourly rates. It is not surprising at all that many companies have found taking legal services in-house to be all the more attractive. The private firms need to recognize that the gravy train for outside legal services

has dwindled and will continue to do so. Some have already done so, as we have seen several law firms withdraw from the franchise market.

Will it be easy for companies to find qualified franchise lawyers to hire? Undoubtedly so. Companies have figured out that it makes sense to let private law firms hire and train franchise lawyers, and then hire these lawyers away from the law firms and into their own organizations. This way they avoid training costs, so that these transient lawyers begin work at their companies wearing roller skates. There is little, if any, start-up down time. Contrast this to the situation in private law firms, where it often takes one to two years for the private firms to make profits from new hires. When these trends are coupled with the likelihood that associates in law firms will not make the big jump to partnership, it becomes more probable that lawyers will jump ships and go in-house.

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Time and Money

And there are other reasons that in-house positions have become more attractive. Four decades ago, there was a stigma attached to going in-house. Companies were viewed as being havens for the less successful or less ambitious attorneys. That is no longer true. Many lawyers have abandoned the rat race of private practice for the corporate world, and for good reasons. In some cases, it may be from the fear of having to find new work. In other cases, it may be that the lawyer wants to live an alternative lifestyle: less than a five day work week or more time at home. But if one looks at the credentials of many in-house franchise lawyers, they are superlative. And many of them work just as

hard, if not harder, than their outside counsel counterparts.

Compensation is one other variable to look at. In the past, corporate positions have not, and still do not on average, pay as well as private ones. The typical salaries are considerably lower, and much of an attorney's compensation comes in the form of bonuses. However, if the company or legal department has a successful year, the gap between private practice and in-house corporations grows smaller. Also, corporate positions can offer one thing that law firms cannot—stock options.

Law firms can award high-performing lawyers greater levels of equity in the law firm, but these equity levels readily change from year to year in most firms; some years they increase; sometimes the amount of equity goes down. Companies, on the other hand, can offer stock and stock options. These values, too, will fluctuate, but, when an attorney with stock leaves his company, he or she typically walks away with the equity he or she has accumulated, while the lawyer who leaves his law firm often walks away empty handed.

I have painted a dismal picture in this column—perhaps I have overstated the case. However, lawyers who want to practice franchise law must be aware that the good times for private practitioners may be a thing of the past. Do I regret that I became a lawyer who specializes in franchise law? No. I have had a rewarding career. But, if I were starting anew today, I would feel obligated to look at other areas of practice—especially intellectual property—as being more attractive. The need for franchise lawyers in private practice will continue to exist, but in a quite different environment.