

## **California Leads the Way in Franchise and Distribution Law**

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*By Robin Day Glenn, Orange County Lawyer*

On December 1, 2006, seven California attorneys sat in a conference room at the Irvine Marriott typing or scribbling copious notes as consultant Karen Barbieri taught us how to write a good examination. A good examination, she explained, is one that elicits the examinee's knowledge without confusing, misleading or distracting him or her. The note takers were the newly appointed members of the Board of Legal Specialization's Advisory Commission on Franchise and Distribution Law. She was preparing us to write the first qualifying test for the State Bar of California's newest certified specialty, Franchise and Distribution Law, which is scheduled to be administered this August.

The meeting's Irvine location was logical. Five of the newly appointed members of the Advisory Commission are Orange County lawyers – Chairman Gerard P. Davey of Costa Mesa, Don M. Drysdale of Newport Beach, Robin Day Glenn of Rancho Santa Margarita, James M. Mulcahy of Irvine and Rodney R. Hatter, also of Costa Mesa. The county has been home to such franchise giants as Taco Bell, Money Mailer, Sir Speedy, PIP and Century 21 is also home to a number of practitioners who serve the legal needs of franchisor and franchisees.

Nor is it surprising that California is the first state in the U.S. to make franchise and distribution law a certified specialty. California law always led the nation in this field. In 1971, California's Franchise Investment Law (Corporations Code § 31000, *et seq.*) became the nation's first statutory scheme to regulate the offer and sale of franchises. The federal government followed suit a decade later, promulgating a Franchise Rule administered by the Federal Trade Commission, as did Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin. In recent years, franchise legislation has been enacted in a growing number of non-U.S. jurisdictions, including the Canadian provinces of Alberta, Ontario, and Prince Edward Island, as well as the countries of Australia, Belgium, China, France, Indonesia, Italy, Japan, Korea, Lithuania, Malaysia, Mexico, Romania, Russia, Spain, Sweden, Taiwan, Venezuela, and Vietnam.

In addition to the presale disclosure and registration requirements embodied in the Franchise Investment Law, California has also enacted legislation governing the termination and non-renewal of franchises (California Franchise Relations Act, Bus. and Prof. Code § 20000, *et seq.*) and specialty legislation for particular industries, notably petroleum dealers and distributors, beverage distributors and new motor vehicle dealers.

### **What is Franchise and Distribution Law?**

When attorneys refer to franchise law, what springs to mind most readily is the complex body of regulatory laws described above, laws designed primarily to protect the rights of prospective franchisors and franchisees. But franchise law encompasses far more than this important function. The centerpiece of this area of legal expertise is the peculiar dynamic of the relationship between franchisor and franchisee. Permutations of this relationship – such as distributor-dealer, trademark licensor-licensee, manufacturer-distributor, seller-assisted marketing plan seller-buyer – share many of the same

characteristics. Franchise law and distribution law include all law that commonly applies to these relationships.

Franchise law is, in reality, a rich *mélange* drawn from many different areas of law, including administrative law, trademark law, antitrust law, bankruptcy law, contract law, conflicts of law and international law, as well as the law applicable to unfair business practices, trade secrets, business opportunities, alternative dispute resolution, and more. An experienced franchise lawyer knows a little about all of them and a good deal about some of them. “Franchising is just one method of distribution,” says Commission member Robert J. Brown. “A good franchise lawyer must be sensitive to all of them.”

When you consider that most transactional franchise attorneys practice nationally and, to an increasing extent, internationally and that a large percentage of franchise dispute resolution involves multiple jurisdictions, it becomes apparent that the breadth of knowledge required to operate competently in this field is enormous.

### **Why Should Franchise and Distribution Law Be a Certified Specialty?**

The California Supreme Court approved the State Bar’s legal specialization program in 1972, making this the first State in the country to institute such a program. The purpose of the program is “to identify to the public attorneys who have demonstrated proficiency in the specialty fields and to encourage attorney competence.” The certification program also helps attorneys identify experts with whom they may consult or to whom they may refer their clients.

Several years ago, members of the State Bar’s Franchise Law Committee and others in the California franchise legal community began talking about the idea of adding franchise and distribution law to the list of certified specialties. “Although many general business attorneys or litigators perform particular tasks in our field well, all of us in franchise law have seen enough malpractice, sometimes originating from well-known law firms, to be aware that legal consumers need assistance in selecting attorneys in this area of law,” says Commission member David Holmes of San Luis Obispo, who chaired the Franchise Law Committee when the idea was launched.

Commission member Jim Mulcahy, who also helped get the project off the ground, explains, “Most franchise lawyers have a common understanding and shared perspective of the law that comes from joint participation in continuing education programs, state bar committees and writing projects over the years. Creating a certified specialty in this area of law gives recognition to what already exists but which may not be apparent to the general legal community.”

### **Why is distribution law included in the mix?**

San Francisco attorney Stafford Matthews, who chaired the consulting group that originally developed and presented the concept to the State Bar Board of Governors for approval, explains: “There are many different kinds of commercial relationships in the marketing and distribution of products and services. Although some of these may not be regulated by the Franchise laws, most share certain characteristics. The committee felt that it was not possible or appropriate to separate these similar types of relationships. An expert in this field should be competent in a broad range of relationships.”

In fact, most franchise attorneys spend a good deal of time counseling business owners and other attorneys how to avoid the application of the franchise laws, when appropriate. Lawyers whose practices are centered on the manufacturer-distributor relationship must have a sophisticated understanding of the numerous issues that must be considered in determining whether a distributorship is also a franchise. They must also be competent to deal with the consequences of this determination.

### **What Will It Take to Qualify?**

Qualifying for certification as a specialist in franchise and distribution law is no slam dunk, but should be feasible for an experienced attorney practicing in this area of law. An applicant must:

- be an active member of the State Bar of California
- demonstrate that he or she has had substantial experience in this specialty within the past five years, as demonstrated by achieving a specified number of points for performing legal tasks included on a long list of services involving franchise or distribution law
- have completed at least 45 hours of continuing education approved by the State Bar for franchise and distribution law
- pass a written examination
- be favorably evaluated by attorneys and judges familiar with the quality of the applicant's work

### **How Does Certification Benefit an Attorney?**

A certified specialist may advertise his or her specialty status in press releases, business cards, brochures and stationery, as well as on websites, according to California Rule of Professional Conduct 1-400(D)(6). Many franchise agreements currently require that mediators or arbitrators must be attorneys with substantial experience in franchise law, but arbitral organizations have difficulty identifying these practitioners. We can anticipate that franchise agreements will soon be revised to specify that neutrals must be certified specialists. The State Bar website and various directories also offer searches or listings of certified specialists.

### **How Can I Get More Information?**

More information about the State Bar's legal specialization program for this and other specialties is available at <http://www.californiaspecialist.org> or by calling the Board of Legal Specialization at 415.538.2120.

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*Robin Day Glen is the managing attorney at the Franchise Law Team in Rancho Santa Margarita. She can be reached at [rdglenn@franchiselawteam.com](mailto:rdglenn@franchiselawteam.com) or at 949.459.7474.*