

# Teaching Franchise Law in Law Schools: A Role for Experienced Franchise Lawyers

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The authors of this article write to encourage experienced franchise lawyers to propose franchise law courses to law schools and, if the proposals are successful, to teach the courses as adjunct professors. Both authors have taught franchise law, and both are happy to consult with any lawyer considering becoming an adjunct professor who has questions concerning the proposal process or the design or teaching of the course.



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Part I of this article describes the role that adjunct professors have performed in law schools for decades and reasons for a school administration to have an adjunct teach franchise law. Part II highlights reasons that a lawyer can cite to persuade a law school that does not offer a course on franchise law to do so. Part III describes recent developments in legal education that affect law schools' interest in adding new courses and hiring new adjuncts—developments that may pose challenges but also offer opportunities for aspiring adjunct professors of franchise law. Part IV explains how the Forum's casebook, published in 2013, can be used in proposing, designing, and teaching a franchise-law course.

## I. Adjunct Professors and Franchise Law

For decades, law schools have employed adjunct professors to teach courses after the first year. An adjunct may be well versed in a substantive legal area that is outside the areas of expertise of the school's full-time faculty members. Changes in law school curricula often lag behind developments in

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practice, and few law schools have enough full-time faculty members to teach all the courses that may be useful to their students. A particular course may require greater familiarity with practice than full-time faculty members possess. A lawyer who teaches as an adjunct can provide curricular enrichment in terms of course coverage and by introducing students to various aspects of legal practice. Moreover, adjunct teaching can powerfully reinforce traditional doctrinal instruction<sup>1</sup> by bringing home to students the connections between mastery of doctrine and effective practice.

Experienced franchise lawyers can offer law schools the benefit of their expertise in a specialized area of law and practice that is not covered in depth in Contracts or other traditional business-law courses. Franchising is subject to myriad statutes, regulations, and common law doctrines, including federal and state disclosure and relationship laws, some of which are highly complex.<sup>2</sup> The Federal Trade Commission (FTC) Rule, state disclosure laws, state relationship laws, and federal and state special industry laws all focus specifically on franchise sales and relationships. The numerous cases on inadvertent franchises offer cautionary examples of adverse business consequences that can result from either inadequate legal representation or none at all. Moreover, the ongoing activity on the Forum's list serve attests to the dynamism of franchise practice, as new legal issues and practical problems continually arise, challenging even seasoned practitioners.

To understand the purposes that those laws are designed to serve, students must become familiar with the transactions to which the laws apply and the claims of abuse that prompted their adoption. Franchise lawyers have a wealth of business knowledge that they can impart to students.<sup>3</sup>

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1. In earlier decades, classroom discussion often took the form of Socratic questioning by a faculty member and responses by students. Some teachers provided few, if any, clear answers to students' questions. More recently, the pendulum has swung away from the "Kingsfield" model of teaching, summarized in Catharine W. Hantzis, *Kingsfield and Kennedy, Reappraising the Male Model of Law School Teaching*, 38 J. LEGAL EDUC. 155, 156 (1988), toward a model in which teachers are more willing to provide clear answers. In addition, some teachers teach mainly by means of lectures.

2. The FTC regulates offers and sales of franchises pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (West 2016) and a Trade Regulation Rule on Franchising, 16 C.F.R. § 436 (2016). The FTC also regulates offers and sales of business opportunity ventures. 16 C.F.R. § 437 (2016). Approximately fifteen states have adopted legislation regulating offers and sales of franchises. See, e.g., California Franchise Investment Law, CAL. CORP. CODE §§ 31000–31516 (West 2016). Numerous states have adopted legislation regulating the ongoing relationships between franchisors and their franchisees and restricting franchisors from terminating or refusing to renew a franchise in the absence of good cause. Congress and numerous states have also enacted legislation regulating franchising in particular industries. For example, Congress enacted legislation regulating franchising in the automobile dealer industry, 15 U.S.C. §§ 1221–1226 (West 2016), and the petroleum marketing industry, 15 U.S.C. §§ 2801–2807 (West 2016). States regulate franchising in the automobile, petroleum, farm, and equipment industries, among others, as well as beer and wine distribution.

3. Fellow faculty members may also gain useful knowledge and ideas from interaction with adjunct franchise law practitioners, although the practitioners may have few, if any, interactions with full-time faculty members. See Andrew F. Popper, *The Uneasy Integration of Adjunct Teachers into American Legal Education*, 47 J. LEGAL EDUC. 83 (1997).

That knowledge will help students understand the context in which a particular franchise transaction took place, or a particular dispute arose, including at least some of the economic incentives and motives of the various actors who were involved. Contextual information can greatly increase students' interest in the law as well as their comprehension of legal issues.

## II. Franchising: A Major Player in the Economy but an Orphan in Legal Education

A few statistics concerning franchising's economic role can help to convince a law school's administration, and perhaps also its faculty,<sup>4</sup> of the importance of franchise law. According to the U.S. Census Bureau, in 2007 there were 453,326 franchised establishments in the "top franchise sectors." Those establishments "accounted for 10.5 percent of businesses in the 295 industries covered by the census inquiry. . . ." The value of "sales, shipments, receipts, or revenue" from franchises was \$1,288 billion, or 16.8 percent of the total for all businesses. Annual payroll was \$154 billion, or 9.7 percent of the total for all businesses, and employment was 7,882,048, or 13.5 percent of the total for all businesses.<sup>5</sup>

To the extent that a subject generates news and controversy, it should be of heightened interest to law schools and their students. In recent years, labor-related litigation and administrative proceedings have brought franchising into the national discussion of income inequality.<sup>6</sup> News organizations and, no doubt, social media, have covered lawsuits in which plaintiffs sought to impose joint-employer liability on franchisors, including Domino's,<sup>7</sup> for actions by employees of their franchisees. The City of Seattle's decision to treat some franchised units as large employers for purposes of its minimum wage ordinance generated an unsuccessful but well-publicized challenge by the International Franchise Association, and the Ninth Circuit's

4. The faculty may need to vote to add the course to the curriculum. If so, the practitioner may need to begin the process by submitting a proposal to the faculty's Curriculum Committee. The office of the Dean should be able to identify the chair of that committee and provide his or her contact information.

5. U.S. CENSUS BUREAU, ECONOMIC CENSUS: INDUSTRY SNAPSHOT (2007), [http://www.census.gov/econ/census/pdf/franchises\\_snapshot.pdf](http://www.census.gov/econ/census/pdf/franchises_snapshot.pdf) (last visited June 18, 2016). The International Franchise Association estimates that "[t]he output of franchise establishments in nominal dollars in 2016 will increase 5.8 percent from \$892 billion to \$944 billion. . . ." The IFA also estimates that "the number of franchise establishments will increase by 1.7 percent in 2016, from 782,573 to 795,932" and that "the number of direct jobs in franchise establishments will increase 3.1 percent in 2016 from 8,834 million to 9,112 million. . . ." Int'l Franchise Ass'n, 2016 Franchise Business Economic Outlook (Jan. 2016), [http://www.franchise.org/sites/default/files/EconomicOutlookInfographic\\_January2016.pdf](http://www.franchise.org/sites/default/files/EconomicOutlookInfographic_January2016.pdf) (last visited June 30, 2016).

6. See e.g., Erin Conway & Caroline Fichter, *Surviving the Tempest: Franchisees in the Brave New World of Joint Employers and \$15 Now*, 35:4 FRANCHISE L.J. 509 (2016) ("Although both wage stagnation and the fissured workplace have concerned policymakers for decades, the Great Recession brought them to the attention of the general public. . . . Both issues could have a substantial effect on the franchise industry.")

7. *Patterson v. Domino's Pizza*, 333 P.3d 723 (Cal. 2014).

decision upholding the ordinance<sup>8</sup> may encourage other municipalities to emulate Seattle's example. The general counsel of the National Labor Relations Board has issued complaints alleging that McDonald's, as a joint employer of the employees of some of its franchisees, "violated the rights of employees [of those franchisees] by, among other things, making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions, including participating in nationwide fast food worker protests about their terms and conditions of employment. . . ."<sup>9</sup> And the U.S. Labor Department has sued a New Jersey company that allegedly misclassified its cleaning employees as franchisees, claiming that the misclassification led to violations of the Fair Labor Standards Act.<sup>10</sup>

The future may well bring more developments with regard to claims of labor law violations in franchise systems. David Weil, the Administrator of the Wage and Hour Division of the Labor Department, authored a 2014 book called *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*. The word "fissured" in the title refers to a workplace in which "lead" companies focus on their core competencies, using contracts to split off—delegate—the performance of non-core functions. In Weil's view, franchising is a form of fissuring which, at least in certain industries, can lead to wage and hour violations.<sup>11</sup>

Many franchise lawyers believe that these employment-related claims against franchisors are based on a fundamental misunderstanding of the franchise relationship. But regardless of their merit, the claims have brought attention to franchising that is likely to persist for some years to come.

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8. *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 839 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1838 (2016).

9. Press Release, Nat'l Labor Relations Board, NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's USA, LLC, as Joint Employers (Dec. 19, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-issues-consolidated-complaints-against> (last visited July 2, 2016).

10. See News Release, U.S. Dep't of Labor, New Jersey Commercial Cleaning Company Sold "Franchises" to Low-Wage Custodial Workers to Avoid Paying Minimum Wage, Overtime (May 9, 2016), <https://www.dol.gov/newsroom/releases/whd/whd20160509-0> (last visited July 2, 2016). The suit culminated in a consent judgment against the company. *Id.*

11. Weil summarizes his views concerning franchising as follows:

Any effort to improve labor standards in franchised industries must recognize that organizational form's role in creating fissured workplaces. Traditional approaches to enforcement—focusing on the individual enterprise—may bring to light widespread violations of minimum wages, overtime pay, and off-the-clock work. But if not wedded to a larger strategy that attempts to change the forces that drive this behavior, enforcement will be effective only at the margin.

DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 158 (2014). Weil's views were embraced by a three-to-two majority of the National Labor Relations Board in *Browning-Ferris Industries of California, Inc.*, 362 NLRB 186 (2015). The NLRB is headed by a five-member board appointed by the president. Currently, the Board has two vacancies created by the departure of two members, including one of the members in the *Browning-Ferris* majority and one who dissented. The filling of both vacancies by President Trump may change the political and philosophical makeup of the board, resulting in a return to the joint employer definition, or something closer to the definition, that the Board employed prior to the *Browning-Ferris* decision.

Adding franchise law to the curriculum may also enable a school to augment its existing strengths. In a school that maintains an intellectual property concentration, for example, the administration or the faculty, or both, may believe that students should be able to study trademarks and trade secrets in action. A school that maintains a concentration in corporate, commercial, or workplace law may adopt the course in recognition of franchising's role in the economy.

Despite the importance of franchising and the complexity of franchise law, only a very small percentage of law schools have offered courses on the subject. There are more than 200 law schools in the United States.<sup>12</sup> Yet when one of the authors of this article conducted an informal survey of subscribers to the Forum's list serve in 2015, respondents identified only thirteen law schools in the country that have offered the course during the past twenty-five years.<sup>13</sup> There may be more, but the total number is undoubtedly small.

Today's law students have come of age in a world in which franchised outlets are ubiquitous. Reminding administrators of that fact and making them aware of the existence and complexity of franchise law may convince them to incorporate franchise law in their curricula and hire experienced lawyers as teachers.

### III. Recent Developments in Legal Education: Lower Enrollments but More Interest in Practice-Oriented Courses

Two developments in legal education since 2010 have affected the hiring practices of many law schools. One development has probably made many schools less receptive to proposals for new courses or employment of new adjuncts, or both. But the other has increased schools' interest in practice-

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12. The American Bar Association has granted full accreditation to 201 law schools in the United States and provisional accreditation to four more. ABA Section of Legal Education and Admissions to the Bar, Resources, ABA-Approved Law Schools, [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html) (last visited June 30, 2016). Moreover, some states have given degree-granting authority to law schools that lack even provisional ABA accreditation.

13. The survey asked for information concerning franchise law courses taught in law schools and any personal experience teaching such courses. The thirteen law schools are Emory University School of Law; Fordham University School of Law; Georgetown University Law Center; University of LaVerne College of Law; University of Memphis, Cecil C. Humphreys School of Law; University of Michigan Law School; Nova Southeastern University, Shepard Broad College of Law; Quinnipiac University School of Law; San Fernando Valley College of Law (now University of West Los Angeles School of Law); Southern Methodist University, Dedman School of Law; Temple University Beasley School of Law; University of Virginia School of Law; and Western New England University School of Law. After the completion of the survey, the law school at the University of Georgia added a course, which was taught for the first time in spring 2016, and the authors learned that a franchise law class has been taught at Creighton University School of Law. Survey respondents also identified courses outside the United States at Bond University in Australia, Western University Law School in Canada, University of Toronto in Canada, and University of Adelaide in Australia.

oriented courses, which experienced lawyers are well qualified to teach, either alone or in collaboration with full-time faculty members.

The first development is a substantial decline in the number of applicants to law schools.<sup>14</sup> That decline has led many law schools to reduce the number of students they admit. A school that does so while offering essentially the same curriculum will experience lower enrollments in many courses, leading the administration to consider reducing the number of electives, and perhaps the frequency with which certain electives are offered, and to reject proposals for new ones absent compelling arguments in their favor.

Smaller student bodies also mean reduced tuition revenue, which may increase interest in staffing courses with adjunct professors, who are relatively inexpensive.<sup>15</sup> But an American Bar Association accreditation standard limits the percentage of courses in a school's curriculum that adjunct faculty members can teach.<sup>16</sup>

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14. In the fall of 2012, according to the Law School Admission Council, there were approximately 87,900 applicants to ABA-accredited law schools. The number declined every fall thereafter, reaching a low of 54,500 in the fall of 2015. Law School Admission Council, LSAC Resources, Data, End-of-Year Summary: ABA (Applicants, Applications, & Admissions), LSATS, Credential Assembly Service, <http://www.lsac.org/lsacresources/data/lsac-volume-summary> (last visited June 22, 2016). The number of people who took the LSAT in 2015–16 was 4.1 percent higher than it was in 2014–15, *id.*, suggesting that the number of applicants may have stabilized.

15. The nominal tuition per credit hour at a relatively expensive private law school is approximately \$1,500 to \$2,000. *See, e.g.,* Daniel Park, *A Nudge, Push, and a Shove: Where Duty Must Meet Deceptive Law School Marketing*, 27 GEO. J. LEGAL ETHICS 785, 803 n.108 (2014). Writing in 2014, the author stated that Brooklyn Law School, which ranked 83 in the 2014 *U.S. News & World Report* rankings, charged \$1,795 per credit, while New York University School of Law, which ranked 6, charged \$54,678 per year. A full-time student generally takes 28 to 30 credits worth of courses per year. Both Brooklyn and NYU law schools are located in New York City.

At most, if not all, ABA-accredited law schools, most students receive some scholarship support and thus pay less than the nominal tuition. David Yellen, Dean and Professor of Law at Loyola University of Chicago School of Law, estimates that the average private law school tuition discount rate may be approaching 50 percent. *See* David Yellen, *Tuition Discounting on the Rise and Its Impact on Law Schools*, LAW DEANS ON LEGAL EDUC. BLOG (June 19, 2016, 4:54 P.M.), [http://lawprofessors.typepad.com/law\\_deans/2015/08/tuition-discounting-on-the-rise-and-its-impact-on-law-schools.html#](http://lawprofessors.typepad.com/law_deans/2015/08/tuition-discounting-on-the-rise-and-its-impact-on-law-schools.html#). Assuming that Dean Yellen is correct and an adjunct faculty member receives \$5,000 for teaching a two-credit franchise law course, an enrollment of five or six students may be necessary to cover the cost of the adjunct's compensation. *See* Popper, *supra* note 3 (stating that in 1997 it was "fairly typical" for an adjunct to receive \$4,000 to \$5,000 for teaching a fourteen-week course that met once a week). The law school will probably also want compensation for its administrative expenses and overhead as well as any percentage of its revenue that it pays to its university unless it is one of the country's few free-standing law schools. For purely economic reasons, the law school administration may believe that the course needs a minimum enrollment of seven or eight students.

If a course is offered for one credit, it will meet for one academic hour per week; if it is offered for two credits, the meeting will be for two academic hours. An academic hour may be only fifty minutes long. Rates of compensation probably vary from one school to another. Given the time required for class preparation, grading, and any work with students outside of class, however, the adjunct's hourly rate is likely to be quite low.

16. The standard provides as follows:

The full-time faculty shall teach substantially all of the first one-third of each student's coursework. The full-time faculty shall also teach during the academic year either (1) more than half of all of the credit hours actually offered by the law school, or (2) two-thirds of the student contact hours generated by student enrollment at the law school.

These and other factors may lead a school to decline to add franchise law to its elective offerings or to hire an adjunct faculty member to teach the course. Moreover, a school may add the course and hire an adjunct to teach it, only to drop the course from the schedule in a particular semester because of insufficient enrollment.

The second development, however, is an effort by many law schools to increase their offerings of practice-oriented, or “experiential,” courses, or to add experiential components to existing doctrinal courses. The American Bar Association, which accredits law schools, recently mandated that schools require all their students to complete satisfactorily at least six credits of experiential courses. Live-client clinics, externships, and simulation courses can all qualify as experiential. A simulation course is one which

provides substantial experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts or circumstances devised or adopted by a faculty member, and (2) includes the following:

- (i) direct supervision of the student’s performance by the faculty member;
- (ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and
- (iii) a classroom instructional component.<sup>17</sup>

In a simulation course that focuses on franchising, a lawyer can draw on his or her experience to craft any number of realistic exercises for students. Possible drafting assignments, for example, include a memo to a supervising lawyer, a comment letter or other communication to a regulatory agency, a letter or memo to a client, a portion of a disclosure document or a franchise agreement, a notice of breach or termination, and a court pleading asserting or defending a franchise law claim. Students can engage in mock negotiations, counseling sessions, or dispute resolution proceedings under the lawyer’s supervision. The resulting curricular enrichment can assist the law school in meeting its accreditation requirements and its graduates in their transition to practice.

If a franchise lawyer knows a full-time faculty member who is willing to co-teach a franchise law course, the two teachers can collaborate. Students will then benefit from both the lawyer’s experience in franchise practice and business and the full-time teacher’s experience in teaching classes, giving assignments, and assessing students’ work.<sup>18</sup>

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American Bar Association, *2015-2016 Standards and Rules of Procedure for Approval of Law Schools*, Standard 403(a), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2015\\_2016\\_aba\\_standards\\_for\\_approval\\_of\\_law\\_schools\\_final\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_aba_standards_for_approval_of_law_schools_final_authcheckdam.pdf) (last visited June 22, 2016).

17. *ABA Standards and Rules of Procedure*, Standard 304(a), *supra* note 16.

18. For advocacy of collaboration between full-time and adjunct faculty members in teaching broad capstone courses, see R. Michael Cassidy, *Reforming the Law School Curriculum from the Top Down*, 64 J. LEGAL EDUC. 428 (2015). The authors of this article concur in Cassidy’s advo-

#### IV. The Forum's Casebook Can Ease the Task of Creating and Teaching a Franchise Law Course

In 2013, the Forum published a casebook on franchise law.<sup>19</sup> Legal academics and practitioners worked together to create the book,<sup>20</sup> which includes numerous questions and problems for students. A teacher who adopts the book in his or her course can obtain a teachers' manual that includes the authors' thoughts concerning possible answers to the questions and problems. Moreover, the table of contents of the book should be sufficient to convince law school administrators and faculty members both that (1) franchise law is a distinct area of doctrine and practice and (2) there is sufficient material to justify a two-, three-, or even four-credit course. As published in 2013, the book did not include a chapter on the employment issues, but a supplement that focuses on those issues is available to teachers.<sup>21</sup>

#### Conclusion

The number of full-time faculty members who teach franchise law is probably even smaller than the number of schools that offer the course. As a consequence, the impetus for adoption of a course is likely to come from lawyers who emphasize the importance of the subject, their interest in teaching, and perhaps their willingness to include experiential components in their courses.

As every law teacher knows, teaching bright, motivated law students is challenging, thought-provoking, and thoroughly enjoyable. The authors of this article hope that, in the future, many more students will be able to benefit from the experience and the wisdom of experienced franchise lawyers.

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cy of full-time-adjunct collaboration but not with some of his other arguments. *See also* Alexander M. Meiklejohn, Lisa Oak & Robert A. White, *Teamwork in Teaching Transactional Law and Skills: Academic, Practitioner, and Business Contributions*, *TRANSACTIONS: TENN. J. OF BUS. LAW* (forthcoming).

19. *FRANCHISING: CASES, MATERIALS & PROBLEMS* (Alexander M. Meiklejohn ed. 2013).

20. The authors are among the twenty-nine contributors to the book, most of whom are practitioners. The Forum receives all proceeds of sales; none of the contributors has received or will receive any monetary compensation.

21. Alexander M. Meiklejohn, 2016 Supplement: Some Employment Issues (unpublished manuscript) (copy on file with author).