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Q&A With Gray Plant Mooty's Carl Zwisler

Law360, New York (November 09, 2009) -- Carl E. Zwisler is a principal in Gray Plant Mooty's franchise and distribution practice group and focuses his practice on the representation of franchisors, manufacturers, and investors in structuring, negotiating, and enforcing domestic and international franchise, licensing, distribution, and acquisition agreements.

He also assists executives and general counsel in more than 65 industries or industry segments with creative solutions for developing and implementing business expansion strategies. With more than 35 years experience, Zwisler has worked with clients in every phase of domestic and international franchising, licensing, and distribution programs, frequently advising companies entering the U.S. market and U.S. companies expanding abroad.

Q: What attracted you to your practice area?

A: When I entered law school in 1970, franchise law, as we know it today, did not exist. My only encounter with franchising was through some cases studied in an antitrust course. When I was invited to interview for a new position at the International Franchise Association, I saw that its board of directors included representatives of Burger King, McDonald's, 7-Eleven, H&R Block and Pizza Hut, and I thought it would be interesting to work with the leaders of those companies.

However, when I interviewed for the job, I had to confess that I really did not know what a "franchise" was. I was not alone. During the last 35 years I have been frequently asked whether a particular program is or is not a "franchise."

In 1975 my job was to compile all of the laws which regulated franchisors, to publish a digest of legislative and legal developments affecting franchising, and to coordinate the IFA's governmental affairs activities. By the time I entered private law practice, I had been involved in the development of almost every major U.S. franchise regulation, and had developed personal relationships with scores of franchisor executives and franchise

lawyers. I decided that I was destined to become a franchise lawyer, and I have practiced franchise law ever since.

Q: What is the most challenging case you've worked on, and why?

A: Over the last three years, advising U.S. companies about their obligations under the new franchise regulations in China has been a real challenge. Just as the Chinese economy began to boom, China adopted franchise “Measures,” developed by the Ministry of Commerce (MOFCOM) which were intended to level the playing field for franchisors and facilitate China’s entry to the World Trade Organization.

However, the Measures were full of ambiguities, and required a company to have operated at least two outlets in China for one year (the “2 + 1 Rule”) before it could offer franchises. Thus our clients could not franchise directly, but had to find a way either to establish a business or a joint venture with a Chinese company, then open and operate two outlets for a year before offering a franchise.

Our clients use franchising as their preferred method of expansion. The new requirements fundamentally changed the economics and timing of the deals that they were contemplating.

We sought clarification of exactly how the 2 + 1 Rule could be satisfied. Could an affiliate of the entity which operated the two stores for one year offer franchises? Could that company grant a master franchise? No written clarification was forthcoming, but we learned that formal regulations were planned for the near future. Our clients continued with their negotiations and asked our advice about how they could move forward with their plans. When the regulations were issued we learned that the 2 + 1 Rule could be satisfied with outlets anywhere in the world.

But we could not tell our clients which documents an American company must submit to MOFCOM to prove that it had satisfied the 2 + 1 Rule. No U.S. federal or state agency issues such certificates. Many other questions remained, and interpretations were slow to arrive, and always oral. Local counsel in Beijing had conversations with MOFCOM staff, but could not get a formal interpretative opinion on many of the issues which we had raised.

Today, written interpretations of the regulations still are not published. We continue to advise clients about how to comply with regulations which permit both administrative sanctions by MOFCOM and private law suits by franchisees if our clients violate the law. However, we must offer our advice without the benefit of written guidance or judicial precedent. For a lawyer who is supposed to understand the law, providing advice on franchising in China remains a challenge.

Q: What are the most challenging legal problems currently facing clients in your practice area?

A: Enforcing international franchise agreements is expensive and time-consuming under the best of circumstances. However, HR 1020, the “Arbitration Fairness Act of 2009,” would create unique enforcement barriers for U.S. based international franchisors.

Because the U.S. is not party to treaties which generally permit the enforcement of judgments obtained in U.S. courts in another country, judgments obtained against parties resident in foreign countries generally must be subject to a fairness hearing in the foreign courts before they may be enforced. The fairness hearings sometimes can amount to a new trial.

Fortunately the U.S. is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which allows arbitral awards from more than 100 countries to be enforced in the courts of any other signatory to the treaty. Thus, most U.S. franchisors draft international franchise agreements which select arbitration as the method of resolving most disputes.

HR 1020 would prohibit the enforcement of predispute arbitration agreements in franchise agreements. The result could be that U.S. franchisors’ only realistic enforcement option in international franchise disputes would be to sue franchisees in foreign courts. The legislation does not address how it would apply to franchise agreements signed before the legislation’s effective date.

Q: How do you see your practice area evolving in the next five years?

A: The international portion of our franchise practice will continue to grow, especially once the current economic conditions change. More U.S. franchisors consider international franchising earlier in their growth than ever before, and many more foreign franchisors are considering franchising in the U.S.

Recent changes to the FTC's franchising rule, which eliminate the duty of a franchisor to provide disclosure documents at the first personal meeting with a prospective franchisee, make it much easier for foreign franchisors to test the U.S. market. Because of our experience, extreme study and writing about international master franchising, I expect that many more franchisors who are considering franchising into new markets will be looking to us for advice in their international development.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

Richard Asbill [of Paul Hastings Janofsky & Walker LLP], who recently retired from the practice of law, has been my mentor. He encouraged me to enter private practice, and taught me how to practice law. I was always impressed by his advice to do what makes sense or what is fair, which was usually an excellent guide to clients whom he counseled through many different issues.

He not only tutored me and many other successful lawyers in the practice of franchising law, but he was an amazing leader of the bar. He served simultaneously as chair of

both the ABA Forum on Franchising and the Franchising Committee of the IBA, while growing his law practice. Rick is now arbitrating franchise cases, undoubtedly deciding cases based upon what makes sense.

What advice would you give to a young lawyer interested in getting into your practice area?

A: The ABA Forum on Franchising, the IBA Franchising Committee, the IFA and the International Distribution Institute all offer excellent programs for new and experienced international franchise lawyers, and lawyers interested in the area should attend as many programs as possible and meet as many people who participate in them as they can.

They also should seek out mentors within the bar, write articles on issues of interest and become active in their state bar association's franchising committees, as well as the ABA Forum on Franchising, IFA and the IBA. They must read the CCH Business Franchise Guide each month, and the ABA's Franchise Law Journal, and if they really want to master the area, they should consider taking the Certified Franchise Executive program offered by IFA.