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Social Justice Issues

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I. Introduction¹

In recent years, there has been a sea of change in how the world both addresses and reacts to social justice issues. In 2020, the convergence of the COVID-19 pandemic, Black Lives Matter movement, and U.S. Presidential election spurred historic discourse on social justice issues. Franchisors may feel pressure to engage in critically important social discourse, and, even if they do not want to engage, may find themselves caught up in a social justice crisis! This paper will provide proven strategies for thoughtful engagement that will assist franchisors in navigating this rapidly changing landscape. It first addresses the importance of a public relations crisis management plan, the role of the lawyer, and their legal/ethical obligations therein. It then discusses the decision to implement system-wide changes and the challenges present in rolling out those changes. Finally, the paper examines how a franchise system can develop and implement a social media policy.

Before we begin, what is social justice? In general, the term “social justice” refers to the concept of fair and equal treatment of all people in a society and how various institutions distribute benefits and burdens within a community, including the interplay of wealth, privilege, and opportunities.²

A. Corporate Engagement in Social Justice Issues:

Corporate engagement in the public conversation around social justice issues has evolved rapidly in recent years. Conventional wisdom in previous decades was to stay well out of the fray, as companies feared taking a position, one way or another, would alienate consumers. Today, the instinct to remain silent on social justice issues has proven to be misguided, as a growing number of American consumers want to know where companies stand. Since 2016, the number of Americans who have sought out information about positions companies take on social and political issues has increased by more than 11 percent, and, in a key demographic of 18-44 year-olds, by 16 percent.³ The shift in consumer demand for information and the confluence of historic events

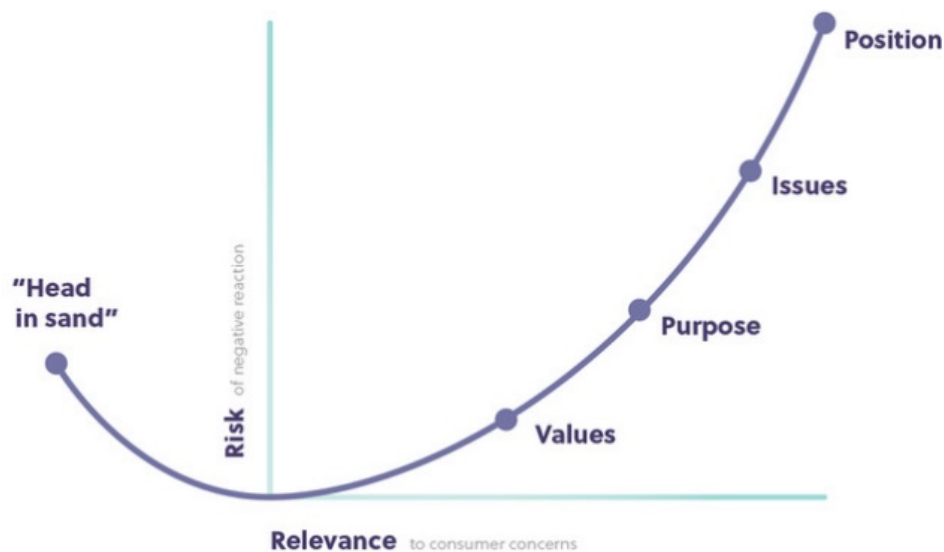
¹ The authors would like to sincerely thank Tyler Morris, of Einbinder & Dunn, LLP for his work in researching and drafting this article.

² Definition on Dictionary.com, <https://www.dictionary.com/browse/social-justice?s=t>; and see Wikipedia.com, https://en.wikipedia.org/wiki/Social_justice citing *Clark, Mary T. (2015). "Augustine on Justice," a Chapter in Augustine and Social Justice. Lexington Books. pp. 3–10. ISBN 978-1-4985-0918-3; and citing John Rawls, A Theory of Justice (1971) 4, "the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of benefits and burdens of social co-operation."*

³ Id.

referenced above, led to unprecedented pressures on corporations to take positions on social and political issues in recent years.⁴

Moreover, companies with sophisticated marketing guidance have also discovered that corporate actions on social justice issues are not limited to two extremes: Sticking their proverbial head in the sand, or being intentionally controversial. Corporations whose fear of controversy has kept them out of the conversation should be guided by the “Brand Risk-Relevance Curve,”⁵ which is used to illustrate that each company can select from a wide range of choices when choosing to address social justice issues.



In addition to illustrating the range of options available to companies considering engaging in the social conversation, the Brand Risk-Relevance Curve provides a roadmap, guiding companies from “head in the sand” all the way to taking a polarizing position on an issue. Companies seeking to address social justice issues in ways that will positively impact their brand should take note of the following guidelines, using this chart to evaluate risk:

The first, foundational step toward positive engagement with social justice issues is for the company to define its values. This of course requires the company to go far beyond rote and repetitive human resources-authored mission statements and to take an

⁴ Global Strategy Group, The New Normal; What a Changing Culture Means for the Future of Business; 8th Annual Business & Politics Study, 2021, https://www.globalstrategygroup.com/wp-content/uploads/2021/01/BizPol2021_FINAL.pdf.

⁵ See Horst, Peter, “Marketing in the #FakeNews Era: New Rules for a New Reality of Tribalism, Activism, and Loss of Trust.”

in-depth appraisal of the company's core beliefs.⁶ Whether the company ultimately decides to continue to progress any further along the Brand Risk-Relevance Curve, defining its core values will enable it to respond more quickly, effectively, and consistently in a crisis situation (see, section II, below). Each company's core values should guide all of its major decisions, including in a crisis.

The next step calls for the company to publicly embrace its purpose. Here, the company and brand connects with a transcendent value or belief. (For example, Dove has publicly and extremely successfully aligned itself with body positivity and acceptance.) These higher values are "timeless, laudable, and generally uncontroversial."⁷ For a restaurant, aligning with family gatherings, nutritious food, or comfort cooking is an example of a company embracing a higher principle as part of its public ethos.

After embracing its purpose, a company may decide to take its engagement a step further; by addressing timely issues. Here, companies may need to embrace social tension as they acknowledge a hot-button issue in order to insert their brand into timely public dialogue. When done skillfully, brands can accomplish this step, establishing themselves as relevant, without actually taking a position, thus, avoiding a great deal of controversy.⁸ Research shows that Americans do not want *activism*, so much as *action* – for companies to be 'forward thinking' and open-minded' as opposed to activists on any particular issue.⁹ A perfect example of action as opposed to activism is Heineken's "worlds apart" campaign, where the company paired strangers on opposite ends of the political spectrum together to complete several DIY tasks before revealing their rivaling views on hot-button topics. The commercial films participants as they choose to either leave or stay and talk over their differences over a Heineken. Here, the company does not reveal its stance on any of the hot button issues, but cleverly positions itself squarely in the middle, as the bridge between the differing viewpoints – appealing to higher values of civility and community while addressing important topics. Their advertising campaign is a prime example of engaging in important social discourse without alienating consumers, and while staying true to the company's core values.

Finally, and most controversially, is taking a position on a polarizing issue. This, of course, requires you to march boldly into the fray, as companies like Nike, Pepsi, and Patagonia have done, in recent years, with varying degrees of success. The risks and rewards can be great – the right message and actions can attract more business; the wrong ones can result in detrimental losses that cannot easily be mitigated. Critically, where companies' message is seen as consistent with its core values, it is less likely to be penalized by its consumer base for taking a strong stance (here, the best example is Patagonia, described below).

⁶ Horst, p. 61

⁷ Horst, p. 61.

⁸ Horst, p. 61.

⁹ Global Strategy Group, supra.

- Nike took a social justice issue head-on in its advertisements featuring Colin Kaepernick in the wake of the athlete's suspension from the NFL after kneeling during the national anthem to protest police violence. Nike ran a series of advertisements and billboards featuring Kaepernick's portrait, in black-and-white, overlaid with text saying, "Believe in something; Even if it means sacrificing everything." The ads received unprecedented support and heavy backlash. Notwithstanding the boycotts and social media outcry from certain groups, Nike's online sales jumped by 31 percent after the campaign, generating more than \$163 million in media value in the first few days.¹⁰
- Pepsi attempted to tackle social justice with its campaign starring Kendall Jenner, which featured the model joining in an unspecified protest, handing a police officer a Pepsi, resulting in world peace. The ad drew widespread criticism for appropriating the Black Lives Matter movement, trivializing the very issues it was attempting to speak to. Pepsi ultimately issued an apology and pulled the ad.
- Outdoor retail and sustainability brand Patagonia published one of the most provocative stances in recent memory in 2017 when it announced it would sue President Trump in response to the President's decision to reduce national parks and monuments, with an accompanying advertising campaign called "The President Stole your Land." An analysis of social media revealed that more than 87 percent of social media posts related to the announcement were positive, and just six percent were in opposition to Patagonia's announcement.¹¹

B. Social Justice Issues and Franchising

In order to best engage with the topics raised in this paper, it is critical for franchisees and franchisors alike to be aware of their brand's core values and the social justice issues facing their industry. A fast-food restaurant brand whose core values include equal access to nutritious food and equality in the workforce, may look to target the social justice issues of minimum wage and food insecurity in the U.S., whereas a beauty services brand, whose core values are empowering women, might identify the "Me Too" movement, and the gender pay gap as social justice issues affecting its industry and/or consumers. While this exercise may seem obvious, for different franchise systems

¹⁰ See Jake Yablonski, Philadelphia Business Journal, "Nike and Kaepernick: PR disaster or move in the right direction?" September 17, 2018. <https://www.bizjournals.com/philadelphia/news/2018/09/17/nike-and-kaepernick-nfl-pr-disaster-or-move-in-the.html> (Last accessed: March 10, 2021.)

¹¹ See Whitney Dailey, SustainableBrands.com, "Know Your Audience: Why Patagonia Can Sue the President – and Thrive," December 18, 2017. <https://sustainablebrands.com/read/marketing-and-comms/know-your-audience-why-patagonia-can-sue-the-president-and-thrive> (Last accessed: March 12, 2021.)

it can be increasingly complex, particularly for franchisors that manage multiple brands in various industries.

The rising tide of social justice issues presents unique challenges for franchise systems. To meet the call for corporate engagement, franchisors should be motivated to develop, communicate, and implement system-wide change. At a minimum, as set forth above and expanded upon in Section II, below, all brands looking to engage with social justice issues should seek to identify their core values, which should inform all aspects of their response in a crisis. However, while the benefits of engagement are desirable, implementation is fraught with challenges. For example, the restaurant franchisor who identifies its “core values” as equality in the workforce may decide to speak out publicly in support of increasing minimum wages. Here, of course, the franchise attorneys’ alarm-bells are going off – how could a franchisor *effectuate* an increase in wages system-wide without running afoul of joint employer issues? Moreover, when a company speaks out on issues it does not (or cannot) implement internally, it risks appearing disingenuous, hypocritical, and alienating its consumers. Accordingly, while much of the work in identifying core values and engaging in social discourse may not appear to be purely legal, an attorneys’ input into which issues a company engages in and to what extent is critical.

Even where there are no obvious pitfalls to addressing a particular issue for franchisors, the question of ‘how’ to implement change involves the consideration of many factors, including what its operative agreements permit and/or require, the timing of such changes, the costs involved for the entire system. A well-considered strategy is necessary to navigate the pitfalls of creating, communicating, and applying a system-wide change.

II. CRISIS MANAGEMENT

All franchisors should have a well thought out and proactive public relations crisis management plan. To protect itself, its brand, and its franchisees, with social justice issues in the news daily and content readily available on social media, each franchisor must have a plan in place to deal with such issues. Just as joining a franchise system can benefit entrepreneurs who seek to build a business with the help of recognized branding and well-established goodwill, one mis-managed or non-managed public relations crisis, on either a franchisor or franchisee level, could cause irreparable damage to the entire system, the franchisor and leaving franchisees at the risk of losing their entire investment.

A. The Lawyer’s Role and Legal Ethical Obligations

In a crisis management situation, it is critical all lawyers involved, whether in-house or outside counsel, be swift and flexible in their approach. Client management challenges will be brought to the forefront during a crisis. Clients all too frequently are reluctant to bring legal counsel to the table, based on concerns the lawyer will be too risk adverse, or will not adequately consider business needs. In crisis situations, this concern is amplified.

Business personnel may feel the in-house lawyer will be solely focused on limiting liability, and may prohibit the organization from publicly addressing the issue in the time and manner the business deems necessary. Thus, regardless of serving in an outside counsel role or as in-house counsel, it is imperative for attorneys to have a deep understanding of the client's business and build a relationship with their clients of trust, so that during a crisis the attorney can build upon that understanding and credibility and the client is made to be receptive to the attorneys' counsel. In-house counsel are uniquely situated to develop business relationships over time with corporate officers and brand leaders, so that when a crisis arises, they can help navigate the franchisor through the crisis from a position of trust. For outside counsel, greater effort may be needed to gain insight.

Attorneys representing clients during a crisis should be mindful of their ethical responsibilities, particularly those related to privilege. These are somewhat unclear under the Model Rules for the in-house lawyer, who acts in a dual role of attorney and business counselor. For all attorneys, privilege often falls into a grey area when discussing business or other non-legal subjects. Model Rule 1.7(a) expressly states that a lawyer "shall not represent a client if the representation involves a concurrent conflict of interest." Most business clients believe that because a lawyer is in the room or on an e-mail communication, the subject is automatically protected by attorney-client privilege. It is the attorney's responsibility to ensure that the clients understand where privilege applies. In a crisis management situation, an attorney would be well-advised to inform their team, upfront, as to what communications may be privileged. For in-house counsel, this should be standard operating procedure, but a brief refresh for your team and/or for any outside consultants or others working on the crisis would be prudent.

Model Rule 2.1 states that any *legal advice* provided is subject to ethical rules.¹² Model Rule 2.1 states that, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation." Again, it is incumbent upon the lawyer to advise their client when they are rendering legal advice or business guidance, and to remind their client as often as needed.

In-house counsel may represent multiple clients in their capacity as in-house counsel for a franchisor, particularly one that has multiple brands, subsidiaries, or affiliated companies. Thus, in their legal capacity, in-house counsel must be very clear as to *who* they represent – the corporation, and not its underlying executives, officers, directors, and employees. Depending upon the nature of the crisis, in-house counsel must also be cautious not to inadvertently run afoul of Rule 1.7(a) by representing a corporate client where there is a concurrent conflict of interest in their representation of a subsidiary or affiliated entity of the franchisor.

ABA Formal Opinion 482, issued in 2018, "Ethical Obligations Related to Disasters" addresses a lawyer's obligations in the face of a disaster, specifically relating

¹² See Jim Rubinger, et al., *Legal Ethics in Counseling Franchise Systems in Crisis*, IFA Legal Symposium (2019), at 2-3.

to extreme weather conditions, such as hurricanes, floods, tornadoes and fires. While a social justice “crisis” may fall outside of the scope of the opinion, its advice is broadly applicable, and can aid a lawyer in navigating ethical responsibilities during any crisis.¹³ As of the date of this paper, there are no ABA Formal Opinions that specifically address a lawyer’s ethical obligations in a crisis management situation, outside of a disaster scenario, so lawyers should continue to use common sense, discretion and other ethical obligations to navigate their responsibilities in the absence of a formal Opinion.

B. The Struggle Is Real

Lawyers and communication professionals naturally have different approaches to dealing with business challenges, and a social justice crisis is no different. Lawyers analyze facts and liability, and, accordingly, their primary focus when reviewing corporate communications is typically on accuracy and risk mitigation. Public relations personnel, on the other hand, are focused on brand reputation and instinctively act to control the narrative.¹⁴ Lawyers must recognize the need to work quickly as the situation evolves to guide the franchisor in such a way as to not place it in further jeopardy. The inclination to say, “no comment,” delay comment, or make a statement that distances the franchisor from the situation or denies responsibility are strategies that lawyers may gravitate to, but that have proven ineffective in dealing with public relations crisis, as covered later in this section. Lawyers may also underestimate the impact that social media may have on public opinion when a corporate reputation is at stake, or may simply be unfamiliar with using social media as a means to an end.¹⁵

Despite the disparity in how lawyers and public relations professionals approach a crisis, it is critical that lawyers be involved and work on crisis management teams from the outset. Building a rapport between the business, marketing, and legal teams will benefit the franchisor as a crisis unfolds. Further, cooperation between the lawyers, the public relations team and business personnel will result in a well-rounded crisis management response. All parties involved need to collectively have the system’s reputation and the franchisor’s best interests in mind in order to protect it, all while timely disseminating accurate information to the public, and limiting the franchisor’s potential legal liability as the crisis unfolds.¹⁶

Lawyers working with public relations firms (“PR firms”) must note that case law is split on whether attorney-client privilege applies to PR firms, since as a general matter, attorney-client privilege protects communications provided in confidence in counsel, but this privilege is waived if the communication is shared with a third party.¹⁷ This creates a

¹³ *Id.* at 18

¹⁴ See the discussion between Preston L. Pugh, Esq. and Emil Hill in *Crisis Management Lessons: The Interchange Between Lawyer and Communication Professionals*, PLI live webinar CLE (April 24, 2020)

¹⁵ William Comcowich, Why PR Crisis Managers Should Learn to Love Lawyers, *Crisis Management*, May 27, 2020

¹⁶ See also Preston L. Pugh, Esq and Emil Hil.

¹⁷ See *Protecting Privilege When Communicating With PR Consultants*, *The National Law Review*, Vol. X, Number 114, April 23, 2020

potential issue where a company engages a PR firm to assist in a crisis situation. Since 2001, courts have reviewed arguments on whether attorney-client privilege should be extended to PR firms. The cases fall into three categories: (1) Third-party waiver exceptions can apply to PR firms; (2) no waiver for third parties applies; and (3) a waiver applies.

In the first category, courts have held that in order for third-party waiver exceptions to apply to privilege, the parties must show that the PR firm was the “functional equivalent of an employee such that the privilege was not waived when counsel shared communications with the firm”¹⁸ and thus, within the scope of privilege as defined by *Upjohn Co. v. United States*¹⁹. Two years after the “functional equivalent” standard was created by the court in *In re Copper Mkt. Antitrust Litigation*, the same issue was brought before the Southern District of New York in *In re Grand Jury Subpoenas Dated March 24, 2003*, where the court upheld the privilege on the basis that lawyers need to have the ability to engage in “frank discussion of facts and strategies with the lawyer’s public relations consultants,” citing *United States v. Kovel*, where the Second Circuit ruled that privilege could extend to communications between a client and a non-attorney third-party if “the communication is made in confidence for the purpose of obtaining legal advice from the lawyer.”²⁰ In *Upjohn* the court held that mid-level employee information was protected by the attorney-client privilege where it was necessary to defend against potential litigation. In *Upjohn*, the court rejected the lower court’s “control group” test and permitted the work-product doctrine to extend to tax summonses provided by mid-level employees as they could have information necessary to defend against potential litigation pursuant to Fed. R. Evid. 501, and that the work-product doctrine could only be overcome upon a strong showing of necessity for disclosure and that the information was unavailable by other means. Thus in a situation where a PR firm is acting as an extension of an employee, to defend against potential litigation, and meets the standard, courts have been willing to provide an exception to third-party waivers and attach privilege.²¹

Other courts, relying on the same reasoning, have held that no waiver was even necessary, as long as the client could show that the PR firm was “the functional equivalent of an employee such that the disclosure did not constitute a waiver.”²² Taking it a step further, a California court held in *Stardock Systems v. Reiche*, a federal trademark action, that privilege applies when the PR firm is engaged for the purpose of litigation strategy.²³

Alternatively, some courts have been unwilling to extend the privilege to third-party PR firms, either on the basis of applying a waiver, or that one wasn’t necessary. Applying

¹⁸ See *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001)

¹⁹ *Id.*, *The National Law Review* at 1, citing *Upjohn Co. v. United States*, 49 U.S. 383, 391 (1981)

²⁰ *Id.*, *The National Law Review* at 1, citing *United States v. Kovel*, 296 F. 2d 918, 922 (2nd Cir. 1961)

²¹ See *In re Upjohn Co. v. United States*, 49 U.S. 383 (1981)

²² *Id.*, *The National Law Review* at 1, citing *NECA-IBEW Pension Trust Fund v. Precision Castparts Corp.*, No. 3:16-cv-017756, 29019 U.S. Dist. LEXIS 168088 (D. Or Sep. 27, 2019)

²³ *Id.*, *The National Law Review* at 1, citing *Stardock Systems v. Reiche*, 2018 U.D. Dist. LEXIS 204438 (N.D. Cal. Nov. 30, 2018)

waiver to a third-party PR firm as a functional equivalent hinges on the role and specific responsibilities the PR firm was engaged to provide. For example, following the film, “Blackfish,” SeaWorld retained two “crisis” PR firms to assist in developing legal strategy and when they redacted documents on the basis of privilege, the question arose whether privilege applied. The court was unwilling to recognize that privilege applied to the PR firms merely under the argument that the PR consultants were the “functional equivalent to employees” as they did not meet the standard of “reasonably necessary” established in *Behunin v. Superior Court*, the only California case to date that had addressed the issue in a PR firm context.²⁴ The court in *Behunin* ruled that “it is not enough that the third party weighs in on legal strategy, but the third party must facilitate communication between attorney and client,” which the court opined was not present in the SeaWorld case.

Other courts have not only looked at why the PR firm was engaged, but what the individual’s responsibilities within the PR firm were as it relates to the subject matter. With conflicting case law, some best practices suggest a three prong approach to engaging PR firms: (1) when a client engages a PR firm that it should be their counsel who engages them and that there should be a “clear, written description of the PR firm’s role in the litigation in their engagement letter,” (2) be aware that not every communication between the client and the PR firm will involve the rendering of legal advice, such as communications involving non-legal matters like assisting in matters of public perception, and (3) if challenged, that counsel should provide affidavits describing specific tasks the PR firm was engaged in and that the purpose for seeking out legal advice.²⁵

C. Protecting Brand Image

The key asset in any franchise system is its trademarks, which encompass the brand’s image and goodwill. If a franchisor does not protect its trademarks and, thus, its brand, there is no value to the franchise system. This means not only protecting the trademarks in proper usage and enforcement, but in operating the business. If a franchisor conducts its business in a manner that is damaging to its reputation, the system will suffer, potentially causing all of its franchisees to fail. Some franchise systems have experienced public relations crisis either as a result of their branding, or in the manner in which they have responded to crisis situations.

For example, from a brand perspective, developing a brand’s image and reputation entirely on one single individual is not advisable. If the “face of the brand” faces negative publicity, whether it’s because they made a bad personal decision, committed a crime or took a divisive public stance on an issue contrary to the brand values, it can be very challenging and expensive for a brand to unwind its image, causing reputational damage and impairment to the brand’s goodwill.²⁶ One such example is the Papa John’s

²⁴ *Id.*, *The National Law Review* at 1, citing *Anderson v. SeaWorld Parks & Entertainment, Inc.*, 329 F.R.D 628 (N.D. Cal. 2019)

²⁵ *Id.* at 4

²⁶ See William Comcowich, *5 Lessons from the Papa John’s PR Crisis*, Crisis Management, July 16, 2018

franchise. Papa John's was founded in 1984 when Papa John Schnatter knocked out a broom closet in the back of his father's tavern in Jefferson, Indiana to make pizzas. Within two years, John Schnatter and his partner, with the help of a few others, were making 3,000 – 4,000 pizzas a week. In 1985, they incorporated their operation, went public in 1993 and then later franchised the pizza chain in the late 1990s.²⁷ PMQ Pizza Magazine named them the third-largest take-out and pizza delivery restaurant chain in the United States in 2016. Despite its popularity in the U.S. and in 44 countries and territories,²⁸ Papa John's found itself in a public relations crisis, beginning in November 2017 when Papa John Chairman and founder, John Schnatter blamed players kneeling during the national anthem on "poor leadership" by the NFL.²⁹ The negative publicity affected the company's valuation as its stock tumbled by 11% within hours and franchise sales dropped by 5% or more.³⁰ However, that was just the beginning, as things started to unravel for the pizza franchisor when Schantter used a racial slur during a conference call in mid-2018, leading to a 33% dip in stock price and months of additional bad press stemming from legal battles between Schnatter and the company.³¹ The franchisor built its entire public image around one person and subsequently Papa John's was forced to undo everything in an effort to protect the brand that was built entirely on his image.

Subway provides another cautionary example. Subway opened in the 1960s, and quickly grew to be the world's largest fast-food chain. In the early 2000s, they created a successful ad campaign by advertising how customer, Jared Fogle lost over 200 pounds eating Subway sandwiches. Fogle soon became the face of the brand and sales rose by 20% after the first commercial aired.³² In 2008 with the economic recession, Subway launched the \$5 footlong, which would later be the basis of its own controversy. In 2015, Fogle pleaded guilty to having sex with minors and distributing and receiving child pornography, leading to a federal raid on his home. Although Subway took steps to protect itself by immediately suspending its relationship with Fogle, their initial response to the raid was in defense of Fogle, in that it was their belief that the raid was related to a prior investigation of someone who worked for Fogle's foundation.³³ They later tweeted that they had no further comment reiterating that they had severed the relationship due to Fogle's inexcusable actions that did not represent the chain's brand values.

²⁷ See Zippia.com; *History of Papa John's Pizza*, August 27, 2020; last reviewed on April 17, 2021

²⁸ *Id*

²⁹ See Sarah Whitten, Papa John's missteps and mistakes have Wall Street wondering whether the pizza chain is beyond recovery, CNBC, July 25, 2018

³⁰ See Noah Kirsch, *The Inside Story of Papa John's Toxic Culture*, Forbes, July 19, 2018

³¹ See William Comcowich at 1

³² See Frank Olito, *The rise and fall of Subway, the world's largest fast-food chain*, Business Insider, November 3, 2020

³³ See Hilary Fussell Sisco, PhD, *Three Lessons Learned From Subway's Crisis* (August 12, 2015)

In each case, the franchise system was faced with repairing damage to the brand, but not before impairment to the brand image, loss of revenue and negative perception from the general public arose in the handling of the matters.³⁴

Lessons learned from other franchise systems dealing with crises have been that franchisors are better off when they are proactive, rather than left scrambling to address a crisis and render a response without a proper crisis management in place. Some examples include³⁵:

- Jack in the Box's response in 1993 to the E. coli outbreak linked to its meat and Jack in the Box's attempt to distance itself from responsibility resulted in \$138 million in losses to the parent company, Foodmaker, and a 30% drop in stock.
- Wendy's "finger in the chili" hoax in 2005, in which Wendy's response, though timely, was not handled effectively, resulting in \$21M in lost sales, and a 50% business hit in northern California.
- A Starbucks location in downtown Manhattan on 9/11, in the middle of a national disaster, charged victims of the terrorist attacks for water and employees of Midway Ambulance were charged \$130 for a case of water. A few days later, the President of Midway contacted Starbucks and was reportedly told that "it could not have happened." It wasn't until the story appeared repeatedly on the internet and in major newspapers that Starbucks finally contacted the President of Midway Ambulance, offering regrets and refunding the money paid by Midway's employees.³⁶ By ignoring the crisis, Starbucks created a public relations issue for itself.
- Burger King's horsemeat scandal in 2013, where Burger King immediately denied the claims, only to later discover that there were traces of horsemeat in some of the patties served in the UK and Ireland.
- Yum! Brands controversy in 2013 involving allegations that its KFC brand's chicken contained dangerous levels of antibiotics, along with general concerns over the avian flu. Although KFC avoided fines, it received negative press and social media coverage resulting in three straight quarters of lower earnings and stock price decreases.
- In 2019, Popeyes announcement of a new chicken sandwich, ultimately led to a chicken shortage and a subsequent public frenzy that turned violent at times,

³⁴ *Id*

³⁵ Aaron Allen & Associates Global Restaurant Consultant, *22 Biggest Crisis Communications Challenges in Restaurant History*, April 20, 2014

³⁶ See Michael Seid, *Managing your Reputation in Times of Crisis*, MSA Worldwide,

including a homicide at a Maryland location and fights between employees and customers appearing on social media sites. Popeye's failed response to the shortage focused on telling the public, "We hear ya'll" and encouraging customers to download its app so they are the "first to know."³⁷

D. Weathering a Crisis Management Storm

One of the best ways a franchisor can be proactive to protect itself going into a crisis is to have previously built a cache of public trust. If a franchisor has a highly valued public reputation with trust in its brand and image, then rebuilding trust when a crisis happens becomes easier. Public perception going into a crisis will often determine how a company comes out of a crisis. If a company is honest and operates pursuant to a known mission statement and accepted values, then when a crisis occurs, trying to correct a problem in a sincere and transparent way will help minimize impact to the company, the brand and the goodwill.³⁸ This is true not only on the franchisor level, but on the franchisee level. "When a franchise and its owners have a good reputation and are seen as good neighbors who support charities and participate in the business community, local leaders and customers will likely offer more support during a crisis.³⁹ Also where franchisors and local franchise owners have a positive relationship with media outlets, the system and individual franchise owners may be able to help balance the story with positivity and limit negative impact.⁴⁰

The culture and values of a company begins at the top. When the executives act and conduct the business in accordance with the company's mission statement and values, treats its employees consistent with those values and brings in franchisees who match that culture into the system, they become a stronger franchisor and franchise system. Franchisors may want to consider creating a culture of diversity and inclusion throughout the organization and take steps to ensure it operates in accordance with that culture, both internally with its employees and externally with its franchisees and the public. By doing so, a company will be more likely to react in an authentic and genuine manner in the face of a crisis. One method of incorporating a culture of diversity and inclusion is to create communities for franchisor employees to collaborate with, and teach and learn from one another. For example, employee resource groups that are reflective of the diverse employee or franchise population, which includes people with disabilities and veterans, are one way to help establish a culture rich with diversity, acceptance and inclusion.

Employee resource groups ideally should operate pursuant to a charter with defined values and pillars for which it represents and may want to establish specified annual goals to achieve (e.g. charitable events, educational opportunities, speakers to

³⁷ See Hillary George-Parkin, *Why Popeyes is still out of fried chicken sandwiches*, Vox, September 6, 2019

³⁸ *Id* at 31.

³⁹ See Bill Corbett Jr., *Franchise owners and operators should develop crisis communications and preparation strategies before they actually need them*, Franchising Today, August 15, 2017

⁴⁰ *Id*

address various societal issues pertaining to that group). By encouraging employees to become involved in employee resource groups, a company may be better prepared to engage in candid and collaborative discussions among its employees when social justice issues arise. These groups may also help provide a platform to address timely social justice issues with its franchisees, or provide educational resources impacting their industry as a result. Social justice issues can be emotional, stressful, challenging and can create uncertainty. By creating programs and internal resources for employees that align with the values and beliefs of the company, employees will be encouraged to align their values with the company's accepted values, resulting in a safe space for employees to voice concerns and share experiences. Thus, when a crisis unfolds, the franchisor will be in a better position to weather the storm in a transparent and genuine manner, not only within the franchisor's organization, but with their franchisees, consumers, and the general public.

E. Best Practices for Carrying out a Crisis Management Plan

Public relations crises seem to occur with more frequency today, particularly with the ease in which people can use their phones to take video, photos, or livestream content immediately onto social media. This leaves very little opportunity for a franchisor to avoid dealing with an issue, as they seem to be unavoidable. Franchisors must be prepared with a well-crafted and practiced crisis management plan. "Crisis management programs typically involved five key elements: (1) crisis assessment and planning; (2) establishment of crisis management teams; (3) crisis management and response plans; (4) information gathering and dissemination management; and (5) crisis communications plans."⁴¹

For purposes of this section, we're going to focus on best practices of building a crisis management team, the implementation of a crisis communications plan and responding to a crisis. The members of the team and elements to the type of crisis plan needed will depend upon the franchisor's industry. For example, restaurant franchisors may want to include in their plan, steps for responding to food safety and supplier chain issues; real estate franchisors, as noted above, may want to include a Fair Housing violation responses; salon franchisors may have a focus on health and safety concerns; and hotel franchisors may want to focus on disaster planning. In addition to any industry-specific crisis that could arise, it's prudent for franchisors to include a plan for dealing with discrimination or other social justice issues. Regardless of the type of plan, or what specific crises a franchisor decides to address, any crisis management plan should be "clear, decisive and instill confidence in all audiences, including the franchisor's employees, the franchisees and their employees, government officials, third parties and consumers."⁴²

The crisis management team should consist of a mix of leaders across the organization and outside parties, with one person designated as the public spokesperson to address media outlet and legal inquiries. Examples of team members include the

⁴¹ See Leslie D. Curren, et al., *Crisis and Reputation Management: Shaping Standards of Behavior and Implementing Response Plans*, 36th A.B.A. Annual Forum on Franchising (2013), at 1.

⁴² *Id* at 3

President and CEO, Chief Marketing Officer, Chief Compliance Officer, a member of the Board of Directors, legal counsel (either in-house counsel or retained outside counsel, or both), an internal communications director and an outside public/media relations firm representative.⁴³ It should also include one or two key franchisees. The franchisor will want to select franchisees who are easy to work with and well respected by other franchisees in the system. Having an influential franchisee on the team will be valuable in that they may be able to help with communicating to other franchisees and may serve as a point person that franchisees can direct questions or concerns to, or provide information to as a crisis unfolds.

Members of the team should be trained in how to deal with a variety of crises. The team should conduct practice drills so that in the time of an actual crisis, it will be clear who has what role, and ensure that team members are familiar with the process. The crisis management plan should outline what specific role each person on the team will hold and what their responsibilities are. Protocols are also recommended, and although they may differ during various stages of a particular crisis, or vary depending on the type of crisis, they should include a basic framework that can be easily modified based on the circumstances of the crisis.⁴⁴ A protocol can be something as simple as general practices to detailed checklists and flow charts.⁴⁵ During the training, the team will want to thoroughly run through each protocol based on crisis type so that when a crisis occurs, they will be better equipped to handle it, without confusion or delay.

Best practices suggest that there should be one designated individual who will manage the task of gathering all relevant information from the other team members, discern the information and communicate it to the spokesperson, since the information gathering must happen immediately and quickly.⁴⁶ Generally a business, marketing or communications person is better equipped to serve as the spokesperson over an attorney. An attorney may come across as too formal, reserved, protective and might be reluctant to release information due to litigation concerns.⁴⁷ The franchisor will be best suited to have a spokesperson who “understands the informational and emotional needs of all of a franchise systems’ constituents.”⁴⁸

Once a plan is created and tested for effectiveness, a crisis management manual should be prepared including information on all key aspects of the plan, ranging from identifying the team members, information gathering, communication (both internally with network members and externally), and rules or parameters on public statements. The manual should be kept up to date. Some franchisors elect to prepare an emergency crisis plan specifically for distribution to their franchisees to be used as a guide to help them proactively prepare for a crisis. It can include best practices and resources for various types of crises, similar to the franchisor’s plan, along with contact information for the crisis

⁴³ See Allan D.J. Dick, Sotos LLP, *Crisis Management for your Franchise System*, CFA National Convention 2017

⁴⁴ See Curren at 4

⁴⁵ *Id* at 4

⁴⁶ See Jim Rubinger at 31

⁴⁷ See David E. Holmes, et al., *Crisis Management in Franchising*, Business Law News, Spring 1994, at 32

⁴⁸ *Id* at 32

management team. A franchisor may also want to include language in the plan stating that despite the guidelines or directives provided, that the franchisee is in the best position to judge their personal safety and the safety of their employees in a moment of crisis.

The crisis management plan should be stored in an easily accessible place, such as on the franchisor's extranet site or any other site that can be easily updated by the franchisor. As with any manual, bulletins or other network communications provided by a franchisor to its system members, there should be a communication plan to get the word out. Given the importance of the crisis plan, a franchisor will want to ensure that it is widely communicated in a way that will garner the franchisee's attention. For instance, if the open rate for email newsletter communications within a franchise network is low, then a franchisor will not want to include it in the weekly email newsletter. A franchisor may decide that a video message from the brand president may catch network member's attention, or providing an overview of the plan at its annual or regional conferences might present a great opportunity to get the message out. A franchisor may want to implement multiple communication strategies, but with the prevalence of social media, a franchisor will want to include a social media component of the strategy that can be easily distributed in a social media format. By ensuring franchisees are aware of the crisis plan, it will be easier to have a system wide response in the event of a crisis. A franchisor can also utilize those key franchisees on the crisis management team to help get the word out to network members.

It does not go unnoticed, however, that a franchisor crisis management plan in a franchise system presents a unique dichotomy in that a franchisor continually manages risk and vicarious liability concerns by ensuring that the system is comprised of "independently owned and operated" businesses. Franchisors not only make this clear in its franchise agreements, but the manner in which it requires franchisees to clearly notify the public of the franchisor/franchisee relationship. However, the independent nature of each franchisee becomes irrelevant when a public relations crisis occurs. A franchisor will want to be sure its franchisees are educated on best practices for the crisis management plan, to help ensure there is a unified approach to handling a crisis. "Adverse publicity, whether generated as a result of claimed missteps by the franchisor or one or more franchisees, may significantly undercut the value of the image, resulting in immediate lost sales and a potential decrease in the long-term value of each franchised unit, as well as the franchisor."⁴⁹

F. A Crisis Happened. Now What?

It is time for the team to jump into action. "The cardinal rule to any response strategy is "don't make it worse."⁵⁰ Although in nearly every crisis situation, it should be expected that a public perception problem of the franchise system will occur, and a franchise system can mitigate this adverse perception, as described earlier. If a consumer

⁴⁹ Id at 31

⁵⁰ See Allan D.J. Dick, at 5

already has a positive response to the brand, that perception, in and of itself, can generate goodwill.⁵¹

When it comes to instituting a response, a franchisor will want to issue a statement quickly, but it's a slippery slope, because if a statement is released too quickly with wrong information, the franchisor can lose credibility with the public, which could make things worse than if the franchisor issued a slower response. When a franchisor is ready to make a statement, the spokesperson will want to demonstrate authenticity and make a confident statement reflecting that they have a handle on it, are taking it very seriously and that further information will be made available as soon as possible. The more transparency provided to the public, the better off; however, this leads to attorney client privilege concerns as noted earlier.

Denying the existence of a problem before knowing all the facts is another blunder some organizations have faced, such as Burger King with the horsemeat claims or Starbucks denying water was being sold to the ambulance corps during a national crisis. "From a strategic standpoint, it's generally wiser to admit that a problem exists and to convey the impression that the franchisor and franchisees are sincerely dedicated to correcting the problem."⁵² A franchisor will want to ensure that accurate information is provided and acknowledge that there is legitimate public interest at stake.⁵³ Depending upon the nature of the issue, it's tricky to know what is the "right" side. For instance, public reaction to certain social justice issues differ depending on geographical areas in the country. What the public is passionate about regarding a particular social issue in a city on the East Coast may not be perceived the same way as a rural community in the South or a small midwestern community in the heartland. This poses additional challenges when a nationwide franchisor is trying to manage a crisis, whether it be a social justice or a political issue, without causing damage or impact to franchisees in each of these areas of the country. Yet, it wouldn't be wise for a franchisor to imply messaging, not aligned with its mission statement and brand values, even if it means that the business reputation will suffer in one or more regions of the country.

Best practices suggest that a franchisor consider going out with a statement that (1) shows concern, (2) makes a pledge to cooperate; (3) takes responsibility where appropriate; (4) tells the public what is being done about the problem; (5) apologizes if fault lies with the franchisor; and (6) discusses the problem in the context of its general corporate record.⁵⁴ Once the investigation is completed, a franchisor will want to follow up in public with a summary and provide the media with an appropriate contact person.⁵⁵

III. SYSTEM-WIDE CHANGES

A. The Decision To Implement System-Wide Changes

⁵¹ *Id*

⁵² See David E. Holmes et al., at 33

⁵³ *Id*

⁵⁴ See David E. Holmes, et al., at 33

⁵⁵ *Id at 33*

A franchisor may take a position on a social justice issue, but how does that affect franchisees? Generally, systems and their governing contracts are designed to give the franchisor ultimately unfettered control over the brand and messaging. However, Americans overwhelmingly want brands to take a stance on social and political issues in concrete and identifiable ways. Research shows 87 percent of Americans believe that simply making a statement is not enough, and want brands they support to take public actions that reflect their values.⁵⁶ Nearly the same number believe brands' internal policies should reflect those values, and, critically, 80 percent of Americans feel brands should not just behave consistent with their beliefs, but should be actively creating change on issues that matter the most.⁵⁷ Accordingly, in addressing social justice issues, franchisors may determine that their consumer-base wants their active participation.

Examples of system-wide changes that might address social justice issues include: required training on diversity in hiring; updated vendor requirements in order to promote minority-owned or locally-owned suppliers; local marketing requirements that include community outreach; for restaurants, a policy to reduce and/or donate food waste; and for fitness businesses, an improved layout designed to de-emphasize any focus on weight or appearance and to instead enhance wellness, among many others.

There are endless reasons why a franchisor might decide to implement system-wide changes in its franchise system. Of course, a brand has no choice when it is forced to address a social justice issue that has fallen into its lap as a result of an ongoing crisis involving the brand itself. Ideally, though the decision to address a social justice issue arises *before* a crisis emerges, potentially when a franchisor is conducting its internal values-assessment and identifying relevant social justice issues that affect its business. During this process, a franchisor may identify ways to improve its system in order to remain true to its newly reinforced principles. Another pressure-point when franchisors may find themselves looking to make changes to respond to social justice issues may arise after analyzing its target demographic, or when seeking to broaden its appeal to a new demographic. Another point when brands made decide to take action on their social justice values is when a crisis occurs *outside* of the brand – that is, when the brand is responding to a critical event in the social narrative.

In today's changing media landscape, activist consumers, social media influencers and the news media can ensnare unwitting franchise systems into the latest topic/controversy seemingly overnight.⁵⁸ Therefore, in addition to identifying brand-values and preparing for a crisis, it is best practice for franchisors to implement system wide changes that address social justice issues as a proactive measure.⁵⁹

Because system-wide changes impact the whole network, it is advisable to involve franchisees in the process by clearly communicating the rationale and plan for change.

⁵⁶ Global Strategy Group, *supra*.

⁵⁷ *Id.*

⁵⁸ See Peter Horst, *Marketing In The #FakeNews Era*, p. 11-12.

⁵⁹ Dull, *supra* note 1 at 1.

This requires the franchisor to identify and disclose the mechanics and purpose of the change by including a well-informed business case.⁶⁰

B. Making a business case – Easier to Accomplish if your Brand has Communicated its Core Values

To get buy-in for a system-wide change, franchisors must be prepared to make a business case with a clear economic reason for the decision. A convincing business rationale can create franchisee support for the change. For other, typical system-wide changes, the benefits might be practical. For example, in adopting new technology stores might become more efficient, competitive in the market, or there may even be a dollar-amount of long-term savings. In addressing social justice issues, however, the company may be on unfamiliar footing: How can a franchisor convey to its franchisees the importance of remaining true to its core values or taking a stance on a social or political issue? The leap becomes less difficult if internal communications within the brand are consistent, and franchisees are familiar with the brand's values and integrity. Franchisees may intuitively understand the brand's desire to take a stance in response to issues that align with company ideals. That said, the business case will drive this message home, and may convert even skeptical franchisees.

Critically, the business case may impact the franchisor's ability to ultimately enforce the change as well, as courts have analyzed the benefit to the system when assessing the franchisor's reasonableness in implementing system-wide changes.⁶¹ In the *Carvel* case, the court found there was an issue of fact as to whether the franchisor acted in good faith when it implemented a new distribution channel. Critically, the Court also held that the franchisor's actions may violate the implied duty of good faith even if its actions are supported by the explicit terms of the franchise agreement. In the *In re Sizzler* case, the court considered whether the system-change sought by the franchisor was based on sound business judgment. This is critical as it appears the Court was more influenced by the rationale behind the change and not whether the franchisor's business objectives were ultimately realized.⁶² Moreover, the failure to even attempt to provide a business rationale for a decision may result in a finding of bad faith.⁶³ Accordingly the franchisor's decision to research the benefits to the system and to document those

⁶⁰ Dull, *supra* note 1 at 15.

⁶¹ *Carvel Corp. v. Baker*, 79 F. Supp. 2d 53 (D. Conn. 1997) (finding that Carvel breached the covenant of good faith and fair dealing where it used its discretion to institute an alternative distribution program to compete directly with a franchisee); but see *In re Musicland Holding Corp* 376 B.R. 428 (S.D.N.Y., May 22, 2008) (finding no breach of the covenant of good faith and fair dealing where such a finding would impose obligations inconsistent with the express terms of the agreement.)

⁶² *In re Sizzler Restaurants Int'l, Inc.*, 225 B.R. 466 (Bankr. C.D. Cal. 1998)

⁶³ *Amos v. Union Oil Co. of California*, 663 F. Supp 1027 (D. Or. 1987)(When franchisor's business decisions harmed franchisees and also those decisions were unsupported by any study, market research, or other rationale, the franchisor has acted in bad faith.); but see *George Hammersmith, Inc. v. Taco Bell Corp.*, 942 F.2d 791 (9th Cir. 1991) (finding that no fiduciary or trust relationship existed as a matter of Oregon law; noted that *Amos* was not a traditional franchise relationship, and more akin to a partnership).

benefits may critically impact the franchisor's ability to enforce the decision later on – even if those benefits do not ultimately come to fruition.

With respect to social justice issues, a franchisor might create a high-level marketing analysis in order to show its franchisees how engaging in social justice issues will improve the company's standing with its target demographics, translating into higher levels of success. Critically, the more universally applicable this benefit is, the more franchisees gain from buying in to the plan.

C. Audit all Agreements before Implementation

Once the franchisor has identified the social justice issues it seeks to engage in, and determines a plan to address these issues internally, it is critical to do a thorough review of all versions of all operative contracts in the system. Franchisors who seek to implement changes that are clearly and specifically addressed in its franchise agreements will have a smoother path to effectuating these changes.⁶⁴

Courts may, of course, consider the course of dealing between the franchisor and the franchisee in order to interpret specific contract provisions.⁶⁵ In the *Montgomery Mall Service* case, where the franchisor sought to implement system-wide pricing changes in accordance with its rights specifically reserved in the franchise agreement, the Court denied the franchisor's motion to dismiss where the parties' prior course of dealing revealed that consistent pricing should be established throughout the county. Moreover, in *Montgomery Mall Service*, the change implemented by the franchisor would have disproportionately impacted the franchisee who sought to prevent the change. While the Court did not address this issue, the decision suggests that Courts will consider this disproportionate effect in evaluating such a change.

Accordingly, the franchisor's best course of action is to audit all operative agreements and determine first whether the course of action it seeks to take is specifically provided for and to also determine whether the franchisor has enforced this provision in the past. However, even where franchise agreements contain only broadly worded reservations of rights that do not specifically apply to the system-wide changes in

⁶⁴ See e.g. *Carlock v. Pillsbury Co.*, 719 F. Supp 791 (D. Minn 1989) (Holding a franchisor may modify its system by altering or adding distribution channels where the franchise agreements contained a clear reservation of this specific right); *Johnson v. Arby's Inc.*, Bus. Franchise Guide (CCH) ¶ 12,018 (E.D. Tenn. Mar. 15, 2000) (Holding where a franchisee sought to modify the appearance of the business, necessitating costly renovations for some franchisees, there was no breach of contract as the operative agreements expressly permitted the franchisor to modify building specifications, among other things).

⁶⁵ *Montgomery Mall Service, Inc. v. Motiva Enterprises, Inc.*, Bus. Franchise Guide (CCH) ¶ 11,839 (D. Md. Oct. 4, 1999) ; and see *Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 2011 WL 2473330 (C.D. Ill. June 22, 2011), aff'd 695 F.3d 676 (7th Cir. 2012) (Court relied on extrinsic evidence and course of dealing to determine franchisee was not obligated to comply with franchisor policy change regarding pricing.)

question, courts have, in some circumstances upheld franchisors' rights to implement such changes.⁶⁶ Some courts evaluate whether the change the franchisor seeks to make is material, holding that a broad reservation of rights in the franchise agreement will not apply where the change is material to the system.⁶⁷

Franchisors, even while complying to the letter with their franchise agreements, should be wary of good faith and fair dealing claims. As set forth above, some courts, like the Carvel court, have held that a franchisor may violate the covenant of good faith and fair dealing even where it acts under a specific contractual right in the franchise agreement. Other courts, however, have held that where a franchisor acts in compliance with the franchise agreement, the franchisor necessarily has acted in good faith.⁶⁸ The Franchisor's motive has also been considered as a critical factor in determining good faith.⁶⁹

D. Identify Enforcement Issues in States with Constructive Termination or Relationship Laws

In states with relationship laws and/or prohibitions against constructive termination, franchisors' initial legwork in making their business case for the proposed change will be critically important. State courts have held that as long as a franchisor acts in good faith it can make impactful business decisions and comply with applicable statutes.⁷⁰ In *Munno*, the court held that the franchisor's decision to increase rent was in the normal course of business and in good faith, even though the increase was between 200 and 300 percent. Where a franchisor acts in good faith, it can defeat statutory claims.⁷¹ Franchisors should beware, however, when the change and/or the mechanism

⁶⁶ See e.g. *Economou v. Physicians Weight Loss Centers of America*, 756 F. Supp 1024 (N.D. Ohio 1991) (Holding broad language in the franchise agreements permitting the franchisor to change the system were enforceable.); but see *Chicago Title Ins. Corp. v. Magnuson*, 487 F.3d 985 (6th Cir. 2007) (finding that a failure to provide specific justification for a covenant's length does not automatically make it unreasonable); *Bores v. Domino's Pizza LLC*, 489 F. Supp. 2d 940 (D. Minn. 2007), enforcement denied 2007 WL 3312272 (D. Minn. Nov. 6, 2007) and rev'd and remanded 530 F.3d 671 (8th Cir. 2008) (reversing trial court's finding that franchisor was prohibited from mandating franchisees to implement and buy proprietary software from them where agreement stated franchisees could buy from "any source" so long as it met franchisor's "specifications".)

⁶⁷ *Bird Hotel Corp. v. Super 8 Motels Inc.* 246 FRD 603 (D. S.D. 2007).

⁶⁸ *Clark et al v. America's Favorite Chicken Co. et al.*, 110 F.3d 295 (5th Cir. 1997); *La Quinta Corp. v. Heartland Properties LLC*, 603 F.3d 327 (6th Cir. 2010).

⁶⁹ *Nat'l Franchise Ass'n v. Burger King Corp.*, 715 F. Supp. 2d 1232 (SD Fla. 2010) (Where franchisor imposed a set value menu and mandated maximum prices, evaluating franchisor's motive to find no showing of bad faith.); but see *Joc, Inc. v. Exxonmobil Oil Corp.*, 2010 WL 1380750 (D.N.J. Apr. 1, 2010) (Where franchisor knew its decisions to change pricing prevented its franchisee from receiving benefits reasonably expected under the contract, the franchisor acted in bad faith.); but see *T.J. McDermott Transp. Co., Inc. v. Cummins, Inc.*, Case No. 14-04209, 2015 WL 1119475 (D. N.J. Mar. 7, 2017) (denying plaintiff's breach of implied covenant of good faith and fair dealing where it arose from the same set of facts as a breach of warranty claim).

⁷⁰ *Munno v. Amoco Oil Co.*, 488 F. Supp 1114 (D. Conn. 1980).

⁷¹ *Remus v. Amoco Oil Co.*, 794 F.2d 1238 (7th Cir. 1986) (Franchisor's pricing change did not constitute constructive termination and thus did not violate the WFDL.); but see *Morley-Murphy Co. v. Zenith Electronic Corp.*, 142 F.3d 373 (7th Cir. 1997) (reversing district court decision that termination violated

for enforcement may be construed as an unreasonable performance expectation, as that may run afoul of state laws.⁷²

E. Implementation

After researching the change and communicating the business rationale to franchisees, franchisors must seek to engage with franchisees about the practical aspects of the rollout. Reaching out to franchisee associations or advisory counsels is advised, as is open communications with both influential and problem franchisees to attempt to head-off potential issues and/or negotiate certain aspects of the roll-out to make the change less controversial within the system. At this stage, it is critical to leverage any 'asks' from the franchisees in order to ultimately support your enforcement. If you agree, for example, to an extended or staged roll-out, do so in writing, with an accompanying release from any claims based on the enforcement of the change, and an acknowledgment that the change is for the benefit of the system, among other things.

Once the franchisor's plan is in place, it must monitor the roll-out for any problems that occur during the early stages, and seek to address them quickly. If the franchisor has engaged with franchisees already, this should be an easier process, as those lines of communication are already open. Franchisors may even schedule periodic communications with strategic franchisees during the roll-out and afterwards to discuss implementation challenges, potential improvements, and, eventually, the outcome. One critically important aspect of any system-wide change is to evaluate its effectiveness at achieving the identified business outcomes, and to then document this success and share the findings within the system.

IV. MANAGING SOCIAL MEDIA

The emergence of social media has significantly impacted the way information is disseminated throughout the world. For many consumers, social media is the primary access to information about social, political and commercial matters. So-called "online activists" may use their respective platforms to uplift or tear down brands at a moment's notice. Having a social media presence and policy, both of which are guided by the same principles that guide the company's overall mission, will enable a company to monitor potential issues on social media, and avoid a crisis.

A. Social Media "Dos and Don'ts"

WFDL and remanding so grantor could have opportunity to provide economic circumstances to establish good cause for termination).

⁷² *Beilowitz v. Gen. Motors Corp.*, 233 F. Supp. 2d (D.N.J. 2002)(Finding costly system changes to be an unreasonable performance expectation in violation of the New Jersey Franchise Practices Act).

Given how crucial the brand and reputation are to a franchise system's business, it is important for franchisors to develop a comprehensive and balanced social media policy. The benefits of a social media policy can help a franchise system consistently and positively interact with consumers. Moreover, the same policy can assist the system in dealing with unexpected crises. These policies should be applicable internally, to the franchisor's employees, and externally, to franchisees and their employees, and should cover issues that arise outside of the system (including social justice issues), and those that arise within the system (for example, a comprehensive policy should prohibit posts by franchisees and employees about disputes, lawsuits, legal compliance issues, and legal settlements involving the franchise system or its members.)

The most critically important aspect of a social media policy as it relates to social justice issues, is to ensure consistency. The company is likely to run into trouble if its guiding principles are at odds with the outward communications of its franchisees or employees.

B. Personal v. Business Accounts

In this day and age, many individuals spend large portions of their workdays on social media. As a result, there is an elevated risk that an employee may engage, intentionally or unintentionally, in online misconduct. Franchise systems may encounter this risk from corporate employees or franchisees or even franchisee employees. With respect to social justice issues, franchisors should steer clear of attempting to control or censor franchisees (or their employees) personal pages, and instead should focus on creating clear controls to keep franchisees' personal social media use completely unaffiliated with the franchise system.

For corporate employees, it is critical to make clear the franchisor has the right to monitor online activity during working hours, and to create policies addressing confidential information and trade secrets and other best practices.⁷³

For franchisees and franchisee employees, franchisors should establish guidelines that provide a clear delineation between the franchisee (or employee's) personal social media use and the company. These guidelines should include the following key points: (a) franchisees may not create personal social media accounts which use the franchisor's name, or which reference the franchise system, or which are affiliated with their e-mail address associated with the system (if any); (b) franchisees should not create personal social media accounts using the franchisor's primary trademark, trade names, logos, or other images representing its identity; (c) franchisees must make a personal disclaimer that their social media accounts are their personal accounts and that any postings do not reflect the opinions of the franchisor or its affiliates, including franchisees; (d) franchisees are prohibited from conducting franchise business over personal social media accounts and cannot post confidential or sensitive information about the franchise business; (e) all communication with franchisee customers and employees should be conducted through

⁷³ Twitter, p. 10-11.

business communication channels (aka not personal social media); (f) franchisees cannot discuss franchisee business on personal social media accounts; (g) franchisees are not permitted to disparage competitors.⁷⁴ These guidelines are non-exhaustive examples of how a franchisor can appropriately mitigate risk when it comes to their franchise system's social media use.

In addition to developing a clear social media policy to protect its brand and image; the franchisor should use its franchise agreement and operations manual to protect its brand and reputation. These governing documents should ensure that the franchisor retains the level of control needed to protect the brand. The franchise agreement should, among other things, prohibit using the franchisor's trademarks in a manner adverse or detrimental to the brand. It follows that any limitations on license use should extend to the franchisee's use of social media. Further, the language should be crafted broadly enough to meet the ever-evolving nature of social media.⁷⁵ The operations manual should address the social media policy in detail. The franchise agreement should specifically require franchisees to monitor and follow the specific guidelines on social media use as set forth in the operations manual and updated from time to time. The flexibility of updating the operations manual is a great benefit in addressing the rapidly changing environment of social media.

C. How far can you go?

Although the franchisor can implement limitations to regulate its brand's social media presence, there are laws in place to protect consumers and free speech rights. The U.S. Federal Trade Commission ("FTC") and state regulators prohibit the use of false and misleading advertisements. Consistent with these laws, franchisors must ensure that all endorsements are disclosed. Additionally, while a franchisor may implement a policy prohibiting the use of disparaging comments regarding the brand or a competitor, this is countered by the first amendment and free speech. In fact, blanket prohibitions on "disparaging" statements or use of "confidential" or "inaccurate information" should be appropriately tailored and explained through examples so employees know that the policy is not intended to censure free speech.⁷⁶

Franchisors must also be savvy and careful to follow all U.S. Federal Trade Commission's (FTC) guidelines when promoting their brand on social media platforms. For example, where a franchisor compensates a blog or podcast in exchange for an advertisement or endorsement of its brand or products, the exchange will be monitored by the FTC, which, among other things, prohibits unfair or deceptive ads or practices in

⁷⁴ Twitter, Appendix A., p. v.

⁷⁵ Twitter, p. 13.

⁷⁶ Philip L. Gordon & Kwabena A. Appenteng, *NLRB Ruling in Social Media Case Provides Useful Guidance for Employers*, INSIGHT (Aug. 29, 2016), <https://www.littler.com/publication-press/publication/nlrb-ruling-social-mediacase-provides-useful-guidance-employers>; Developing, p. 24.

the marketplace. One deceptive practice is where the blog or podcast fails to disclose the financial relationship with the brand. For example, if a franchisor pays a blogger (even in gift cards or products) in exchange for a positive review or publicity, the endorsement should be disclosed on the blog. The FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255 ("FTC Endorsements Guides") provides important guidelines to consider for social media ads. In addition, the FTC's .com Disclosures – How to Make Effective Disclosures in Digital Advertising ("Dot Com Disclosures") provides a resource for making claims in social media ads in compliance with consumer protection laws. In today's social justice climate, the fall-out from attempting to skirt regulations could be disastrous. Not only should franchisors be mindful of best practices from a legal standpoint, the optics of failing to disclose financial incentives could undermine the message the franchisor is trying to promote.

The use of music, images, and other copyrighted material is heavily regulated. U.S. copyright law protects original works of authorship, including messages and pictures shared on social media. Of course, media can be utilized in ways that are beneficial to promoting your business and brand; however, using this material impermissibly can risk opening up the entire system to liability. Franchisors should be sure to implement policies that: (a) prohibit franchisees from posting any copyrighted materials without proper attribution or permission of the author; (b) prohibits franchisees from posting the trademarks, slogans, or logos of a competitor without prior approval from the franchisor; (c) franchisees may only use approved trademarks, slogans, logos and other media from the franchisor; and (d) franchisees must comply immediately with any request by the franchisor to modify or remove any content contained on the franchisee's social media account. Again, not only can violating these restrictions run afoul of federal regulations and/or state laws, but they can also undermine the franchisor's message and engagement in social justice issues. A franchisor who fails to fairly compensate artists for their work may lose credibility when addressing social justice issues if the consuming public learns of this failure.

While these policies may seem restrictive, they exist for the protection of the franchise system. The Digital Millennium Copyright Act (DMCA) addresses copyright infringement on the internet.⁷⁷ Pursuant to the DMCA, a franchisor that fails to take down properly noticed material can be exposed to copyright liability. Although the DMCA has a safe harbor provision to protect both social media platforms and franchisors, those protections are not absolute. A franchisor can lose the protection of the safe harbor if they have knowledge of the infringement or are aware of facts from which the infringement should be apparent.⁷⁸ To stay within the safe harbor, the franchisor should engage in the following activities: (a) adopt and implement internal procedures to assure receipt and proper handling of Takedown Notices, tracking of repeat offenders and termination of repeat offenders' accounts; (b) adopt appropriate terms and conditions for user generated

⁷⁷ Development paper, p. 11.

⁷⁸ *Advertising and Promotions in Social Media: Key Issues Checklist*, Practical Law Checklist w-007-9458 (2019).

content accepted by the user; and (c) include unilateral takedown and termination provisions, content policies, warranties and indemnification obligations of the submitter, and limitation of liability of the service provider to content submitters.⁷⁹

D. Infringement Protocols

Franchisors must protect their intellectual property. Not only should the franchisor have an appropriately designated person or committee to respond to infringement demands and legal action, but it should also have a list of protocols to determine whether legal action is the best recourse. Although legal action can be a swift and effective way to protect copyrighted material, the franchisor should evaluate all outcomes before deciding. For example, if the alleged infringement occurs on social media, a good first step is to contact the infringer. In the case of inadvertent infringement, a to take down the material can resolve the issue more expediently (and cheaply) than litigation. Additionally, the franchisor should consider if the social media platform can resolve the issue by requesting the platform assist in removing the infringing content.⁸⁰ Under certain circumstances, utilizing the social media platform can be effective, with the benefit of not involving the infringer.

Critically, all communications with the public, whether on social media, or to an infringer, should be drafted as though they will be seen by the public, as Ferrero learned in 2013, when its cease and desist letter to a popular Nutella enthusiast gained public ire after the infringer published it online. After a public outcry, Ferrero was forced to stand down.⁸¹ Franchisors should ensure their language and tone in addressing infringement is appropriate and professional and, critically, does not alienate their consumers.

E. Not all Platforms are Created Equal

It is a common practice for a franchisor to require prior approval to use its trademarks and logos in franchisee promotional materials. To apply this prior approval approach to social media approach may appear logical, but it is not without practical limitations. Franchisors should consider these limitations and seek some middle ground that allows franchisees to act quickly on certain mediums. Social media is inherently dependent on quick responses and relevance is often fleeting. Prior approval may be cumbersome and may negatively impact social media engagement.

Franchisors may also spoon-feed franchisees with content they can use on social media platforms. In taking this approach, a franchisor might develop a social media “playbook” comprised of pre-approved messages, tweets, images, and model answers to

⁷⁹ Development paper, p. 12.

⁸⁰ Reddit, p. 19.

⁸¹ See Alan Farnham, ABC News, “Ferrero Embraces World Nutella Day, Backs Down its Lawyers” May 21, 2013. <https://abcnews.go.com/Business/nutella-crisis-averted-maker-ferrero-backs/story?id=19226773> (Last accessed: April 20, 2021).

FAQs. Under this approach, however, franchisors may sacrifice some control over franchisees' social media presence.

The franchisor may also engage a third-party vendor to create social media content for the franchisor and all franchisees, prohibiting franchisees from having their own, local pages. The benefit to this system the franchisor's retention of control over the messaging of its brand. Franchisees, however, may be upset to lose the potential engagement in their local markets, so this approach may require the franchisor (or its third-party designee) to devote more time to ensuring responsiveness and relevance for franchisees.

At the other end of the spectrum, franchisors may allow franchisees to control their own social media presence, saving the franchisor time and resources but, critically, sacrificing consistency and control. The more autonomy a franchisee has, the more guidance the franchisor should be sure to provide, including social media training, and clear messaging on the franchise system and brand's core values.

While there is no one-size-fits-all approach, all franchisors should create and implement policies and guidelines that informs appropriate behavior, discloses applicable rules and laws, and prohibits impermissible conduct. Any amorphous or vague instruction can risk inconsistency in communication and in branding. Therefore, a franchisor should ensure that the social media policy it chooses is applied across the board, whether in franchisee agreements, operating manuals, or both.

F. Franchisor Social Media

Not only should a franchisor be concerned with protecting its intellectual property, it should also ensure protection of its social media accounts. As discussed above, a franchisor should be wary of *any* social media use, whether their own, the franchisees, or its employees. Therefore, it is good practice for the franchisor to include policies that address password protection and protecting information store on portable devices such as laptops and phones.⁸² For example, franchisors should require two-factor authentication⁸³ for access to any social media account used in connection with the business. Additionally, another layer of security is to ensure single ownership for a social media account. Of course, the more users that have access to an account, the greater likelihood of a breach. Keeping security credentials in the hands of one user mitigates the likelihood of an account being hacked.⁸⁴

These concepts are best implemented through a comprehensive social media policy and future franchise agreements.⁸⁵ The policy should make explicit that franchisees

⁸² Twitter, p. 11

⁸³ Two-factor authentication is an electronic authentication method in which a computer user is granted access to a website or application only after presenting two or more pieces of evidence to confirm the user's identity.

⁸⁴ Twitter, p. 16.

⁸⁵ *Id.*

assign the franchisor any and all rights and interests in anything developed by the franchisee in connection with the business the franchisee is licensed to operate.

G. Social Justice and Social Media

One way to avoid missteps is, as set forth above, to consistently communicate your brand's message. In franchise systems, this message should be repeated consistently, and potentially even made part of the criteria for renewal, among other things. Franchisors that consistently require the entire system, from top to bottom, to commit to advancing the brand toward its goals and in its mission, will find that the entire system is more in tune with the franchisor's brand messaging and, thus, less likely to step out of line.

Another critical component to successfully navigating difficult social justice conversations is to establish a successful social media presence, first. This means, among other things, letting consumers know your brand and messaging before you wade into a hot-button issue. This also means identifying the social media landscape for your brand – who are your allies? Are there influences, celebrity endorsers, blogs, podcasts, or cult-followings for your brand? Engage with these audiences and you will find that when you face a crisis or take a stance on a charged issue down the road, you will have more friends in your corner.

V. CONCLUSION

In the coming years as companies respond to consumer demand to engage in social justice issues, attorneys should first and foremost be aware of their role in advising their client and any ethical considerations, and should be mindful of their client's core values and ensure that any social justice engagement is consistent with those values. Attorneys can help avoid controversy or crises by communicating their core values and plans to incorporate any system-wide changes early and openly. Following the advice set forth in this article, attorneys should feel confident in their role guiding their clients toward meaningful social justice engagement.