



IFA LEGAL SYMPOSIUM

Legal and Moral Considerations when including Social Justice Issues in Brand Positioning and Control

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Speakers

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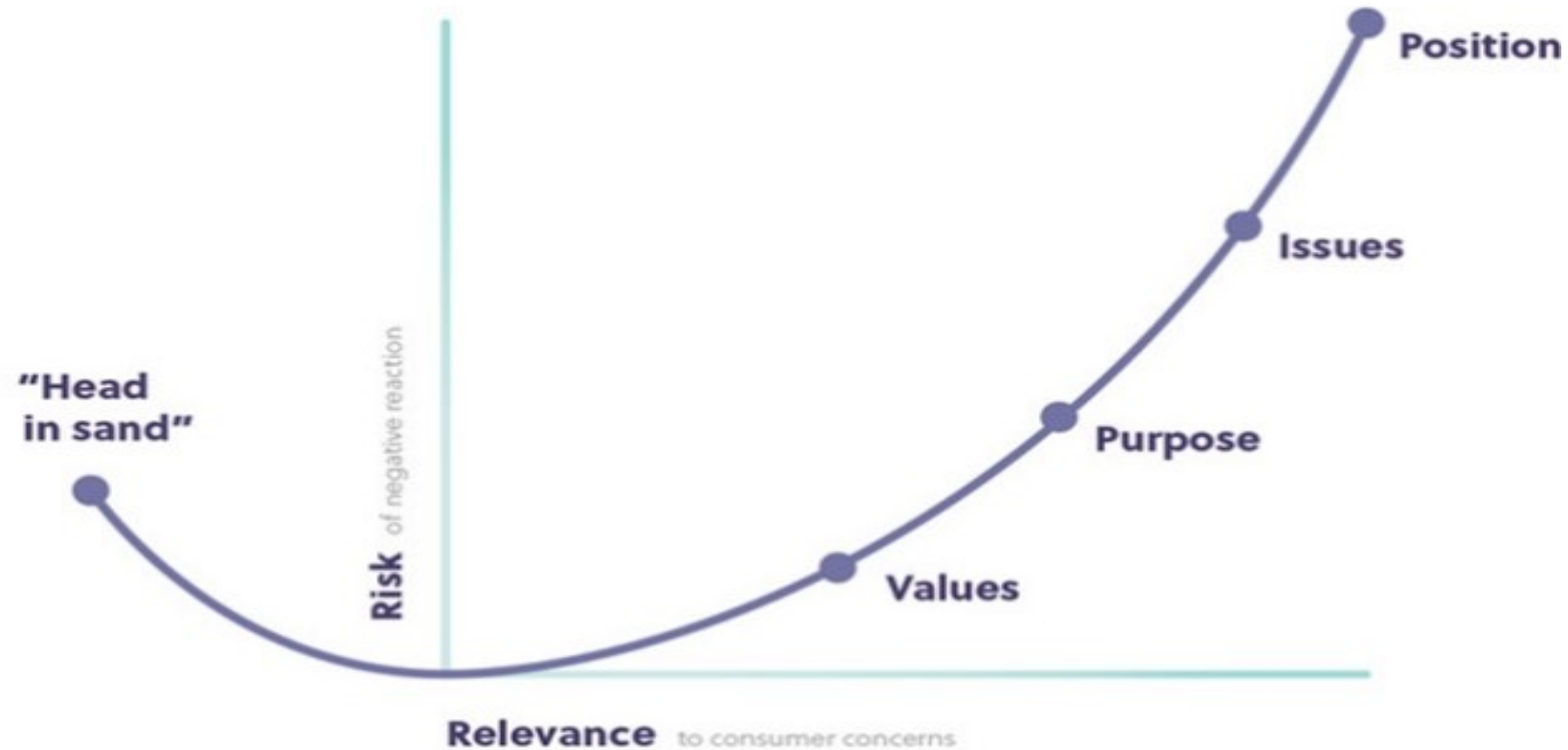
Introduction

- What are social justice issues?
 - Fair and equal treatment of all people in a society
 - How various institutions distribute benefits and burdens within a community
 - Consider the interaction of wealth, privilege, and opportunities
- Social justice issues today
 - COVID-19, Black Lives Matter, 2020 U.S. Presidential election

Corporate Engagement in Social Justice Issues

- Pressure on corporations to take positions on social and political issues
- Americans have increasingly sought out information about positions companies take on social and political issues.
 - Since 2016, increase of 11% overall
 - Since 2016, increase of 16% among 18–44-year-olds
- Companies are not limited to either being fully engaged or disengaged on social issues

Brand Risk-Relevance Curve



Steps Towards Positive Engagements

- Step 1: Define Your Values
 - In depth appraisal of company's core beliefs
- Step 2: Publicly Embrace Your Purpose
 - Example: Dove and body positivity/acceptance
- Step 3: Address Timely Issues
 - Balance of action v. activism; open-minded and forward-thinking
 - Example: Heineken's "worlds apart" campaign
- Step 4: Take A Position On A Polarizing Issue
 - Risk vs. Reward

Corporate Engagement Example 1: Colin Kaepernick and Nike



Corporate Engagement Example 2: Kendall Jenner and Pepsi



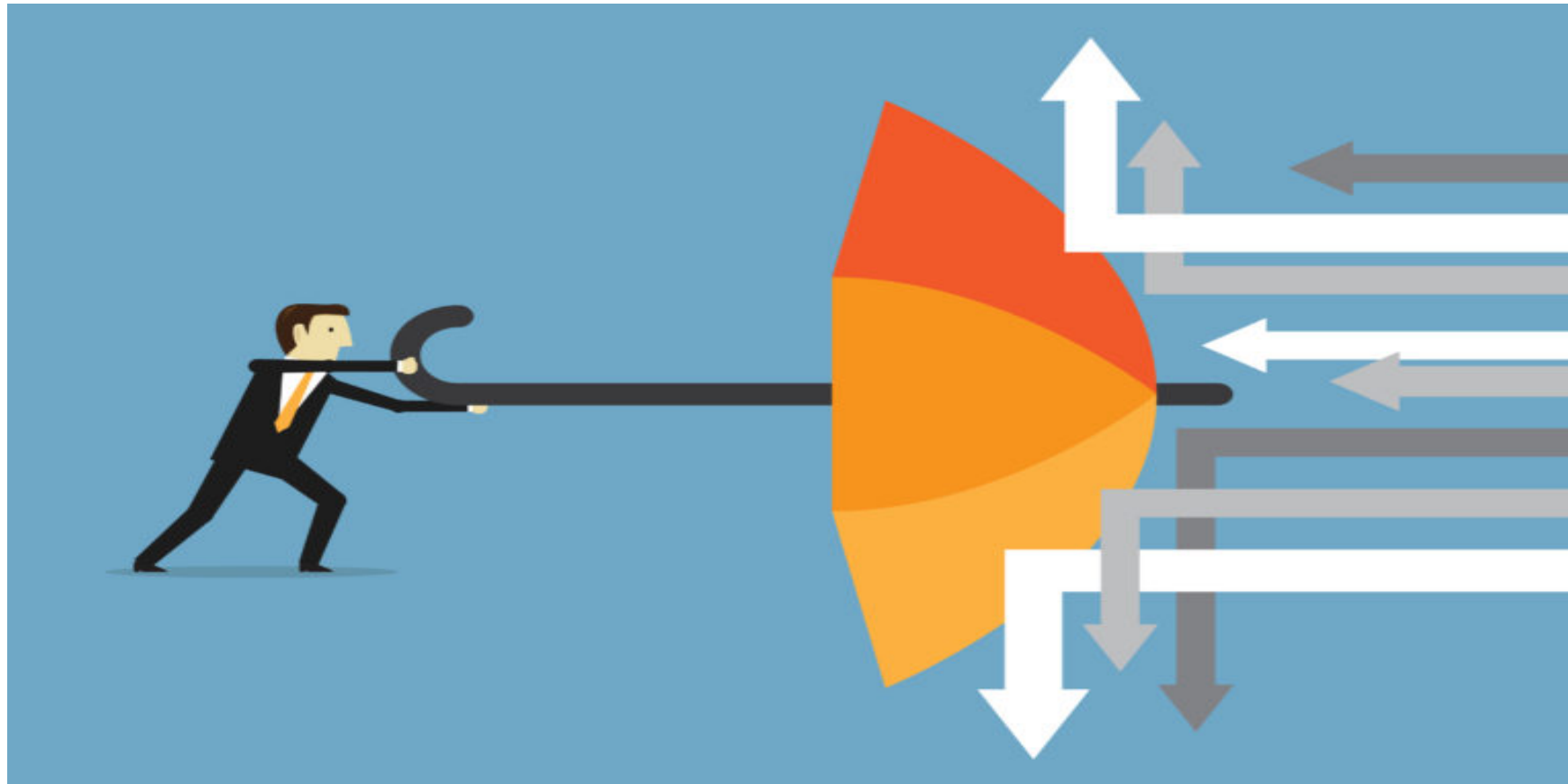
Corporate Engagement Example 3: Patagonia and President Trump



Social Justice Issues and Franchising

- Franchisees and franchisors alike should be aware of their brand's core values and social justice issues facing the industry
 - Example: fast-food brands and minimum wage, equal access to nutritious food, etc.
 - Example 2: beauty services brand and gender pay gap, “Me Too” movement
- Develop, communicate, and implement system-wide change
 - Be mindful of challenges:
 - Logistical: activism without action risks hypocrisy and alienating consumers
 - Legal: joint-employer issues

Crisis Management



The Lawyer's Role and Legal Ethical Obligations

- Whether in-house or outside counsel, crucial to build a relationship with client
 - Balance of risk-aversion vs. understanding client's business needs
 - Stronger relationship = more credibility
- Attorneys representing clients during a crisis should be mindful of their ethical responsibilities, especially privilege
 - Model Rule 1.7(a)
 - Model Rule 2.1
 - ABA Formal Opinion 482

Model Rule 1.7(a)

Client-Lawyer Relationship

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Model Rule 2.1

Advisor

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.

ABA Formal Opinion 482

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 482

September 19, 2018

Ethical Obligations Related to Disasters

The Rules of Professional Conduct apply to lawyers affected by disasters. Model Rule 1.4 (communication) requires lawyers to take reasonable steps to communicate with clients after a disaster. Model Rule 1.1 (competence) requires lawyers to develop sufficient competence in technology to meet their obligations under the Rules after a disaster. Model Rule 1.15 (safekeeping property) requires lawyers to protect trust accounts, documents and property the lawyer is holding for clients or third parties. Model Rule 5.5 (multijurisdictional practice) limits practice by lawyers displaced by a disaster. Model Rules 7.1 through 7.3 limit lawyers' advertising directed to and solicitation of disaster victims. By proper advance preparation and planning and taking advantage of available technology during recovery efforts, lawyers can reduce their risk of violating the Rules of Professional Conduct after a disaster.

The Struggle Is Real

- Lawyers: channel your inner public relations professional
 - Lawyers = No comment, delay comment, or distancing statements
 - PR personnel = brand reputation and instinctive action to control narrative
 - Recognize the need to work quickly and mitigate the crisis

The Struggle Is Real, pt. 2

- Does attorney-client privilege apply to PR firms?
 - Consider three categories: (1) third-party waiver exceptions apply to PR firms; (2) no waiver applies; and (3) a waiver applies
- Cases to consider:
 - *Upjohn Co. v. United States*, 49 U.S. 383 (1981).
 - New York = *United States v. Kovel*, 296 F. 2d 918. (2d Cir. 1961)
 - California = *Stardock Systems v. Reiche*, 2018 U.S. Dist. LEXIS 204438 (N.D. Cal. Nov. 30, 2018); *Anderson v. Seaworld Parks & Entertainment, Inc.* 329 F.R.D. 628 (N.D. Cal. 2019)

The Struggle Is Real, pt. 3

- Best practices for PR firms and privilege:
 - Lawyer should engage the PR firm and there should be a “clear written description of PR firm’s role in the litigation in their engagement letter”
 - Awareness that not every communication will involve the rendering of legal advice (i.e., assisting in matters of public perception)
 - If challenged, lawyer should provide affidavits describing specific tasks the PR firm was engaged in and the purpose for seeking out legal advice.

Protecting Brand Image: Dangers of the “Face of the Brand”



Protecting Brand Image: Lessons Learned

- Jack in the Box and E. coli outbreak in 1993
- Wendy's "finger in the chili" hoax in 2005
- Starbucks' NYC location and 9/11
- Burger King's horsemeat scandal in 2013
- Yum! Brands and KFC and the avian flu in 2013
- Popeyes' failed response to chicken sandwich shortage in 2019

Weathering a Crisis Management Storm



Weathering a Crisis Management Storm

- Best practice: franchisor developing a high level of public trust
 - Rebuilding trust when a crisis happens is easier
 - Sincerity and transparency can minimize the impact to the organization, the brand and good will
- Franchisor use of Employee Resource Groups
 - Helps to instill a culture of diversity, inclusion and compassion in employee population
 - Provides a platform to quickly respond to social justice issues
 - Encourages employee engagement, collaboration and education

Best Practices for Carrying out a Crisis Management Plan

- Five Key Elements of Crisis Management Programs:
 - Crisis assessment and planning
 - Establishment of crisis management teams
 - Implementation of crisis management teams
 - Information gathering and dissemination management
 - Crisis communications plans

Other Best Practices for Crisis Management

- Crisis management team should be mix of leaders across organization and outside parties
- Team members should be trained in how to deal with variety of crises
- Crisis management plan should outline each members role
- Crisis management manual should include all key aspects of plan
- Install communication plan to get word out across system
- Educate the system in crisis management best practices

A Crisis Happened: Now What?

- Respond quickly but ensure accurate information
- Statement should be authentic, confident, and transparent
 - But note attorney-client privilege considerations
- Statements should consider:
 - Showing concern,
 - Making a pledge to cooperate,
 - Taking responsibility where appropriate,
 - Telling the public what is being done about the problem
 - Apologizing if at fault
 - Discussing the problem in the context of your general corporate record

System-Wide Changes



**Change is a process,
not an event.**

A Decision to Implement System-Wide Changes

- Americans overwhelmingly want brands to take a stance on social and political issues in concrete and identifiable ways
- Better to implement change *before* a crisis emerges (proactive v. reactive)
- Examples of system wide-changes that might address social justice:
 - Required training on diversity in hiring
 - Updated vendor requirements to promote minority-owned businesses
 - Local marketing requirements that include community outreach

Making a business case

- Making a business case = clear economic reason for decision
- Courts have analyzed the benefit to the system when addressing franchisor's reasonableness in implementing system-wide change:
 - *Carvel Corp. v. Baker*, 79 F. Supp. 2d 53 (D. Conn. 1997)
 - *In re Musicland Holding Corp.* (S.D.N.Y. May 22, 2008).
- A franchisor's rationale can be material to a court's decision
 - *In re Sizzler Int'l Inc.*, 225 B.R. 466 (Bankr. C.D. Cal. 1998)
- Lack of rationale may result in finding of bad faith
 - *Amos v. Union Oil Co. of California*, 663 F. Supp. 1027 (D. Or. 1987)

Audit All Agreements pre-Implementation

- Review all operative contracts in system to implement change
- Contracts that clearly and specifically address changes create a smoother path of implementation
 - *Carlock v. Pillsbury Co.*, 719 F. Supp. 791 (D. Minn. 1989)
 - *Johnson v. Arby's Inc.* (E.D. Tenn. Mar. 15, 2000)
- Courts may consider course of dealing between franchisor and franchisees to interpret contractual provisions:
 - *Montgomery Mall Service, Inc. v. Motiva Enterprises, Inc.* (D. Md. Oct. 4, 1999).
 - *Stuller, Inc. v. Steak N Shake Enterprises, Inc.* (C.D. Ill. June 22, 2011)
- Broadly worded reservation of rights may be enforceable. Material changes are considered in enforceability.
 - *Economou v. Physicians Weight Loss Centers of America*, 756 F. Supp. 1024 (N.D. Ohio 1991)
 - *Bird Hotel Corp. v. Super 8 Motels Inc.* 246 FRD 603 (D. S.D. 2007)

Identify Enforcement Issues in States with Constructive Termination or Relationship Laws

- In states with relationship laws and/or prohibitions against constructive terminations, the business case for a change is crucial.
- Generally, so long as franchisor acts in good faith, it can make impactful business decisions and comply with applicable statutes.
 - *Munno v. Amoco Oil Co.*, 488 F. Supp 1114 (D. Conn. 1980)
 - *Remus v. Amoco Oil Co.*, 794 F.2d 1238 (7th Cir. 1986)
- Carefully consider when change may be construed as unreasonable performance expectation.
 - *Beilowitz v. Gen. Motors Corp.*, 233 F. Supp. 2d (D.N.J. 2002)

Implementation



Managing Social Media



Social Media “Dos and Don’ts”

- Develop a comprehensive social media policy
 - Cover issues outside the system (i.e., social justice issues)
 - Cover issues inside the system (prohibiting posts by franchisees and employees about disputes, lawsuits, compliance issues, settlements, etc.)
- Policies should be applicable both internally and externally
 - Internally = franchisor’s employees
 - Externally = franchisees and their employees

Personal v. business accounts

- Franchisors should establish guidelines creating a clear delineation between the franchisee (or employee's) personal social media use and the company
 - No personal accounts can use the franchise name or reference the system
 - No personal accounts using the franchisor's primary trademark, trade names, logos, or other images representing the brand
 - Personal disclaimer noting that personal accounts don't reflect opinions of the franchise
 - No franchise business conducted over personal accounts
 - No discussion of franchise business over personal accounts
 - No disparaging competitors

Not all Platforms are Created Equal

- All franchisors should create and implement policies and guidelines that informs appropriate behavior, discloses applicable rules and laws, and prohibits impermissible conduct.
- Social media strategies to consider:
 - Prior approval approach
 - Social media playbook of pre-approved content
 - Third-Party vendor creates content for the whole system
 - Franchisees control their own social media presence (Warning: sacrifices consistency and control)

How far can you go?

- U.S. Federal Trade Commission and state regulators prohibit use of false and misleading advertisements
- First amendment and free speech protections can challenge a franchisor's prohibition on disparaging the brand and/or competitors
- Blanket prohibitions on “disparaging” statements or use of “confidential” or “inaccurate information” should be appropriately tailored
 - Explain to employees that the policies are not intended to censure free speech.

FTC Guidelines and Copyright Rules

- Franchisors should be careful when promoting their brand on social media
 - Consider whether a blogger or podcaster discloses the financial relationship between them and a paying sponsor (the franchisor)
 - The FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255
- Franchisors should ensure franchisees only use approved trademarks and prohibit any unapproved use
 - Also comply with any request to modify/take down unapproved content
 - The Digital Millennium Copyright Act (DMCA)

Infringement Protocols

- Best practices for a franchisor to protect their intellectual property:
 - Assign an appropriately designated person or committee to respond to infringement demands and legal action
 - Develop a list of protocols to determine if legal action is best recourse
 - Contact the infringer to possibly take down inadvertent infringement
 - Ensure language and tone in addressing infringement is appropriate and professional
 - Example: Ferrero and 2013 cease and desist letter

Franchisor social media

- Franchisors should be wary of *any* social media use, whether their own, the franchisees, or its employees
- A franchisor can implement the following in social media policy and any future franchise agreements:
 - Include policies that address password protection and protecting information stored on portable devices
 - Two-factor authentication for any social media account used in connection with the business
 - Ensure single ownership for a social media account

Social Justice and Social Media

- Consistently communicate your brand's message!
 - Message should be repeated consistently and possibly made part of the criteria for franchise renewal
 - Consistently requiring the entire system (top to bottom) to commit to the brand's goal and mission will ensure consistent messaging
- Establish a successful social media presence
 - Letting consumers know your brand and messaging before a crisis arises
 - Identifying your allies on social media (influencers, celebrity endorsers, blogs, podcasts, cult-followings, etc.)

Conclusion / Q&A?

