MANAGING THE ORGANIZATION OF A FRANCHISE ASSOCIATION

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Table of Contents

I. INTRODUCTION ........................................................................................................... 1
II. WHAT IS AN INDEPENDENT FRANCHISEE ASSOCIATION? ....................... 1
III. HOW IS AN INDEPENDENT FRANCHISEE ASSOCIATION DIFFERENT FROM A FAC? ................................................................. 2
IV. WHY DO INDEPENDENT FRANCHISEE ASSOCIATIONS FORM? .............. 3
V. IS IT POSSIBLE THAT A FRANCHISOR WANTS AN INDEPENDENT FRANCHISEE ASSOCIATION TO BE FORMED AND BE ASSOCIATED WITH ITS SYSTEM? ................................................................. 5
VI. HOW FRANCHISORS REACT TO THE FORMATION OF AN INDEPENDENT FRANCHISEE ASSOCIATION .................................................. 6
VII. HOW A FRANCHISOR CAN BEST DEAL WITH THE OFTEN DIFFICULT GESTATION AND “BIRTH” OF THE ASSOCIATION IF FORMED THROUGH ANTAGONISM, EVENTS, CATASTROPHE, ETC .................... 10
VIII. HOW FRANCHISORS DO AND SHOULD CONSTRUCTIVELY REACT TO THE FORMATION AND EXISTENCE OF AN INDEPENDENT FRANCHISEE ASSOCIATION ................................................................. 14
IX. HOW CAN THE FRANCHISOR EFFECTIVELY ENGAGE THE INDEPENDENT FRANCHISEE ASSOCIATION? .................................................. 17
X. CONCLUSION .............................................................................................................. 22

Appendix

Appendix “A” - Annotated Bibliography ........................................................................ 1
MANAGING THE ORGANIZATION OF A FRANCHISE ASSOCIATION

I. INTRODUCTION

Is an independent franchisee association really the devil of the franchise system?

Can there be benefits to a franchisee association? Is it possible that a franchisor would want to even encourage the creation of an independent franchisee association?

Does a franchisee association’s role change depending upon the economic climate or condition of the country or the particular system?

Can an independent franchisee association (sometimes “FA”) and a franchisee advisory council (sometimes “FAC”) co-exist with one another and be of benefit to the franchise system?

Should there ever be a need for a franchisee association whether you are a franchisee or franchisor?

All of these questions and many others are always on the minds of, in particular, the franchisors and for that matter, the franchisees who are anticipating creating a franchisee association or even those who are thinking about joining an existing association. This paper focuses more on the practical side of the relationship between a franchisee association and the franchisor, rather than many of the legal issues involved with the creation and potential standing a franchisee association may have in connection with lawsuits involving franchisors. In addition, the focus is also targeted toward the current (at least at the time of the writing of this paper) economic situation in the United States, primarily the economic downturn that everyone has been experiencing. The paper tries not to create a bias from either the franchisor or franchisee perspective and hopefully achieves a balanced approach.¹

The paper is also primarily centered around the dynamics of an independent franchisee association instead of a FAC.

Finally, as a resource for the reader, Appendix "A" to this paper is a reprint of an annotated bibliography that was incorporated into a paper written for the International Franchise Association.² It includes most of the more significant articles on independent franchisee associations and FACs. A number of those papers address the legal issues involved with the formation and establishment of each type of association.

II. WHAT IS AN INDEPENDENT FRANCHISEE ASSOCIATION?

An independent franchisee association can be generally defined as two or more franchisees of the same franchise system that: (i) want to form an association/group, (ii) want an association independent from the franchisor, (iii) want to control their own agenda as a group without having to seek permission or funding from the franchisor in regard to the issues they wish to advance, and (iv) come together as a group to represent their collective interests to address issues among themselves, their franchisor, their fellow franchisees who are not members of the association, other third parties, and/or the general public.

¹ The views expressed in this paper are those of the individual authors and do not represent the views of any clients, franchises or organizations with which the authors are affiliated or represent.
III. HOW IS AN INDEPENDENT FRANCHISEE ASSOCIATION DIFFERENT FROM A FAC?

For purposes of this paper, a "FAC" is defined as an organization formed by a franchisor in which all of its franchisees in good standing are automatically members, whose operating expenses are primarily funded by the franchisor and interests of all franchisees are represented by providing an organization for both advice and feedback as to potential actions, new initiatives, programs, policies, and the like that the franchisor is considering. The FAC governing members consist of both franchisor and franchisee representatives and are either appointed by the franchisor, or as to the franchisee members, can be elected or appointed.

Both FACs and independent franchisee associations can have tremendous advantages for the franchisor and its franchisees. A FAC will provide a direct link between the franchisees and franchisor. The independent franchisee association will also allow member franchisees to caucus independently without the perception of “big brother” being involved in the process and provide the franchisees with a forum to then convey their “independent” thoughts to the franchisor. Both a FAC and independent franchisee association can be used to foster discussions and communications. Communications are the key to a successful relationship between the parties.

An advantage of having both a FAC and independent franchisee association is that it allows for, as noted above, the franchisees to have an independent forum to develop their own independent issues, concerns or responses and then funnel that information through the FAC, which is set up to communicate directly with the franchisor. The franchisees can, in essence, have two voices. Likewise, a franchisor, at the same time, may communicate with the FAC and/or with the independent franchise association. This can be done separately from one another or through the FAC, a FAC representative communicating directly to the association. The important part is for the franchisor to remain consistent in how it operates and communicates with all franchisees.

The obvious downside to having both the FAC and independent franchisee association at the same time is that there could be miscommunications or two separate groups of franchisees responding differently to the same issue.

Whether it is a FAC or an independent franchisee association, every franchisor should consider at least one type of franchisee association for its system. The ultimate benefit over any real or perceived disadvantage will be an invaluable resource to the franchise system. There are no easy answers, but franchisors, franchisees, independent franchisee associations and FAC leaders should keep an open mind as to the variety of ways in which to interact. These vehicles provide the best hope for effective communications between the franchisor and franchisee community, which, in the long run, will serve the divergent and common interests of everyone involved.

The key ingredient to distinguishing a FAC from an independent franchisee association is the fact that the franchisor is the entity that basically forms, controls and operates the FAC even though there may be bylaws and other governing documents. Additionally, the franchisor maintains representation within the group and, therefore, it is not truly an “independent franchisee association.”
IV. WHY DO INDEPENDENT FRANCHISEE ASSOCIATIONS FORM?

There are a multitude of reasons why an independent franchisee association would be created and a number of those reasons are listed below:

1. Outside forces (e.g., competition, economy, technological changes) are impacting the franchise system, causing concern among some franchisees, and the franchisees are not properly addressing these forces.

2. Franchisees face a common issue with the franchisor – a recent change in policy (e.g., advertising, the internet), an upcoming event (franchise agreement renewals), or a perceived threat to their businesses (e.g., encroachment or reaction to an alternative channel of distribution).

3. Franchisees face issues not currently shared uniformly by all of their fellow franchisees, but are seeking system-wide support.

4. An existing FAC is not addressing the concerns of the franchisees to their satisfaction.

5. Franchisees desire an independent voice – not one controlled by a FAC.

6. Franchisees seek to create a vehicle for franchisees to share information such as operational best practices as well as business, legal and legislative updates.

7. Franchisees want “power in numbers” and economics of scale for collective representation by legal counsel, including the possibility of initiating litigation against the franchisor by the association and/or by individual association members.

8. The franchisor encourages the formation of a single independent franchisee association to avoid communication with multiple “splinter” groups of franchisees.

9. The franchisor seeks to create a sounding board for the franchisees.

10. The franchisor seeks to create a forum for educating franchisees.

It is, however, our experience, both from anecdotes of others and from actual, real and practical experience, that the number one reason is distrust and poor communications between the franchisor and its franchisees. Also, most franchisee associations are formed during times of real or perceived dispute or external crisis. We believe that the best time for a franchisee association (or for that matter a FAC) to be created is when times are good. There are more advantages than disadvantages to a franchisee association, in particular, when there is a “good” relationship between the franchisor and its franchisees. The “rush” to form a franchisee association when a dispute arises tends to create additional angst and disconnect between the franchisor and the franchisees, in particular, those who are forming the association. Many times when a franchisee association is formed, the franchisor takes a negative approach to the creation of such a group and the franchisees then react with even more force (whether warranted or not) to the franchisor’s reaction to the creation of the franchisee association.

The more unique part of the discussion in this paper and at the eventual workshop on this topic is discussion of a franchisor actually encouraging franchisees to form an independent franchisee association. Some may say we are off the wall in even suggesting that a franchisor would want to have an independent franchisee association, but in reality, when the reader steps
back and analyzes the issue from outside the realm of who you are representing and what position you need to put forth, you may also agree that there is value in a franchisor encouraging the establishment of an independent franchisee association. This is not to say that the franchisor should not also establish a FAC, and the establishment of both does not mean that the two types of groups cannot coexist and function together for the betterment of the entire system. If you consider the reasons for formation of a franchisee association (in particular items 8, 9 and 10 above), they are some of the same reasons that franchisors would want to establish a franchisee association. Again, one may make an argument that a FAC can accomplish these purposes, but you need to overcome the issue that a FAC is many times perceived as being the franchisor’s vehicle and not the franchisees’. As noted in the definition of a FAC, it is typically created by the franchisor, typically funded by the franchisor, and most importantly, controlled by the franchisor whether by establishing the bylaws in the organizational structure or by having a number of franchisor positions within the FAC. Also, many times the franchisees who are a part of the FAC governing committee are perceived as being merely puppets of the franchisor.

Accordingly, an independent franchisee association, with the emphasis on "independent", gives the franchisees the ability to create and control their own association. The franchisor can then work in tandem with such an organization to implement its system and address issues of materiality and change. The association can then in turn have private meetings about the issues presented by the franchisor and create a working relationship that should have the full faith and trust of all of its members in its furtherance of its relationship with the franchisor.

This paper does not focus upon how to create an independent franchisee association from a legal viewpoint, but briefly below are some of the issues that go into creating an association so the reader has at least a cursory understanding of what is involved. The creation of a franchisee association is not as simple as just finding two or more franchisees who want to form an independent association. There are a number of legal issues that need to be addressed in the formation of an association. Appendix “A” should be one of the resources for locating more detailed information on the creation of an independent franchisee association.

Some of the issues that should be addressed in forming an independent franchisee association begin with the following:

1. What type of legal entity should it be, or structure should it have?

2. What state should it be formed in? There may be an opportunity to take advantage of some of the states that protect franchisees from franchisors trying to terminate or target franchisees who try to form an association.

3. What name should it utilize, the name of the franchisor or are there certain trademark issues to consider?

4. What will the organizational structure of the association be, will there be bylaws and other necessary documents?

5. Who may join the association? Is it only for those in “good standing?”

6. What are the voting rights of the members of the association? Is it by number of units, is it by territory or is it simply one member–one vote? Also, do you need to address any differences between an individual franchisee, a multi-unit franchisee and an entity franchisee?
7. How will dues be assessed? One per unit? Based on sales volume? Discount for multiple units?

8. Who will be the leaders of the group and how will they be selected? Should there be representation from all categories of franchisees - number of units owned, geographic location and/or other characteristic issues?

9. Are there any tax issues to address?

Franchisee organizations also form to consolidate the franchisees’ individual goals, questions and requests to a manageable level. One thousand franchisees operating without a franchise association can have several thousand priorities, all of which they would like to see the franchisor responding to. The result is fragmentation of effort and resources - on both sides. Franchisee associations play a valuable role in reducing this to a “shortlist” and focusing on the top priorities that are likely to be widely endorsed by their members and can materially affect the business of the majority of franchisees rather than a sub-set or region.

V. IS IT POSSIBLE THAT A FRANCHISOR WANTS AN INDEPENDENT FRANCHISEE ASSOCIATION TO BE FORMED AND BE ASSOCIATED WITH ITS SYSTEM?

As briefly noted above, this is a relatively novel concept but one that has been used in the past. There have been several well known franchise systems, including Holiday Inn, Aaron Rents and Curves, that not only encouraged, but aided, its franchisees in forming independent associations. It is also the authors’ viewpoint that franchisors should rethink their position on independent franchisee associations. The readers should consider and ask, what is the downside to the creation of an independent franchisee association? Is it the fact that the system might have a vehicle that is “trusted” by the franchisees and may encourage more open and honest communications among themselves and the franchisor? Is it the fact that the system might have an association that can communicate with all of the franchisees at one time, rather than having to address them on an individual basis? Is it the fact that by having the franchisees have their own group, they may actually come up with recommendations or suggestions that will benefit not only the franchisees but the franchisor? Are these the real fears, or is it the fear that there is “power in numbers” and the franchisees will be able to pool their resources and hire an attorney and then possibly sue the franchisor? Hiring an attorney and filing a lawsuit may be a reality whether or not there is an association and if that is the fear, then there obviously are problems within the system that need to be addressed. The authors are not aware of any system where the majority of the franchisees are continuously disgruntled and the franchise system is a success. Yes, there will always be disgruntled franchisees, but if the vast majority of the franchisees are disgruntled about something within the system, good business practices suggest that something needs to occur so that the franchisees are no longer disgruntled. Disgruntled franchisees, even if the franchisor is making money, are not good for the longevity of the system. Disgruntled franchisees will not be encouraging others to enter into the system. Disgruntled franchisees will not be expanding. Disgruntled franchisees will not take kindly to changes within the system. Disgruntled franchisees can only bring down the system, which is of no benefit to the franchisor or its franchisees.

Most of the franchisors’ fears of franchisee associations revolve around the fact that most franchisee associations are created when things are not going well in the system, during difficult economic times, during system crises and when the franchisees believe they have no other choice but to form a group to confront the franchisor or even commence litigation against the franchisor. Those issues, if a franchisee association were in place from the beginning, and if the franchisor properly addresses issues or communicates properly, may never come to fruition or can at least be addressed in an orderly manner. The franchisor may well then avoid having to
engage its attorney and spending additional time and effort, as well as avoid its staff dealing with disgruntled franchisees and an antagonistic franchisee association. The franchisor staff should be working on business issues, solidifying the system and setting it up for continued growth, not using its resources to litigate or add further to the disgruntlement to its franchisees.

The encouragement of a franchisee association by the franchisor would provide the following benefits:

1. A real or perceived notion that the franchisor is concerned with its franchisees and wants the franchisees, collectively, to be able to communicate among themselves to come to some sort of consensus concerning issues;

2. Formation of an independent franchisee association may provide the benefit of good public relations;

3. The formation prior to any type of dispute would establish an organization that would be well structured and not put together in haste or with antagonism. It would be better organized to address any material issues or disputes at a more professional and organized level and be able to rely upon, hopefully, a prior good working relationship between the franchisor and franchisee on issues that were not at the dispute level; and

4. It would allow the franchisor to rely on a truly independent approval process by the independent franchisee association for years to come, should there be some sort of disagreement or question concerning certain changes within the system.

VI. HOW FRANCHISORS REACT TO THE FORMATION OF AN INDEPENDENT FRANCHISEE ASSOCIATION.

One would surmise that a franchisor’s typical reaction to the franchisees forming an independent franchisee association would be one of disdain and contempt, with trepidation and even a dose of fear tossed in, regardless of the circumstances surrounding the formation. Although more recent actual experience has eroded this attitude somewhat, historically such was the typical franchisor reaction when a franchisor’s most feared event was the formation of an independent franchisee association by the franchisees. Usually, that was due to the simple fact that most associations were formed because of an adverse set of circumstances between franchisee and franchisor. Franchisors were also typically of the opinion that any franchisee association was adverse to the franchisor’s interests. These adversarial attitudes that have prevailed throughout the years between franchisors and their associations didn’t just happen overnight; nevertheless, why would it be imprudent to begin peacefully? Today, franchisors should not necessarily harbor fear upon learning the franchisees are forming an independent franchisee association, but should give it a positive look first and may rather relish a peaceful formation of the association as a sign of constructive progress and maturity in the system. Of course, this is purely the most optimistic attitude any franchisor could muster, and it is certainly the attitude with which the formation of a legitimate independent franchisee association may initially be met, albeit things may change. One only knows what would happen if the franchisor actually harbored thoughts of aiding the formation. Also, this can only be true when the formation is peaceful and not driven by a catastrophe or an adverse set of circumstances between franchisee and franchisor. Still, why would any franchisor prefer to operate its system with an independent franchisee association, especially one that spends every waking moment scanning the system with overly critical eyes, waiting to pounce on the franchisor for any miniscule grievance imaginable, or, continually stirring the pot trying to be the most disruptive and unproductive segment in the system? Franchisors should not be criticized for failing to embrace an independent franchisee association that hatches solely from acute hostility bent on
devastation and destruction within the system. Yet, there is evidence that a franchise system fares better in the long run with a legitimate, well-represented, resourceful and effective independent franchise association.

Many franchise systems communicate with their franchisees through “FACs” that have been around for years. Regardless of the structure of the organization, it is imperative that the system have a means of communication internally. Such communication is a necessary factor in the growth and survival of a franchise system and is probably best served by the existence of a legitimate independent franchise association.

Peaceful formation of an independent franchise association with participation and cooperation from the franchisee and franchisor in a challenging economic climate - a franchisor may even desire that a franchisee association be formed – is no doubt a controversial suggestion to some franchisors.

There has been much written over the last ten years regarding the formation of independent franchisee associations and strategies on how to best organize and/or supervise the formation of an independent franchise association by the franchisor. There are dozens of articles, long and short, stretching a ten year plus span with every opinion on every facet of a franchise association and the franchisor’s involvement therein. See Appendix "A." Far be it for us to opine against the grain of many previous learned counsel other than to simply remind the franchise communities not to forget common sense and good business judgment, seemingly novel concepts that franchisors and their lawyers too often ignore. A large dose of common sense and good business judgment are required in not only forming an independent franchise association, but in interacting with the association on an ongoing basis. There is no franchise “bible” or perfect “blueprint” delineating the proper “strategy” for the formation of an independent franchise association, either by the franchisees alone, or with the franchisor’s assistance, as each system seems to be unique unto its own. The authors are not advocating the premise that what works for one system/association will work for another, but we are advocating that a franchisor is in a better position to control, influence and/or design the relationship it will ultimately have with an independent franchise association if the franchisor has undergone significant internal evaluation and sufficiently explored the current state of affairs among its current franchisees before the process of forming an association has begun.

There are numerous examples of independent franchisee associations formed out of pure anger, spite and conflict. Not a great way to start. Litigation is not the solution in a situation where two sides depend on each other for survival and success. A franchise system is a unique structure and an independent franchisee association can be an important asset to the system, or it can be a very divisive and destructive liability instead. The authors’ simple straightforward strategy is for the franchisor to assist in the formation of an independent franchisee association during the good times, when the franchise system is “happy” and the franchisor can have a positive influence on the formation with the franchisees positively embracing it. Right now, it is a difficult time in our economy. In fact, today the United States’ economic climate is just plain tough. The media seem to continually dwell on the most negative aspects of the U.S. and world’s economy. Currently, the poor economic climate and the increasing negative consumer reports, including unemployment, layoffs, bankruptcies, salary reductions, hiring freezes and so on present a truly negative economic picture. Unfortunately, many franchisees everywhere are suffering though this experience, creating a very “unhappy” time in franchise systems nationwide.

The fact that the majority of franchise systems are also suffering is clear from companies’ financial reports and the many comments made in the past months by franchisors and franchisees. However, optimism is one of the keys to success in a franchise system, as is
cooperation during down times in the economy that often lead to strange bedfellows fueled by the necessity of survival. A good time for an independent franchisee association? Again, a controversial suggestion to some franchisors. But yes, despite the “anxieties” experienced by franchisors over franchisee associations, it is probably as good a time as any for an independent franchisee association, maybe under the right circumstances even better. Upon examination, it may be even better if and so long as the independent franchisee association is not merely a platform for complaints for certain groups of franchisees or individual franchisees, but rather a concerted effort to improve the system, independent franchisee associations can be exceptionally beneficial not only to the survival of a system but the development and future of the system, especially in these economic times. There is no question that these economic times do present new issues for franchisors. Many franchisors are experiencing for the first time franchisees contacting them and indicating that they are simply closing because they can’t afford to stay open or that they are ceasing to pay their royalties or make their rent payments due to various economic factors. The typical franchisor’s response is that the franchisee is now in default and that the franchisor will issue notices of termination, and if you do not de-identify and comply, we will start injunction proceedings and begin the process to collect for a breach of the franchise agreement. This is the time when franchisors need to step back and look at the overall situation. If the franchisees are down and out because of the economic climate, it is most likely that the franchisor is also suffering. A franchisor cannot simply look at closures and breaches the same way it did during good economic times. This is where the franchisor needs to be creative and where the formation of an independent franchisee association will result in a tremendous benefit to the system. The formation of a franchisee association could be the conduit for brainstorming in how to save the franchisees, and how to implement possible royalty abatement programs, new ad programs and/or new products and services that can help the franchisees. The loss of franchise units is not only detrimental to the franchisor, but to the other franchisees. As a franchisor in today’s economy, don’t be too fearful of the franchisee association, as it may aid in the survival of the franchise system.

Franchisor Induced Associations

Research and much conversation with the franchise community determined that as few as three major franchisors successfully formulated the process for the formation of their respective independent franchisee associations, complete with invitations from each respective franchisor to their respective franchisee community to join. As stated above, those daring large franchisors were Aaron Rents, Holiday Inn and Curves. If there are more franchisors out there that formed independent franchisee associations, please receive humble apologies for not being mentioned here, but they have been kept a good secret. Only finding three out of hundreds of major franchise systems, one could certainly question the behind-the-scenes reasoning, or lack thereof, as to why these systems stepped forward to help create their respective independent franchisee associations; and, why others have not. Although, except in the case of Curves, we don’t know the real reasons behind their decisions, perhaps they felt it was far better to meet their destiny head on rather than remain secluded hoping the “sky won’t fall.” Or, if the franchisor views its franchisee community with disdain and contempt, the franchisor can always take the age old approach that it is far better to keep your friends close but your enemies closer, the latter being the category most franchisors believe is just where an independent franchisee association fits. Those days of “prevention and/or repression of freedom of association” among the franchisees is (or should be) no longer part of the equation in the franchise world. It is more productive for the franchisor to be the advocate of formation than antagonistic towards the formation of an independent franchisee association.

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3 Roger Schmidt, an author of this paper, was the Senior Vice President and Chief General Counsel for Curves International during this period.
The franchisor of the Curves system looked at an independent franchisee association from a couple of pertinent perspectives. The Curves system was growing so fast and getting so large that the franchisees needed an organization of some kind, and it was becoming apparent that an independent franchisee association was going to eventually form. Therefore, management decided to be proactive and get it started peacefully, with a solid foundation and in the right direction? Curves was certain the formation of a Curves independent franchisee association was inevitable and made the decision that it was far better to lead and influence than to sit silently and watch. So Curves was very instrumental in forming the Curves Franchisee Association (“CFA”). Even though Curves had an active FAC, Curves’ management also believed strongly that an independent franchisee association could be an effective tool in the growth, success and survival of its system.

Interestingly enough, about the time Curves decided to move forward in an attempt to arouse interest in the formation of the CFA, out of the blue and without notice to Curves, a franchisee started one. If you read the comments in Section VII regarding a few things the franchisor should first look at when the franchisees attempt to form, or have formed, an association, such was put to practical use by Curves in this situation. Admittedly, Curves was taken by surprise with a franchisee opening a website and announcing the formation of a legitimate independent franchisee association. At this juncture, Curves had a few obvious choices, one being to embrace this new independent franchisee association, the second being to rebuff it and the third being to do nothing and see what would transpire. Before a decision of this magnitude could or should be made, Curves needed to understand a few things about this upstart fledgling association. After a brief but comprehensive investigation and fact-finding about this attempted franchisee association, Curves found out some very interesting things about the instigating franchisee and the intended association. Disappointingly, the franchisee was not the stellar performer one would hope for. The principals also had questionable motives and an agenda that was far from the beneficial goals of a true franchisee association. The more Curves looked at the new association and its founder(s), the more it was unpalatable and the further Curves wanted to distance itself from it. This became a very interesting situation, with a single franchisee attempting to get an independent franchisee association off the ground at the same time the franchisor and the core franchisees were attempting the very same thing, with both associations competing for franchisee membership.

The good news for Curves is that numerous “core” franchisees stepped up to take an active role in leadership, recruiting and responsibility to help organize, in concert with Curves, the CFA. The lone franchisee’s attempted organization reached its peak with a membership of about 90 franchisees and then went silently by the wayside when the franchise community realized the true intent of the organizer(s). What a mess Curves could have been in had that franchisee succeeded in rallying the franchise system into his fold. Although the association started by this franchisee(s) was not precipitated by a system catastrophe or even adversary relations, it wasn’t being founded with the right goals in mind. Therefore, Curves elected to disregard and not cooperate with the renegade franchisee’s association. Instead, Curves forged forward instituting meetings with core franchisees, the advertising FAC and numerous franchisees from all geographical areas of its system. Curves felt so strongly about having a good independent franchisee association that it initially funded the organization to the point of even encouraging and allowing payment to the CFA for an independent outside counsel of their own choosing -- certainly a seemingly distasteful reality for any franchisor. While the authors are not advocating that this is the strategy for every system to follow in organizing its independent franchisee association, it certainly is a constructive and peaceful way, and it can work. The result can be a good organization that is independent from the franchisor with good legal counsel, which is productive and has a good rapport with the franchisor while being intent on making the system better. Although the organization of the CFA with Curves’ assistance may appear to make it more of a FAC than an independent franchisee association, once formed Curves quickly turned
over all power to the franchisees and took a very distant back seat going forward. Curves wanted to ensure that once formed, the CFA would be truly independent and that Curves would not have any representatives in the independent franchise association and would only attend meetings when and if invited. This attitude was taken in an effort to ensure that the CFA would truly end up as an independent franchisee association.

Franchisors who lack an effective means of communication with their franchisees are prone to be confronted by the unified and perhaps adversarial actions of a franchisee association, particularly in regard to the implementation of unwanted material changes in the franchise system. That being said, if communication does exist between the franchisor and its franchisees, whether it is an independent franchisee association or FAC, both sides will reap the benefits of improved communication in the decision making process as well as by endorsement of the material decisions by the franchisees. As franchise systems mature, so too will franchisee organizations. Similarly, as the issues become more sophisticated and complex in the franchise system, hopefully the franchisee association will also rise to the occasion and address them properly. The structure of and formation of any franchise organization is a major key in determining how it will operate going forward. The authors submit that both sides would agree that the formation of an independent franchisee association is one of the most important steps franchisees can take to augment their prospects for better representation. While most franchisors should agree that the formation of an independent franchisee association ensures better representation for the franchisees, it is doubtful that most franchisors would acknowledge that mere formation guarantees success or that it would benefit the system. This is probably the main reason only a few of the hundred franchise systems have been proactive in the formation of an independent franchisee association. However, when the franchisees are joined by the franchisor in the initial peaceful and cooperative formation of an independent franchisee association, the result should be as good as it gets.

VII. HOW A FRANCHISOR CAN BEST DEAL WITH THE OFTEN DIFFICULT GESTATION AND “BIRTH” OF THE ASSOCIATION IF FORMED THROUGH ANTAGONISM, CATASTROPHE, ETC.

Too often independent franchisee associations come into being during a looming crisis in the system; significant changes in the system; a franchisor filing bankruptcy; a catastrophic event in the system, or from just plain antagonism. Formation from these adverse events usually begin with a core group of franchisees who either have a lot invested and a lot to lose, or they simply blame their misfortune on the franchisor/system and harbor pure disdain for the franchisor. Unfortunately, coupled with an adverse association formation is the unnecessary baggage the franchisees usually tote along in the form of anger, frustration, bitterness and other loathsome attitudes. Business is somewhat easy to deal with and discuss, but emotion lends a whole new perspective and often creates the largest impasse when the franchisor has to reckon with an association formed under adverse circumstances.

Once the franchisor gets over the surprise and deflects the often personal and bitter comments and remarks, a game plan needs to be set in motion for the franchisor to approach and interact with the association. But first it would be very prudent for the franchisor to determine a few things. Why did this happen? Why didn’t the franchisees simply come to the franchisor and discuss their concerns? Is the franchisor doing something that is terribly wrong? Are the franchisees’ grievances founded on legitimate system issues that really merit inspection and discussion? Just who is behind the association and just who does this association truly represent? Is the independent franchisee association a true across-the-board representation of the franchisees in the system? Does it represent a majority of the franchisees, or does it simply represent a few who have in mind nothing more than the creation of a soap box for their complaints? Aside from just counting numbers, the franchisor must also determine just who
from the franchisee community, is the driving force behind the association and how many from
the franchisee community support the association. Are the franchisees behind the formation
“good” franchisees? Are the supporters “good” franchisees or are they in the class of those
behind in royalty payments, always on the list for failing to follow system procedures or negative
and basically marginal operators, etc.? The franchisor has some homework to do before first
engaging a newly formed association, especially one birthed through antagonism, negative
events or catastrophe.

En Garde!! Or so says the franchisor only too often when engaging the newly formed
independent franchisee association that came into being through antagonism, negative events
or catastrophe. Effective? Probably not. We all know you get more bees with honey than with
colloquial Raid. So just how does the franchisor effectively engage the independent franchisee
association that is antagonistic towards the franchisor? Since dueling pistols are probably out of
the question and certainly socially unacceptable, communication is probably the more
acceptable business avenue and a good place to start.

Most people involved on either side of an association have an opinion on how to deal with
difficult situations. And many franchisors have had limited success, and even no success,
interacting with independent franchisee associations formed out of catastrophic turmoil in the
system. Often this results in immediate litigation and ends in downright hatred. Big names are
replete with this end result. Many chains, including UPS Store/Mail Boxes, Etc., Brown Shield
Association and Quiznos have been or are currently in litigation with their respective franchisee
associations. Because the authors are not involved in any of these relationships, we can only
view them from the outside. Perhaps each franchisor and its franchisees tried alternative
resolutions; however, it is painfully obvious that negotiations and franchisor interaction with the
respective franchisee associations did not work. Maybe the franchisor could not bend anymore
and perhaps the franchisees’ demands were absurd, but the resulting litigation is time-
consuming and expensive, usually creating a permanent chasm of distrust between franchisee
and franchisor that is difficult to bridge, much less mend, in the future. Could egos and emotion
also be involved?

Turning the issue over to legal counsel to initially deal with a new association is probably a poor
choice, as they seem to have little success and are seen as threatening the new association
with legal, not business answers. This is not a good beginning. Obviously, communication is
the key with a new association birthed through antagonism, negative events, catastrophe or
duress and communication should start rather quickly and from the franchisor’s management
team. However, as noted with the CFA, having good franchisee counsel “participate” can be a
real benefit for both sides.

A couple things learned from experience, and through numerous materials and discussions with
colleagues, franchisees and franchisors, is that franchisees want to be recognized, listened to
and treated with respect. The franchisees clearly exhibit animosity to those franchisors who
treat them as a nuisance or a stepchild rather than a legitimate force to be reckoned with, or at
the very least a “business partner” (in a non-legal sense). Is your goal as a franchisor to end up
in six years of difficult, high emotional litigation like the Dairy Queen system? Then only to have
the first resolution explode into an additional nine years of enforcement litigation. It is common
knowledge that International Dairy Queen (“IDQ”) and Dairy Queen Operators Association
(“DQOA”) do not have much trust or love for each other. In 2000, it seemed both sides came to
their senses with IDQ and DQOA finally putting down their swords and setting the litigation that
was started by five franchisees in 1994. Or did they? Probably not. Since the 2000 settlement,
they have had three arbitrations which interestingly enough were all filed by the franchisee
association. Let’s move to 2006, the DQOA filed the third arbitration which was decided in 2008
in what appears to be a complete victory for IDQ (portions of the final order we were able to
It is now 2009, fifteen years since the original class action was filed, nine years since the 2000 settlement and one year since the last arbitration, which appears to have taken the steam out of the IDQ/DQOA dispute. Protracted litigation, while great for the lawyers, is in reality a monstrous step backwards for both the franchisor and its franchisees. Just think of the cost in time and money. Just imagine how many Dairy Queen cones the money spent on litigation could have bought. To quote the wondrous words of wisdom from the IDQ/DQOC (Dairy Queen Operators Cooperative) October 2, 2008 Arbitration Order written by the learned Sanford Litvack, Chair; Judge Jim Carrigan; and, Joseph Angland - “While we have found for the Respondents in this Arbitration, there are no real winners in this case. But, there are real losers: the Dairy Queen system, the franchisees and the shareholders that must finance these battles. We can neither legislate nor order trust; we can simply observe that the parties should, in the future, try cooperation in place of arbitration. This would inure to the benefit of all.” It is interesting to note that the DQOA website itself posts the quote we used above from the arbitrator’s decision. Perhaps the message from the arbitrators was more geared to the DQOA by telling it to stop filing these divisive cases. More interesting is that the DQOA compounds the irony by publishing that message on its own website with the headlines, “IDQ wins arbitration.” No one could say it any better than the three learned arbitrators did in the IDQ/DQOC case in the above quote.

Cooperation and communication come in many colors, but meaningful, sincere, timely and respectful cooperation and communication will go a long way in getting the franchisee association’s train on the right track from day one. The "best foot forward" approach may work with the franchisors sending the management team with open minds instead of the lawyers. Franchisees should do the same and keep their finger off the litigation trigger until they exhaust all communication avenues. The most common complaint heard from lawyers, franchisees and franchisors regarding a franchisor’s interaction with an independent franchisee association, is that “the franchisor does not respect us.” Although this is a "slight" understatement and a little tongue in cheek, everyone would agree that systems don’t work very well without franchisees. Regardless of the infighting and posturing, both the franchisor and the franchisee deserve respect from one another.

Granted, sometimes franchisor and franchisee cooperation is simply not going to work if upon initial formation the association is already on the litigation track and the first meaningful interaction the franchisor has with the new association is at the mediation or arbitration table with a slew of lawyers. Unfortunately, that is what appeared to have happen in the IDQ/DQOC matter with the franchisees suing without sitting. Where do you want your system to be?

VIII. HOW FRANCHISORS DO AND SHOULD CONSTRUCTIVELY REACT TO THE FORMATION AND EXISTENCE OF AN INDEPENDENT FRANCHISEE ASSOCIATION

To some franchisors, the term “independent franchisee association” causes more anguish than any other term in franchising. The term often conjures up words such as “confrontation,” “collective bargaining” and/or “threatened litigation.” When confronted with the “threat” of an independent franchisee association, the first instinct of many franchisor leaders is to either attack the association or ignore it. Franchisor leaders would be well served to suppress these initial instincts, and calmly review all of the circumstances and facts giving rise to an association’s formation before making any “snap” reactive decisions.

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4 dqoa-dqoc.com, website of Dairy Queen Owner's Association.

5 id.
By the same token, the association would be well served in allowing franchisor leaders a reasonable period of time to absorb the news of the association’s formation, and not beginning, at inception, with public attacks on, or ultimatums for action by, the franchisor’s top management team. Legal counsel for franchisors and associations should lend light, not heat, to their clients’ initial reactions to each other.

Every franchise system will face challenges over the years and the franchisor must lead the system rather than attempt to defensively respond to changes. Franchisors who wait until the threat of an independent franchisee association arises often find themselves backed into a corner, left with few options in resolving issues of common concern to their franchisees. The franchisor should proactively address issues that arise within the system – issues that if left unresolved may lead to franchisee unrest and talk of collective action. Should a franchisor do the following?

i. Suggest the creation of an independent franchise association that acts as a clear communication device for franchisors and franchisees alike.

ii. Remain focused on bottom line profitability, from the viewpoint of the franchisees as well as the franchisor.

iii. Carefully analyze system-wide proposals and modifications and, where possible, seek input and feedback from the franchisee association.

Let us assume for the moment that the franchisor has absorbed the news of an association’s formation. Further assume that the franchisor has wisely not announced or committed to a position regarding the association and has begun its homework: fact gathering and analysis of the association. Where do you begin and what do you do?

The franchisor should learn about the association’s primary grievances, motivations, and ultimate goals. Some questions to consider:

i. Was the association’s initial action a dignified well-founded communication to the franchisor or a public inflammatory attack, or something in-between?

ii. Who are the members? Are they the players/successful franchisees? Is there a significant number of members?

iii. Are the founders and leaders of the association in good standing under their franchise agreement? Are they respected (and were they elected) by their fellow franchisees?

iv. What are the specific grievances expressed as the association’s top priorities? Do they have a reasonable basis or a reasonable resolution?

v. Have the association’s founders and leaders expressed a willingness to communicate with the franchisor in a constructive (versus destructive) manner? Do these individuals have a track record of conducting themselves in a constructive manner?

Once the franchisor has completed its due diligence, it should determine how it will respond to the association. This will depend on: (1) answers to the above (and similar) questions; and (2) what action the association has sought. Assuming the association sought direct communications with the franchisor to discuss issues of collective franchisee concern, the franchisor must decide whether it wishes to have such communications with the association. Why it would not is questionable.
Franchisors that engage in communications with associations must be mindful as to what impact that has on their relationship with a FAC (if one exists). It is possible that there will be no negative impact. Alternatively, FACs elected by their fellow franchisees may resent a hostile and confrontational association taking credit for “concessions” that the FAC had actually achieved through professional and mutually respectful and yet tough-minded discussions with the franchisor. But, as noted above, FACs and independent franchisee associations can co-exist.

It has been known to happen that franchisors may respond by publicly attacking the credibility of the association, for example claiming that (1) as opposed to an elected FAC, the association’s leaders are self-appointed; (2) as opposed to an elected FAC, the association’s members do not represent a majority or even a significant percentage of all franchises; (3) they are pursuing personal agendas; or (4) the association has merely been formed to threaten to sue the franchisor.

Unfortunately, some franchisee attorneys representing associations encourage a highly confrontational “take no prisoners” approach against the franchisor from the outset, which often provokes the franchisor to react negatively. This, in turn, often helps the association recruit new members and take on an even more adversarial approach against the franchisor. However, as noted in the Curves situation, a good, balanced franchisee lawyer can be an asset to the association.

There is no right or wrong answer as to how a franchisor should react to the formation of an association. Only the facts and circumstances can dictate what the best approach should be. At the risk of oversimplification, whether the franchisor is approached by the association in a tough-minded but constructive manner, versus personally threatened and attacked in a destructive manner, often dictates how the franchisor will respond. However, a franchisor should step back and look beyond the initial attack -- is there really a systemic problem that needs to be addressed, and if so, how?

All parties to the system should remember that all franchisees and franchisors share a fundamental goal, that goal being success in building the strength of the brand they represent. The strength of the brand is what determines the value of the franchisees’ business. However, franchisees and franchisors often have differing opinions about the best strategies and tactics to achieve this goal. Too often, these differing opinions get in the way of a productive relationship and even obscure the fact that there is a shared goal. Franchise associations also provide a means to corral the number of questions and requests from individual franchisees to a manageable level.

Let us assume the franchisor has begun an ongoing process of communicating with an association. The franchisor must determine how it will communicate and work with an association to achieve system-wide goals. A franchisor that leads its system rather than attempting to respond to changes may recognize the association as an excellent source to gather information and assist in implementing major changes to the system before troubling issues take over the system.

Again, effective communication is critical. If the association can be part of the process of evaluating and advising on system-wide change, it can play an important role in moving the system forward in a positive direction, even if the ultimate decision-making authority continues to rest solely with the franchisor. This, of course, is also true with regard to the role that a FAC may play (if there is a FAC). The franchisor and the association should tend not only to the substantive issues at hand, but also to the interpersonal business relationships among and
between the association’s and the franchisor's leaders. They need not become best friends, but to be effective, they must operate with mutual respect.

**IX. HOW CAN THE FRANCHISOR EFFECTIVELY ENGAGE THE INDEPENDENT FRANCHISEE ASSOCIATION?**

If you were limited to naming only two ways the franchisor could effectively engage the independent franchisee association, good choices would probably be communication and transparency, they are probably the most important opportunity that a franchisor can pursue in order to effectively engage an independent franchisee association. The relationship between the franchisor and an independent franchisee association, once formed and nurtured appropriately, can operate in a manner that benefits the system as a whole and furthers the goals and objectives of the entire franchise community. On the other hand, a poorly organized, disjunctive or neglected association, much less one snubbed by the franchisor, will in all probability result in frustration, animosity, distrust and even open hostility on the part of the franchisees, culminating in creating tenuous business relations with the franchisor.

Franchisees, as represented through the association, must feel that their concerns, problems and/or desires are being genuinely considered and addressed by the franchisor. To this end, a franchisor must maintain a free flow of communication between themselves and the franchisees. Communication should be truthful and delivered timely. Once an independent franchise association is formed, the franchisor must also communicate openly and frequently with the franchisee leaders that emerge after the association is established.

**A. How a franchisor should interact with a franchisee association when such is often, if not incorrectly, perceived as creating a difficult situation.**

If the formation of the franchisee association was antagonistic in nature or formed because of conflict, as discussed in Section VII above, all is not lost even though the franchisor is now in a position of reaction instead of being proactive. Unfortunately, throughout franchise history the formation of an independent franchisee association occurred as a result of a crisis in the system or when difficult financial and economic conditions fell on a relatively harmonious franchisor/franchisee relationship. In addition, the existence of a prolonged period of the franchisor ignoring the franchisees may give rise to franchisee collective-action in the birth of a volatile independent franchisee association, something totally unwanted by the franchisor. Regardless, a franchisor’s interaction with the franchisee association must be founded upon a true willingness to cooperate and most importantly communicate with the association with a focus on a constructive and collaborative business environment. It would be a travesty to miss an opportunity for a good relationship with an independent franchisee association simply because of misperception on the part of the franchisor. We are not suggesting that this is the attitude or approach that will be effective or appropriate in all circumstances as such a naïve approach would oversimplify the somewhat inherent adverse interests that exist between franchisor and franchisee as a matter of the franchise structure. To make the program work, the franchisees also have to be willing to engage the franchisor on the same level playing field.

If the initial issues brought forth by the association are legitimate, reasonable and beneficial to all, a franchisor should be willing to promptly listen and respond, if not soon thereafter attempt to rectify the situation or make requested changes. This approach clearly demonstrates to the association that the franchisor is willing to engage the association and address the concerns of disgruntled franchisees. This approach to a common scenario is extremely optimistic given the realities facing some groups with complex structures, deeply rooted problems and changing economic conditions.
However, many times it is incumbent upon the franchisor and in the franchisor's best interest to set the stage of a cooperative environment with an independent franchisee association. A franchisor should also be willing to meet with association leaders and openly communicate. The franchisor should also be willing to receive both messages of concern from the franchisees when introducing new policies and procedures. A franchisor may fare better if it discusses imminent and material system changes with the franchisees before dictating the same and expecting immediate and full compliance by franchisees. Interaction between franchisors and franchisees has traditionally been suspect and until fear and distrust are set aside by both sides, interaction will remain difficult and suspect.

Contrary to popular belief, communicating with an independent association is not a sign of weakness.

B. Can an independent franchisee association be an effective tool for both sides to work together for the benefit of the system, especially during economic downturns?

The answer to this question should be a resounding “yes.” As with nearly every relationship, whether personal, financial, legal, contractual or a combination thereof, increased communication, a desire for the relationship to continue and a genuine motivation to resolve problems constructively will most always yield a stronger and better relationship. Positive interaction between a franchisor and its independent franchisee association may provide opportunities for well-structured growth and expansion, increased profits, and survival/longevity of the system during harsh economic times which often otherwise result in financial loss, contractual breaches and closing businesses.

Once established, franchisee associations can be a useful tool for both parties to create a forum in which to mediate, address and resolve system-wide issues before they rise to a level where resolution through litigation seems the only salvation. In fact, an association is likely the only effective method of cost management and expense sharing when a franchisee is facing difficulties meeting its franchise obligations or is unhappy with actions and decisions being made by the franchisor. In the current downturn economic times, money needs to be spent frugally and for beneficial things. Costly litigation and other legal remedies are not in the budget in these times, not to mention that a resort to legal proceedings is not commonly a positive solution.

When franchisees are content, they are often willing to promote the growth of the franchise system, encourage new investments, and support opening additional franchises. In addition, the sale/transition of current ownership becomes easier and less risky. Conversely this seems not to be true in difficult economic times. However, a franchisor together with a well-established association can help obtain new franchisees by discussing results and activities of the association in addition to reassuring and quelling fears and concerns of those considering making an investment in the system during difficult economic times. With the internet, there are few potential franchisee buyers that don’t contact current franchisees or the franchisee association, or, visit good and bad websites concerning their possible investment into a system. When there is uncertainty and trouble in the economy, people are far less likely to make investments and begin ventures which require significant initial financial contribution - even more so when an investment requires the relinquishment of control and decision-making as is required in a franchise environment. In this regard, franchisee associations can be an important tool for a franchisor to initiate and encourage growth and/or expansion of a franchise during periods of economic downturn.
Franchisee associations can also be extremely helpful to franchisors in obtaining and maintaining compliance by franchisees with the franchise agreement and system requirements. This is especially true when the association will refuse representation and further association with the individual franchisees who are noncompliant. Disgruntled franchisees and rebellious owners that tend to be creating problems for themselves will often not have, or be able to obtain, the support of a franchisee association with regard to particular problems they seem to have brought on themselves through their own behavior, bad habits or methods of operation. This is especially true in difficult economic times. There is also an informal sort of peer pressure that an association can exert on individual noncompliant franchisees by its inherent structure and its ability to effectively interact with the franchisor on behalf of a majority of the franchisees. Because the association has no intrinsic capability of binding the franchisor, it can only rely on exerting pressure towards meaningful and attainable goals which constitute important rights to the franchisee. Working smartly and positively, an independent franchisee association can be an especially helpful tool for both franchisor and franchisee in times of economic hardship.

C. How to work together for the betterment of the system, especially during economic downturns.

During periods of economic hardship, franchisors should be especially receptive to information and communication flowing from the franchisees through the association. The franchisees are the ones in the field operating daily. If information from the franchisees is reliable and accurate, franchisors are able to have a better grasp of the economic impact on their system and obtain critical information about the current market for particular products, operating conditions, investor concerns, earnings of individual franchisees, revenues and expenses. Because franchisees and franchisors are essentially operating two completely different businesses, the information garnered from the franchisee may deliver to the franchisor more detailed insight, which gives the franchisor much better decision-making abilities and effective adjustments in response to downturn changes in the economy. This is especially true where the franchisor does not operate units and the flow of information provided by the franchisees is complete and accurate.

Important issues in this period of economic instability and turmoil that all franchise systems are currently facing include marketing and advertising strategies, purchasing, sales decisions, capital expenditures, investments, expansion and analysis of competition. Most of these issues are best addressed by a collaborative effort between franchisor and its independent franchisee association; and/or, their corresponding FAC. Many issues that individual franchisees encounter are shared by or have been previously encountered and addressed by other franchisees or the franchisor. These reoccurring issues are best dealt with by working with the franchisor and system franchisees using a collaborative process to find solutions. Individual franchisees are unlikely to appropriately address a systemic problem and will be ineffective at figuring out or implementing a solution. An individual franchisee is also usually ineffective at getting the attention of the franchisor. However, a franchisee working through the franchisee association can utilize leverage, access the attention of the franchisor and elicit a prompt and hopefully adequate response from the franchisor.

Once established, a franchisee association can be a useful tool for both franchisor and franchisee and provide a forum in which to mediate, address and resolve system-wide issues before they rise to a level where a party feels compelled to seek resolution through litigation. Avoiding the courtroom is most often a benefit derived from effectively utilizing communication and the franchisee association. This alternative method of dispute resolution can save time and money as well as likely achieve results that don't require as much sacrifice or cost by either party as would use of the judiciary. Again, there is no room in the budget for costly litigation and
other legal expenditures in this economic climate. A brokered resolution is much better than a “forced” judicial determination.

Coordination and cooperation between the franchisor and the independent franchisee association are required to help align the system’s major goals in hopes that the resulting system is stronger, more stable, more responsive to changing economic conditions and more resilient in tough times. Without such, under the current economic pressure the viability, longevity and certainly the effectiveness of a franchise system and its individual business components could be threatened.

Another major benefit that a properly structured and well-managed franchisee association can provide to a franchisor is an avenue for a sufficient and effective implementation of new policies, products and agreements. By first introducing potential changes in the operations or policies to the association, a franchisor can often gauge the reaction of the franchisees to determine and assess how much resistance a given system change implementation will face. Likewise, if the franchisor faces little or no adverse reaction on the part of the association, it can use this momentum to help smooth the transition period once a change is implemented. Conversely, a well organized association can facilitate a myriad of processes that can be utilized to improve franchise relationships and avoid problems that frequently plague and undermine the system as a whole.

D. What does the franchisor need from the independent franchisee association?

This is not an easy question to answer, even though it appears transparent. It is common knowledge that "need" and "want" can be two very different commodities, especially in a relationship where distrust is more a norm than trust, such as a franchisor/franchisee relationship. Effectiveness is usually a product of cooperation or at least a willingness to do so, which is a prevalent requirement the franchisor must have from any association. The franchisees demand from the franchisor an open mind, an ear, respect, transparency, communication, assistance, direction, etc. and the franchisor wants no less from the franchisee. A fair trade? Franchisors should certainly expect the association to be willing to engage in open communication and motivated to have constructive engagement and cooperate in a mature, commercially minded manner in an effort to genuinely improve and increase the value of the system. The franchisor must recognize that it will always be perceived as the one with the money who collects monthly rent from the “poor” franchisees. The franchisor needs to recognize and overcome this perception. The franchisees, correspondingly, must reject the belief that a franchise equals instant and guaranteed success and anything short of that is the franchisor’s fault.

The franchisor needs the franchisees to maintain their focus on relevant issues that are truly systemic and problematic as opposed to trivial or individual franchisee concerns that have no real impact on the system. The franchisor wants all franchisees to participate in the association and needs a solid majority. Participating franchisees must be willing to respect the existing franchise agreement including honoring their responsibilities to the franchisor in understanding the rights possessed by both parties and the interests being pursued. Franchisors are also looking for the franchisees to be willing to adopt an attitude aimed at solving problems, not solely attempting adversarial attacks often complaining and venting frustrations without suggesting realistic solutions or alternative approaches to the status quo. The governing members of the association must be responsible for clear, honest and consistent communication between its members, the franchisor as well as the media and/or the public. Summarily and perhaps overly simplified, the franchisor needs a little "tit for tat" from the franchisees.
E. What are some of the risks to a franchisor in either establishing or working with an independent association? What factors should the franchisor take into account in developing the strategy to engage an independent association?

Even if one successfully navigates all the regulatory hoops and dodges individual state legislation regarding franchises, things don’t always work out and many times the best laid plans of mice and men go up in smoke. The largest practical risk Curves weighed when it assisted in establishing its independent franchisee association was the creation “backfiring.” Aaron Rents, Holiday Inn and Curves formed and funded their respective independent franchisee associations and each risked the fact that once formed and properly organized, the associations might do an about face and become a franchisor’s greatest nightmare, becoming completely uncooperative or even worse, bent on system destruction and/or protracted litigation. Instead of increasing communication and creating a constructive forum for problem-solving and positive interaction, an independent franchisee association may fail and become nothing more than a conduit for constant complaining and criticism by the franchisees where individuals bring only personal and trivial grievances against the franchisor. If allowed to foster, this type of association can stop a franchise system in its tracks and derail individual franchisees from their pursuit of a successful franchise and the common goal of seeing the franchise system prosper. Worse yet, an about face by an association could set it on a destructive mission inhibiting franchise system’s success.

If a total change in attitude is avoided, the franchisor still has risks to face. Once an association has been formed, the franchisor must proceed with extreme caution with any attempts to discourage participation with such association or when further interacting with individual franchisees. The franchisor must be careful to act within lawful bounds as constrained by the laws that affect franchisees’ rights to associate with others.

Some states have specific statutes that govern franchise/franchisee relationships and there are federal antitrust laws and other state and federal statutes that govern franchisor dealings with associations of franchisees. Even if the franchisor elects to consult with its independent association, such consultation always has the potential to curb growth and progress by turning into lengthy negotiations which inherently slow any decision-making process. Additionally, in the course of dealing with an association, the franchisor should assess its own position on the issues at hand as well as the goals and objectives of the association. This assessment is important. As franchisors well know, any possible major system change raised by the franchisor may result in rebellion. This approach may enable the franchisor to keep checks and balances on the influence and ultimate power it allows the franchisee association to exercise. Sharing proprietary system information by a franchisor with an association also invites breaches of security in the protection of that confidential and proprietary information. It is a difficult, if not an impossible, task to protect confidential information when openly shared with an association, which often compromises the franchisor’s attempts to be somewhat transparent. While it is important that the franchisees know what is going on in the system, it is equally important that the franchisor be able to protect its proprietary information. The sharing of information by the franchisor demands confidentiality on the part of the association. Confidentiality is also a great risk to the franchisor as the greater the number of franchisees that know certain information, the less likely confidentiality will be maintained. This is another sensitive balancing act for the franchisor and a great risk to run.

Major factors that should be considered by the franchisor in developing strategy to engage an independent association include the long-term goals and objectives of franchisor and franchisees, the existing system of communication between franchisor and franchisees, the current status quo of franchisor and franchisees, the interest and impact that will result from individual decisions and the overall impact a system changing decision will have on the
franchise system. The manner in which a franchisor deals with an independent franchisee association has largely been seen as a business judgment and probably fares far better without the involvement of lawyers. Therefore, when evaluating what factors to include in making this decision, those factors should be ones that largely affect business. The franchisees will already be operating in a mindset of looking for what is the best outcome for them individually or what is the best case for the system, which may not be the mindset from which the franchisor is operating. It is not a novel idea that, while the franchisor and franchisees share a number of common goals, the inherent structure of the franchisor/franchisee relationship sets them at odds from the beginning on some very basic issues. It is an oversimplification to suggest a franchisor should always seek a cooperative approach in dealing with an independent association.

By encouraging increased communication in an effort to create transparent decision-making, franchisors are likely to have well-informed and cooperative franchisee associations and correspondingly content franchisees, at least in theory. Dissension with individual franchisees can usually be dealt with more easily on a contractual level on a one-on-one basis than through an association. However, when individual problems are left unaddressed or completely ignored by the franchisor, such issues have a strange way of becoming pervasive throughout the system and erupt as an unequivocal demand with widespread support by the association. By closely evaluating the risks discussed above and incorporating necessary factors of dealing with an independent franchisee association, the franchisor should be able to develop a sound strategy for fostering good and viable franchise relationships and maintaining them going forward.

Working with a franchisee association takes patience and a keen sense of balancing the real issues and risks.

F. Can an independent association and a franchise advisory council coexist peacefully?

Certainly. Independent franchisee associations and FACs do coexist and many systems have one of each. However, it would be erroneous to say that they peacefully exist in all systems, but they do coexist. What are some of the major differences between a franchisee association and a FAC? They include the manner of their respective formation, control, input, membership, independence and agenda. A brief glance at each reveals that the FAC is usually operated, funded and pretty much controlled by the franchisor. Interestingly, most franchisee associations have been perceived as threats to the franchisor while FACs have not. The FAC is generally formed solely on the initiative of the franchisor and many times in a somewhat veiled attempt to demonstrate an increase in communication with the franchisees. Both are generally formed and operated independently of one another. Rarely does a FAC obtain an independent entity status like a franchisee association. On the other hand, a franchisee association has historically been formed by a group of franchisees seeking collective and independent representation in dealing with particular concerns among the franchisee community and is formed to the exclusion of the franchisor. Within a franchisee association, the individual franchisee's power will be determined by the method of formation and governing documents of that entity, often one vote for each franchise. FAC franchisee members are advisors, nothing more nothing less, and often appointed by the franchisor.

The amount of control that can be exercised by a franchisee as a member of a franchisee association is much greater than that of a franchisee who is a member of a FAC. Franchisees participating in a FAC almost never have authority or power to bind the franchisor through that council, even when all participating franchisees are unanimous in their position on an issue. By the same token, a franchisee association is also without the ability to make decisions that are
binding on the franchisor, but it instead operates to exert pressure on the franchisor by presenting a united front.

There are similar characteristics of both groups since franchisee associations and FACs are both formed with the intention to serve a communicative function and address problems that exist or that are foreseeable within the franchise system. Solving problems is a continuing and necessary responsibility that belongs to both the franchisor and franchisee, and of course it is always best to accomplish this through a collaborative effort in the interaction that occurs between franchisees and franchisor. This occurs largely through the conduits the franchisee associations and the FACs provide.

Franchisee associations and FACs also both provide a self-policing function among individual franchisees. By their very structure, franchisee associations and FACs can be tools by which participating franchisees are able to exert informal peer pressure on non-compliant franchisees and those who are not subject to identical contractual requirements. Additionally when the franchisor is able to garner franchisee acceptance for particular policies or system changes, either through members on the FAC or by communications with the franchisee association, the process of implementing those policies or system changes becomes imminently smoother resulting in a much less controversial transition.

Franchise systems that have in place a working communication strategy with their franchisees also consistently have a well-organized and effective franchisee association, FAC or both. The franchisee association and FAC both provide a forum for franchisees that are willing to seek out constructive input from their peers and engage the franchisor regarding system issues. The independent franchisee association and the FAC also frequently align their goals and objectives with those of their franchisor counterpart and the franchise system. Both should be able to respectfully respond in addressing specific concerns and legitimate issues brought to light by their members and should have an innate desire to be models of success and longevity among this unique business structure. However, jealousy and control often put a franchisee association and FAC at odds with each other, with the FAC many times being referred to as puppet for the franchisor.

Components of franchise systems vary widely depending on the size and age of the franchise system, so do the existence of an independent franchisee association and/or a FAC. While jealousies have been apparent between a franchisee association and the FAC in some systems, in theory both should have as their underlying characteristics and goals the success, profitability and sustainability of the system. Both the franchisee association and FAC should focus on maintaining an environment for collaboration in interaction with the franchisor while fostering constructive communication between themselves and the franchisor. However, a key in taking full advantage of many of the benefits that can be derived from a franchisee association, the leaders need to ensure the association's counsel is independent from that of the franchisor and is available and present for all association and system meetings. Since the FAC counsel is not always independent and is usually hired by the franchisor, the independent franchisee association and FAC may be in conflict over legal issues and representation. Although sometimes not harmonious, the franchisee association is most effective and beneficial to its members when it maintains its independence from the FAC. From a strategy standpoint it is beneficial to both the franchisee association and FAC to coordinate discussions on overlapping business so progress and momentum are not stifled by a lack of unity in timing or availability. Hopefully, both a franchisee association and FAC within the single franchise system will effectively work together to advance the goals and interests of franchisees and their system.
X. CONCLUSION

A franchisor should not fear an independent franchisee association; nor should franchisees fear that franchisors will not recognize the independent franchisee association or that it will be of no value. The only time there will be no value is if there is no genuine communication between the two groups and it is nothing more than a vehicle to fuel a dispute. The reality is that an independent franchisee association can be a vehicle for success for both the franchisor and the franchisees. Also, franchisors should not fear the suggestion that an independent franchisee association be created even if there is an existing FAC. If nothing else, an independent franchisee association can lead to more trust among the franchisees, allow for better communications and implementation of changes within a system. Remember, changes don’t always have to come from the franchisor in the McDonald’s system, the “Egg McMuffin” came from a franchisee. Also remember, the franchisor really can suggest and help create an independent franchisee association. A bold concept? We don’t think so.

We hope that, if nothing else, this paper invokes some thought about the validity and usefulness of an independent franchisee association and removes some of the reader’s preconceived negative connotations or perceptions.
Appendix “A”:

NOTE: THIS IS A REPRINT FROM AN INTERNATIONAL FRANCHISE ASSOCIATION ARTICLE – SEE FOOTNOTE.

Annotated Bibliography of Helpful Legal Writings on Independent Franchisee Associations (“Associations”) and Franchisee Advisory Councils (“FACs”)

Preface

Our initial plan was to make this bibliography as comprehensive as possible. Over the years there have been many articles on IFAs and FACs in publications such as the IFA’s Franchise World magazine, Franchise Times, the ABA Forum on Franchising’s Franchise Law Journal, and elsewhere. However, after much deliberation, we concluded that making the scope too wide would defeat the purpose of making this resource user-friendly. We ultimately decided to limit our scope to previous (1) International Franchise Association® Annual Legal Symposia papers; and (2) ABA Forum on Franchising® Annual Program papers, except of the references to the American Franchisee Association and American Franchisee and Dealers Association (“AAFD”) within the paper.

The two basic parts of any annotated bibliography are the citation information and the commentary (annotation). Regarding citation information, we attempted to provide only the essential information that will help the reader find the resource (e.g., dates, names of authors, titles). Regarding commentary, we attempt to objectively describe the work’s format, content and intended audience. We then injected our subjective evaluations as to the work’s strengths or weaknesses or special features. These subjective appraisals are jointly held by the authors except where we expressly note our separate opinions. The greatest challenge in composing our commentary was to make it both complete and succinct. To maximize the value for the reader (envisioning him/her scrambling for quick help), we have erred on the side of conciseness.

If you do not have copies of the papers referenced below, you may contact the IFA and ABA Forum on Franchising to see if they can direct you to where you may find copies. You may also ask experienced franchise attorneys to see if they have copies of these papers (especially the older papers dating back 10 or more years). Caveat: Some of the papers referenced below reviewed the law as it existed at the time. Needless to say, you should perform research necessary to confirm whether a particular case, statute or portion thereof remain “good law” and continues to support the broader conclusions articulated in their respective papers.

Finally, a general observation. There is significant overlap regarding the substantive sub-topics covered by the papers below. However, after reading these papers back-to-back, it is truly amazing how many of them still manage to bring a distinct approach to the subject matter. Anyone who undertakes a reading of all of the papers below will not only learn a great deal, but will be served by the great diversity of writing styles and perspectives brought these authors.

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We extend our compliments to all of the authors of these “best of the best” IFA and ABA papers on this topic.

## I. IFA Annual Legal Symposia Papers

<table>
<thead>
<tr>
<th>Title</th>
<th>Dispute Management, Negotiation, and Settlement Techniques in Franchising</th>
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<tbody>
<tr>
<td>Author(s) / Moderator</td>
<td>Moderator: Andrew C. Selden; Author: Andrew A. Caffey</td>
</tr>
<tr>
<td>Year</td>
<td>1989</td>
</tr>
<tr>
<td>Summary</td>
<td>Great opening line: “A franchise organization inherently contains the seeds of friction and dispute.” The article’s emphasis is on techniques for resolving disputes without resort to litigation. Sections I(B)(2)(3)&amp;(4), dealing with FACs, collective bargaining, and “RESPECT” – cover the fundamentals of these interrelated concepts with reference to applicable legal doctrines and concepts, including duty of good faith and antidiscrimination. Covers the technical “nuts and bolts” of how to get from agreement in principle to final agreement (after weighing pros/cons of litigation).</td>
</tr>
<tr>
<td>Evaluation</td>
<td>An older paper but a good read, taking a distinct approach: covering the concept of FACs and independent association in the larger context or reaching settlements short of litigation.</td>
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<table>
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<tr>
<th>Title</th>
<th>Developing a New Franchise Agreement for a Mature Franchise System</th>
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| Author(s) / Moderator | Moderator: Lewis G. Rudnick  
Panelists: Michael Witte, Lee N. Abrams, Russell Frith, & Charles G. Miller |
| Year | 1992 |
| Summary | Hypothetical facts of a mature franchise system “at a critical juncture” facing enterprise-threatening challenges, trying to modify existing franchise agreement in ways that will fix underlying business issues while allowing existing franchisees to voluntarily convert to this new form in a way that is perceived to be in their best interests. Pages 21-27 (“Conversion Strategies”) describe how the franchisor negotiates with a FAC (and FAC’s legal counsel) on the new form agreement, in order to gain FAC’s endorsement for conversion, which is viewed a more practical approach (vs. speaking individually with franchisees or with small regional groups of franchisees). |
| Evaluation | The use of a hypothetical is very helpful in bringing the dynamics of these types of issues alive. Given the caliber of authors, one can easily envision that this hypothetical is a composite of real world situations that, due to confidentiality concerns, could not otherwise be revealed.  

This “Conversion Strategies” section is so appealing that the reader is left wishing that more details of these discussions with FAC could have been added. Also, no discussion of the impact or role of any independent franchisee associations. |

<table>
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<tr>
<th>Title</th>
<th>Relations Between Franchisors and Franchisee Associations: Applicable Legal Principles</th>
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<tbody>
<tr>
<td>Author(s) / Moderator</td>
<td>Rupert M. Barkoff</td>
</tr>
<tr>
<td>Year</td>
<td>1993</td>
</tr>
<tr>
<td>Summary</td>
<td>Discusses state statutes protecting franchisees’ rights of association. Poses various factual scenarios and analyzes whether they would violate any of these statutes. Discusses limited case law (primarily McAlpine v. AAMCO, 1978) addressing “the problems of collaborative conduct by franchisees when dealing with their franchisor, or the limitations imposed on franchisees when acting collectively.” Brief antitrust section. Discusses tortious interference with contractual relations concerns, and raises question of whether statutory freedom of association (in applicable states) creates a “privilege” to defeat franchisor tortious interference claims. Contains a bibliography of IFA, ABA and law review articles from the late 1970’s and early 1980’s that “touch upon collective activities by franchisees.”</td>
</tr>
<tr>
<td>Evaluation</td>
<td>A fine job of not merely reciting the applicable statutes, but by posing hypothetic scenarios. Helps franchise attorneys to consider just how far these statutes limit how a franchisor must deal with franchisees in these states. Author admits to dearth of case law on point, which leads to a deeper than usual review of the McAlpine case. Ends with observation of this paradox: lack of case law may be a good sign that “cooperative approaches” are working, but leaves little legal guidance for franchise attorneys on franchisor's relationships with independent associations.</td>
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| Title | Intrasystem Negotiation |
| Author(s) / Moderator | Rochelle Spandorf and Andrew Selden |
| Year | 1996 |
| Summary | Not a detailed discussion per se of FACs and independent associations, but a discussion of fundamental concepts that serve as foundation for franchisor dealings with groups of franchisees, including overstated fears that negotiating with franchisees might lead to violations of statutes, including state antidiscrimination laws. Section I(B) covers concepts of collective bargaining, dealing with FACs and independent associations. |
| Evaluation | A solid article that balances coverage of the intangible dynamics and strategic business concerns inherent to this topic with a detailed discussion of more technical aspects of applying various applicable statutes and regulations. Brings a point of view: franchisors shouldn’t fear negotiating with franchisees. Good closing quote from a franchisor CEO: “I have no business trying to force franchisees to do anything that I can’t persuade them to do by making a persuasive business case, and that is one of the main reasons we support [the system’s use of a FAC].” |

| Title | Negotiation in the Franchise Relationship |
| Author(s) / Moderator | Lawrence I. Fox, *Richard L. Kolman and Sandy T. Tucker |
| Year | 2000 |
| Summary | Covers relations between franchisor, FACs and independent associations. Covers structure and dynamics of negotiations, what types of (business and legal) issues are most often negotiated, antitrust concerns, state “right of association” statutes, how can negotiated agreements between franchisor and association be made binding upon all franchisees, disclosure implications of negotiations, franchisor remedies against franchisee “concerted action” against franchisor, }
does negotiation with an association confer standing on it to sue the franchisor. Explores questions such as whether FACs are “controlled” by franchisors, if their representatives are elected (not appointed by franchisor) and whether independent associations are representative of their fellow franchisees if they are not elected by them.

**Evaluation**

*Note: co-author of this article is co-author of this evaluation. This paper approaches this topic from 3 distinct perspectives: (1) in-house counsel of large franchise system; (2) antitrust attorney; and (3) private practice franchise attorney, with focus on litigation issues. Analyzes a variety of issues from perspectives of franchisor, FAC and independent association, and also from individual franchisee perspective. A comprehensive review of not only the various technical issues, but also contains helpful checklists of practical questions raised by real-world experiences in large systems.*

<table>
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<tr>
<th>Title</th>
<th>Effective Relationships with Franchisee Associations – Legal and Practical Aspects</th>
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<tbody>
<tr>
<td>Author(s) / Moderator</td>
<td>Joseph Schumacher, William Darrin and Lawrence Cohen</td>
</tr>
<tr>
<td>Year</td>
<td>2001</td>
</tr>
<tr>
<td>Summary</td>
<td>Begins by noting significant growth in independent franchisee associations from 1992 to 2000 – “less than 30...to approximately 250.” Describes how associations are usually born “in response to some franchisor action or to perceived franchisor indifference to franchisee issues...” Briefly discusses FACs. Covers “what can a franchisor do in response or to resist [an independent association.” Reviews types of issues associations frequently raise (e.g., communication, cost sharing) and considers franchisee and franchisor perspectives on issues such as association costs (tangible and intangible). Covers a variety of real world situations (Mail Boxes Etc., Denny’s, Taco Bell, Burger King, Pizza Hut, KFC, A&amp;W, and a detailed history of Subway’s experience by Mr. Darrin.</td>
</tr>
<tr>
<td>Evaluation</td>
<td>A good balance between the authors – franchisor (in-house), franchisee and litigation attorney, led to a well-balanced discussion. Frequently expresses franchisee perspective that FACs are often “controlled by the franchisor.” Has a good concluding section that summarizes what many may consider as best practices in relations between franchisors and independent associations. A fuller discussion of FAC roles – for example interactions between associations and FACs – would have been helpful. The detailed Subway case study offers a rare glimpse into how these dynamics played out in a large system.</td>
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<tr>
<th>Title</th>
<th>Negotiation in the Franchise Relationship</th>
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<tr>
<td>Author(s) / Moderator</td>
<td>Lane Fisher, John W. Fitzgerald and Harris J. Chernow*</td>
</tr>
<tr>
<td>Year</td>
<td>2002</td>
</tr>
<tr>
<td>Summary</td>
<td>Section III is titled “Considerations When Changes Are Requested by Groups / Associations.” Discusses three kinds of parties negotiating franchise agreement</td>
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</table>
terms with franchisors: two or more franchisees “loosely formed” to approach franchisor with common concerns; FACs and independent associations – and the inherent differences in these negotiations (bargaining power, precedential value/risk, cost, efficiency, confidentiality, etc.). Briefly references other bodies of law that must be considered when “negotiating collectively;” e.g., antitrust, FTC Rule, RICO, industry-specific laws. Explains different approaches of American Franchisee Association, American Association of Franchisees and Dealers with regard to helping achieving “more rights and fairness” for franchisees. Lists several issues that associations should consider negotiating.

Evaluation
*Note: co-author of this article is co-author of this evaluation. Sections I and II of this paper deal with the broader topic of franchisors negotiating their franchise agreements with individual franchisees, and provides a thorough list of specific terms, addresses enforceability of such changes and discusses the related concept of negotiating “clarifications” of the agreement. Section III makes several keen observations not found in previous papers reviewed, one example being the importance of confidentiality and efficiency in negotiations, which the authors link in a novel way to a constructive (vs. attacking) style of negotiation.

<table>
<thead>
<tr>
<th>Title</th>
<th>What's Good for the Goose May or May Not be Good for the Gander: Maximizing the Effectiveness of Franchisee Associations</th>
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<tbody>
<tr>
<td>Author(s) / Moderator</td>
<td>Lee Abrams, William Darrin and R. Scott Toop</td>
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<tr>
<td>Year</td>
<td>2006</td>
</tr>
<tr>
<td>Summary</td>
<td>Begins with review of federal constitutional (First Amendment) and state statutory right of franchisees to associate, free from franchisor interference. Discusses purposes of independent franchisee associations including collective bargaining with franchisors. As with the 2001 paper referenced above, Mr. Darrin gives insight into how Subway has dealt with an independently formed Subway franchisee association. This paper stresses the importance of an independent association representing a large percentage of a particular system’s franchisees. Reviews case law on the question of whether an association has standing to sue franchisor on behalf of its franchisee members. Covers technical issues such as independent association funding, leadership, structures and administration. Discusses role of franchisor in establishing FACs and in interacting with associations. Also discusses antitrust concerns.</td>
</tr>
<tr>
<td>Evaluation</td>
<td>Great review from three seasoned practitioners, balancing fundamental principles, actual cases and technical detail. Beyond the excellent discussion of the Subway system, there is detailed coverage the experiences of Dairy Queen, Holiday Inn, Taco Bell, GNC, Jack in the Box, and Burger King dealings with associations. Very helpful footnotes to other resources for those readers who seek even greater detail or a broader selection of resources.</td>
</tr>
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## ABA Forum on Franchising Annual Program Papers

<table>
<thead>
<tr>
<th>Title</th>
<th>Strategy Session: Theories for Franchisee Relief; Ten Phases of Representing Franchisees in Disputes with Franchisors</th>
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<tbody>
<tr>
<td>Author(s) / Moderator</td>
<td>Matthew H. Patton and William Van Hagey</td>
</tr>
<tr>
<td>Year</td>
<td>1990</td>
</tr>
<tr>
<td>Summary</td>
<td>A guide for franchisee attorneys in dealing with the common phases of the franchise relationship requiring legal help, starting with pre-purchase investigation and ending with dispute resolution. Of particular interest are the middle sections titled “Aggregation,” “Aggravation,” and “Publication.” In the Aggregation section, the authors describe tactics for coming together to collectively pursue their common interests and goals. Here’s a snippet from the “Aggravation” section: “The relative disparity between the economic resources of franchisees and their franchisors makes it imperative that the franchisee bring pressure to bear on the franchisor to settle the dispute, while doing so at the lowest cost. In essence, the franchisee must engage in guerrilla warfare: ‘a military action carried out by small forces in the rear of an enemy with the object of harassing the enemy, interrupting his lines of communication, and destroying his supplies.’”</td>
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<tr>
<td>Evaluation</td>
<td>A fresh approach – this is highly readable, predating some of the more traditional discussions of FACs and independent associations. Although the authors write from a purely franchisee perspective, the insight into this perspective is particularly illuminating and helpful for franchisor attorneys who seek to better understand their adversary’s tactics.</td>
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<tr>
<th>Title</th>
<th>Dynamics of Franchisee Associations</th>
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<tr>
<td>Author(s) / Moderator</td>
<td>Gerald Aaron, Anita Blair, Andrew Selden, Mitchell Shapiro, Alan Silberman and Mary Beth Trice</td>
</tr>
<tr>
<td>Year</td>
<td>1991</td>
</tr>
<tr>
<td>Summary</td>
<td>A brief introduction distinguishes between FACs and independent associations; reviews typical reasons giving rise to associations and “act collectively”, and benefits of associations to franchisors. Section I titled “Organization of the Association” covers business and tax considerations for choosing a particular type of entity; financing an association through supplier contributions (and antitrust issues raised); state statutory protection of franchisee associations (right to associate statutes); and cooperative association law. Section II titled “Association Representational Issues” includes these sub-sections: do franchisee associations have standing to assert claims; third party beneficiary rights; trademark law issues; strategies of an association and of a franchisor; registration and disclosure issues; and antitrust aspects of concerted action by franchisees. Section III titled “Association Substantive Issues” includes these sub-sections: associations and the implied duty of good faith performance; duty of due care; encroachment; and retaliatory termination for associational activity.</td>
</tr>
<tr>
<td>Evaluation</td>
<td>An excellent resource dealing in depth with many key association issues, comprehensive in scope. Blending the various styles of six authors (two of which served as editors), this paper ranges from strategic thinking to technical details</td>
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</table>
and appeals to the litigator, transactional attorney, franchisee and franchisor
attorney.

Very little information about FACs, although what was written about FACs was
good. For example, if the franchisor and an elected FAC have an effective
working relationship, how would a franchisor’s dealing with a “splinter group” of
unelected franchisees seeking to take credit for a negotiated change with the
franchisor, be perceived by FAC?

<table>
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<tr>
<th>Title</th>
<th>Dealing with Franchisee Associations: Legal Issues and Practical Problems</th>
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<tbody>
<tr>
<td>Author(s) / Moderator</td>
<td>Rodeny R. Hatter, Roger F. Thomson and Gil Thurm</td>
</tr>
<tr>
<td>Year</td>
<td>1993</td>
</tr>
<tr>
<td>Summary</td>
<td>Contains a one page outline that was intended for the writers' oral presentation, covering topics such as (1) types of franchisee associations and FACs; [then] recent developments at the IFA; “working with (or against?)” a franchisee association; organization of associations; the attorney's role. Sample articles of incorporation and bylaws of a franchisee association are included. Also included is a statement by IFA’s 1993 Chief Counsel, Gil Thurm, before the U.S. House of Representatives Committee on Small Business: Self-Regulation by the Franchise Industry.&quot;</td>
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</table>

| Evaluation | The most interesting aspect of this paper is Mr. Thurm’s statement before Congressional committee at a critical time in IFA’s history when it was seeking greater inclusion by and for franchisees. As a part of this effort, IFA had announced its own “Franchisee Advisory Council;” i.e. a group of franchisees to advise the IFA. |

<table>
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<tr>
<th>Title</th>
<th>Empowering Franchisees: Franchisee Participation in System-wide Governance</th>
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<tr>
<td>Author(s) / Moderator</td>
<td>Mark McLaughlin and Melanie Wisniewski</td>
</tr>
<tr>
<td>Year</td>
<td>1994</td>
</tr>
<tr>
<td>Summary</td>
<td>A uniquely framed question: pros and cons (including legal risks) of franchisees (especially FACs and independent associations) not merely advising or negotiating with a franchisor, but taking part in franchisor decision-making and other joint actions. A broad and deep analysis of antitrust risks. Example: “Despite some recent authority for the proposition that a franchisor and franchisee share a unity of interest such that they cannot be found to have conspired under the antitrust laws, collective action between franchisors and franchisees generally is regarded as raising significant antitrust issues [in part because] franchisees are likely to be viewed as competitors of each other in many settings”…and franchise associations are akin to “gatherings of competitors within a single industry. ” Notes that unlike labor unions, which enjoy a statutory (NLRA) exemption from antitrust laws, franchisees have no such protection. Provides a history of Burger King’s experience with franchise associations.</td>
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| Evaluation | A very helpful, in-depth examination of various specific antitrust issue that may arise as a result of franchisee participation in franchise system governance. The inside account of the Burger King experience honestly recognizes the impact of |
the personalities, intentions, agendas (sometimes hidden and selfish) of the franchisor and franchisee association individuals involved in negotiations. Without losing enthusiasm for a more enlightened approach for franchisor-association communications, the reader of this article is reminded of the interpersonal dynamics that often produce less than ideal results when played out in real life situations.

<table>
<thead>
<tr>
<th>Title</th>
<th>Representing and Dealing with Franchisee Associations</th>
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<tr>
<td>Author(s) / Moderator</td>
<td>Mitchell B. Shapiro and Carl E. Zwisler</td>
</tr>
<tr>
<td>Year</td>
<td>1995</td>
</tr>
<tr>
<td>Summary</td>
<td>Section I titled “organization and membership” discusses perceived differences between FACs and associations, membership eligibility, tax status, financing, insurance, member liability and use of franchisor’s trade name. Section I also reviews association relations with the public (via the press/media), non-member franchisees, franchisor and prospective franchisees. Special concerns are discussed for attorneys representing both an association and an individual franchisee member. Section II reviews state statutes pertaining to franchisee associations (right to associate, etc.). Notes the dearth of case law interpreting these laws. Section III discusses franchisor recognition of, and dealing with, FACs and independent franchisee associations. Section IV titled “Concerted Action” notes, “With the watchful eye of experienced counsel, franchisees should not fear joining an association [due to risk of] provoking antitrust litigation. Section V titled “What an Association Can Accomplish” lists regular meetings, purchasing cooperatives, lobbying, financing litigation collectively and for individual members, and more. Section VI titled “Franchisee Association Litigation” covers legal standing and franchisor responsive action. Exhibits include sample association professional liability policy and sample association bylaws.</td>
</tr>
<tr>
<td>Evaluation</td>
<td>This paper covers the fundamentals and gives citation to previous articles on this topic. Although, unlike some previous papers that cite details of franchisor—franchisee association dealings in large, well-known systems, the personal observations and suggestions contained in this article clearly reflect the authors' considerable experiences in this realm. This paper contains a unique sub-section titled “ethical considerations” that, while noting the lack of case law on point, raises important considerations for franchisor and franchisee counsel.</td>
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<tr>
<th>Title</th>
<th>Towards a New Franchise Paradigm</th>
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<tr>
<td>Author(s) / Moderator</td>
<td>Andrew C. Selden, Rupert M. Barkoff, Michael T. Folks and Donald B. Marks</td>
</tr>
<tr>
<td>Year</td>
<td>1996</td>
</tr>
<tr>
<td>Summary</td>
<td>Begins with the quote “Power tends to corrupt and absolute power corrupts absolutely.” Observes that franchisors and franchisees have different interests, and this divergence tends to increase with system growth. The primary area of overlap of interests is identified as brand equity and customer goodwill associated with “the interests of the system as a whole.” The paper proposes how franchise systems can “identify and exploit their shared interests, rather than fight over their divergent interests.”</td>
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8
Authors propose a new franchisor-franchisee collaborative business model, which they call a “Shared Business Enterprise (SBE).” They propose this as a better alternative to litigation and legislation and contrast SBE’s to traditional FACs and independent associations. SBE attributes include – collective decision-making between franchisors and franchisee representatives on issues of system-wide importance; mandatory franchisee (FAC or association) consultation, either as a “policy” or as provided in franchise agreement; and joint ventures co-owned and controlled by franchisors and franchisees, for example, for advertising and purchasing. Burger King and Voice-Tel were provided as successful case studies of this new paradigm SBE model. Authors identify obstacles to transitioning to this new model as fear by: (1) franchisors of forfeiting “control”; and (2) franchisees of being branded by peers as not being sufficiently zealous in advocating for what is in the franchisee’s best interests.

Evaluation

This article is not a re-hash of how to create an association or a review of the various legal issues that arise in connection with FACs and associations. Instead, it provides a thought-provoking proposal that asks the reader to recognize the interdependence of franchisor, even while they hold divergent interests. It acknowledges that lawyers, charged with “zealously” advancing their clients' narrow interests in a partisan fashion, may be part of the problem in accepting more joint decision-making between franchisors and franchisees. “A necessary precondition for the next evolutionary step in developing franchise norms is the shift of ideas necessary to perceive a franchise relationship not as a quasi-adversary standoff driven by maneuvering for legal advantage, as is now too often the case, by as a unique combined business enterprise in which multiple equity participants share certain goals in common.” The authors should be congratulated for not merely reviewing the law, but advocating for a new approach. All these years later, it would be good to read another paper revisiting this paper and reviewing which franchise systems have come the closest in modeling the SBE approach and what specific, formal structures and mechanisms they have relied upon that may be modeled by others.

<table>
<thead>
<tr>
<th>Title</th>
<th>The Role of Trade Associations and Franchisee Associations in Franchising.</th>
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<tbody>
<tr>
<td>Author(s) / Moderator</td>
<td>William A. Darrin, Jr., L. Seth Stadfeld and Erik B. Wulff</td>
</tr>
<tr>
<td>Year</td>
<td>1998</td>
</tr>
<tr>
<td>Summary</td>
<td>Begins with a discussion of the role of trade associations in franchising, specifically the differences between the IFA, American Association of Franchisees and Dealers (AAFD), and American Franchisee Association. In FAC section, covers typical reasons creating a FAC, how to form a FAC and other standing committees (advertising, purchasing, etc.) and distinct role of FACs. In franchisee association section, discusses formation, legal risks (e.g., in urging royalty non-payment, defamation, tortious interference, antitrust etc.). Discusses state statutes protecting franchisees’ right to associate and the McAlpine v. AAMCO case, as well as a couple of cases that purport to support protection of franchisees against franchisor retaliation for joining an association, even in a state without a statute. Section titled “Franchisor Reaction to Associations” covers the Subway history with associations. A good discussion of association desire (and potential antitrust risk) involved in franchisor decision making regarding the</td>
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“System.” Franchisor “recognition” of associations is discussed, including how any negotiated changes could be made binding on franchisee members of associations (e.g., ratification by each franchisee, by a majority of members, etc.).

Evaluation

This paper reads well, in a cohesive narrative style. By comparison, other papers read in a more “choppy” outline-like fashion. For example, this paper's "Conclusion" section reads as a thought-provoking series of observations of general trends in this area of business and law and about the broader implications for the future. Great footnoting throughout. A solid balance between franchisor and franchisee point of view.

Title: Effective Franchisee Associations, Advisory Boards and Councils
Author(s) / Moderator: David Gurnick and Les Wharton / (authors acknowledge the assistance of Jeffrey A. Brimer)
Year: 2000
Summary: Introduction reviews impetus of forming FACs and associations, including franchisor receiving valuable input, bringing more bargaining power to franchisees in new changes being considered, responding to crisis, establishing purchasing cooperatives, etc. Describes FACs versus independent associations (single issue vs. general), trade associations (IFA, AAFD, AFA). Brief reference to "right of association" state statutes and federal constitutional basis (McAlpine case). Covers basics on how to form an independent association, type of entity, tax issues, charter, bylaws, membership issues, financing, entity name, leadership, decision making, conducting meetings (e.g., Rules of Order). Labels a variety of franchisor approaches to associations, ranging from support to indifference to opposition. Covers how to measure an association's effectiveness, how to manage “group dynamics” and different “personality types.” Covers antitrust concerns for associations.

Evaluation: A very practical “nuts and bolts” writing style and point of view. Example: section VI titled “Different Franchisor Approaches to Franchisee Associations” begins with this observation: “The type of association and the franchisor approaches depend not on academic planning, but on reasons, issues, and manner in which the association evolves and on the circumstances and dynamics that gave rise to the association.” Points out that most association leaders are not elected by their fellow franchisees. Excellent exhibits – probably the most comprehensive set to date assembled include (1) case study of “The Norrell Experience” (with Lessons Learned); and (2) sample association documents: charter, articles of incorporation, bylaws, notice of meeting, meeting agenda, a "script" for meeting of members or board of directions, and meeting minutes.

Title: Collective Bargaining and the Franchise Agreement: Finding the Middle Ground
Author(s) / Moderator: Ted P. Pearce and Rupert M. Barkoff
Year: 2001
Summary: This paper examines the franchisor and franchisees’ collective negotiation of their “Magna Carta” – their franchise agreement – from two perspectives. First, from “on high”: why do this (dealing around the theme of adapting to change); “who
speaks for the franchisees?”; “how high are the stakes”, comparison to collective bargaining in the labor-management environment, challenges to uniformly implementing collectively negotiated changes, and antitrust considerations (e.g., price-fixing). “The second part of this paper is aimed at the practical and tactical aspects of these collective negotiations.” These include: importance of individual franchisee ratification of any collectively bargained changes by association; who should attend the negotiations and the role of outside counsel; possible role of a mediator; where to hold negotiations; length and number of meetings; goals of the first meeting and follow-up meetings; kinds of issues likely to be addressed; who drafts revisions to the franchise agreement and the draft review / revision process; presentation of the new franchise agreement to the System; ratification.

Evaluation
This paper’s focus is not on the basics of FACs versus associations. Instead, it illuminates what actually happens (or should happen) when the franchisor and an independent franchise association (or perhaps FAC) agree to negotiate changes to the Franchise Agreement. This paper is well-balanced with due regard for franchisee and franchisor concerns. Although covering important legal concepts, it is highly readable by franchisor executives and franchisees. Gives real-world insight into the Meineke experience. This paper also features a two-page bibliography of helpful articles for those seeking to read more on this topic.

Title Close Encounters: Franchisee Associations and Councils
Author(s) / Moderator Rochelle B. Spandorf and Rupert M. Barkoff
Year 2003
Summary This paper begins with distinguishing between FACs and independent franchise associations, but with this footnote: “But hybrid groups also exist in many franchise systems that are neither completely independent of the franchisor nor franchisor controlled.” Also: “Our objective is to present a collection of war stories and general observations about the workings of associations and [FACs] to enlighten the franchise community about the successes and mistakes of various franchise systems.” The paper goes into a “history of franchise associations”; a review of why associations and FACs are formed; what does it mean to be independent; why and when does a franchisor recognize an association; how are FACs and associations structured; FAC versus association similarities and differences; burdens and benefits of associations to the franchise system; and an entire section titled “Communication” – covering many aspects thereof. This paper briefly covers special challenges faced by multi-brand franchisors and briefly reviews the distinct topic of “collective bargaining.”

Evaluation This paper’s conclusion sums this paper up nicely: “We do not intend for our war stories or observations to be taken as the definitive word on the subjects we have covered. Nor do we purport to present immutable facts: this paper is intentionally an amalgam of anecdotes and opinions. Nevertheless, we believe this paper offers a useful platform from which the reader can make his or her own comparisons and judgments and thereby represent his or her clients – be they franchisors, franchisees or independent association bodies – more effectively, enlightened by our insights….If there is one truism that can be said about the workings of franchisee associations and FACs, it is that there are exceptions to
“every discernible pattern of behavior!” This paper delivers on its promise – it is not a dogmatic “how to” guide, but it guides the reader through a variety of important lessons, reflections questions and factors to be taken into account when facing their own unique situation. A two-page bibliography of relevant literature is included.

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<th>Title</th>
<th>Selected Antitrust and Other Issues Involving Franchisee Associations and Purchasing Cooperatives</th>
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<tr>
<td>Author(s) / Moderator</td>
<td>Rupert M. Barkoff and Diane Green-Kelly</td>
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<tr>
<td>Year</td>
<td>2006</td>
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<td>Summary</td>
<td>This paper begins by noting that its review of FACs, independent franchisee associations and franchisee purchasing cooperatives is not meant to be in-depth, but necessarily only to the degree needed to set a foundation for discussing the key antitrust issues that fall to these groups. The paper does so, then applies these antitrust bodies of law: Section 1 of the Sherman Act prohibiting “conspiracies” that unreasonably restrain trade; price-fixing among (franchisee) competitors; franchisee associations inducing “group boycotts” against competitors (including, for example, prospective franchisees of the same system); horizontal allocation of customers or territories; vertical restraints (on pricing and non-pricing issues). How franchisee exchange of “benchmarking” information may raise antitrust risks.</td>
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<td>Evaluation</td>
<td>This paper is a scholarly review of the case law, particularly helpful to franchisor counsel responsible for overseeing the franchisor’s purchasing department and for counsel that has been retained to represent a prospective or existing purchasing cooperative. This paper is chock full of footnotes to even more cases that will be especially appreciated by litigation attorneys. For the private practitioner specializing in antitrust work for franchise systems, this is a must read.</td>
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HARRIS J. CHERNOW

Harris J. Chernow is a member of Chernow Katz, LLC, with offices in Pennsylvania, New Jersey, Maryland, South Carolina and the District of Columbia, representing franchisors and multiunit franchisees in franchising and retail distribution throughout the United States. Harris’s franchise and business practice includes franchise transactions, compliance and dispute resolution matters. By virtue of a broad base of legal experience, he also serves as "general counsel" to his clients by coordinating and overseeing other attorneys and matters. Harris has received the honor of being selected by Franchise Times as a "Legal Eagle" and “Hotshot Franchise Lawyer”, by the Pennsylvania law weekly one of “Fifty on the Fast Track”, and as a “Pennsylvania Super Lawyer” by Law & Politics and Philadelphia Magazine. He has also been appointed to the CPR panel of distinguished neutrals Franchise Mediation Panel. Harris has also been selected as a mediator and an arbitrator (as a neutral and party appointed) for various franchise disputes.

Harris serves on the American Bar Association Forum on Franchising Governing Committee and serves as its Finance Officer. He has also served on the Forum’s Publications Committee and was chair of its Litigation and Alternative Dispute Resolution (“LADR”) Division. He also served as chair and co-chair of the Montgomery County Franchise Law Committee, served twice on the Forum’s Nominating Committee for the Board of Governors of the ABA Forum on Franchising and was on the International Franchise Association’s (“IFA”) Legal Symposium Task Force. He is an active member of the Forum, the New Jersey Bar Association’s Franchise Law Committee, the Philadelphia and Montgomery County Franchise Law Committees, and IFA, among others.
ROGER N. SCHMIDT

Mr. Schmidt is a Senior Vice President and the Chief General Counsel for Curves International, Inc., the fastest growing and largest fitness/health club franchise in the world. He supervises Curves' legal department (3 attorneys and 16 support staff) which deals with over 9,000 franchise locations in 65 countries. In an administrative capacity, Mr. Schmidt serves Curves as a Senior Vice President and sits on its Board of Directors. Immediately prior to joining Curves International, Inc., Mr. Schmidt was general counsel and partner in The Olajuwon Group/Hospitality Restaurants in Houston, Texas, which was a multi-unit/multi brand franchisee in the food industry. Mr. Schmidt received his Doctorate of Jurisprudence from South Texas College of Law in 1975 and maintained a law practice in Houston, Texas until joining The Olajuwon Group and then Curves in 2001. Mr. Schmidt serves on the International Franchise Association's 2008/10 Legal Symposium Task Force and is a frequent speaker at legal and franchise functions. Also active in academia, he is currently an Adjunct Professor of Law at Baylor University Law School where he has taught Franchise Law since Spring 2003.