Franchisor attendance at franchisee association meetings as a guest, however, is not problematic, and may be beneficial to both parties. Allowing the franchisor's senior management to attend portions of franchise association meetings can help facilitate communication, and foster an understanding of each other's perspectives on a variety of issues.

VI. Protections for Franchisee Association Members and Leaders

A. Statutory Freedom of Association

At present, the laws of 12 states formally protect the right of franchisees to freely associate for lawful purposes. These statutes differ slightly from state to state and provide varying prohibitions.

For example, the Michigan statute[7] makes void and unenforceable any provision in a franchise agreement that would prohibit a franchisee from joining a franchisee association.

The statutes in Arkansas[8], California[9], Connecticut[10], Minnesota[11], Nebraska[12] and New Jersey[13] go a step further and prohibit the franchisor from directly or indirectly prohibiting the right of association among franchisees for any lawful purpose.

The California statute specifically provides that a franchisor may not restrict or inhibit the right of franchisees to join a trade association and the Minnesota statute provides that it shall be unfair and inequitable for any person to restrict or inhibit the free association of franchisees.

Hawaii[14], Illinois[15] and Washington[16] make it unlawful for a franchisor to restrict or inhibit a franchisee from joining a franchisee association. Specifically, the Hawaii and Washington statutes provide that it shall be an unfair or deceptive act or practice or an unfair method of competition for a franchisor to restrict the right of the franchisees to join a franchisee association and the Illinois statute deems such conduct to be an unfair franchise practice.

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[7] Mich. Comp. Laws § 445.1527(a)
[8] Ark. Stat. Ann. § 4-72-206(2)
[9] Cal. Corp. Code § 31,220
[10] Conn. Gen, Stat. Ann. § 42-133l(f)(2)
[11] Minn.R. 2860.440
[12] Neb. Rev. Stat. § 87-406(2)
[13] N.J. Stat. Ann. § 56:10-7(b)
[14] Haw. Re. Stat. § 482E-6(2)(A)
[15] Ill. Comp. Stat. Ch. 815, § 704-17
[16] Wash. Rev. Code Ann. § 19.100.180(2)(a)

Finally, the Iowa[17] and Rhode Island[18] statutes prohibit a franchisor not only from forbidding franchisees associating with other franchisees or participating in an associate but prohibit franchisors from retaliating against a franchisee for its involvement in a franchisee association.

The text of each state law protecting the rights of franchisees to freely associate has been reproduced in the Appendix A to this paper.

A large selection of states also have industry specific statutes that protect automobile dealers, motor fuel dealers and beer and wine distributors' rights of free association. For example, Massachusetts has an automobile dealership statute which prohibits the improper granting of a competitive motor vehicle franchise in the relevant market area previously granted to another franchisee and provides that "…every franchisee shall have the right of free association with other franchisees for any lawful purpose."[19]

B. FTC Rule Required Disclosure of Franchisee Associations

The Disclosure Requirements and Prohibitions Concerning Franchising (the "New Franchise Rule") was most recently amended, on July 22, 2007 and became effective on July 1, 2008. Among the new disclosures required by the New Franchise Rule was one that required disclosures of trademark specific franchise associations as part of the Item 20 disclosure.[20]

The disclosure requirements regarding associations are divided into two categories of entities. For both categories of entities, the disclosure must include "...the name, address, telephone number, email address and Web address (to the extent known) of each trademark specific franchise organization associated with the franchise system being offered."[21]

For those that "…are created, sponsored or endorsed by the franchisor…", Item 20 must disclose the relationship between the organization and the franchisor.[22]

For franchise organizations that are not so created, sponsored or endorsed, they must be (a) incorporated, or otherwise organized under state law, and (b) request to be included in the franchisor's disclosure document during the next fiscal year. This request must be renewed on an annual basis within 60 days following the close of the franchisor's fiscal year. A franchisor is under no obligation to verify the organization's continued existence but may include the following statement: "the following independent franchisee organizations have asked to be included in this disclosure document".

[17] Iowa. Code Ann. § 537A.10(10)
[18] R.I. Gen. Laws § 19-28.1-16
[19] M.G.L. c. 93B, §4(3)(I) and §10
[20] 16 CFR §436.5(t)(8).
[21] Cite.
[22] Cite.

This provision was the subject of much debate in the nearly decade-long process that led to the adoption of the New Franchise Rule. Some franchisor advocates opined that independent franchise associations should not be disclosed at all, or that if they were disclosed, they should meet some threshold of membership in order to be listed. No such threshold was incorporated into the final version of the New Franchise Rule.

The import of this new disclosure requirement cannot be overstated. To the extent that there was ever any question about the legitimacy of independently organized franchisee associations and their lawful activities, this stamp of approval from the Federal Trade Commission resolved any such doubts.

In the Statement of Basis and Purpose, the Commission made clear its view that speaking to an independent franchisee association is one of many essential elements of pre-investment due diligence available to a prospective franchisee. The Commission stated that "The disclosure of trademark specific franchisee associations-both those sponsored or endorsed by the franchisor and independent franchisee associations-will greatly assist prospective franchisees in their due diligence investigation of the franchise offering, thereby preventing misrepresentations in the offer and sale of franchises."

C. Cases Alleging Discrimination, Retaliation

Over the years, there have been a number of judicial decisions that deal with the rights and responsibilities of franchisee associations, as well as their members and leaders. When presented with credible evidence of unfair, retaliatory or discriminatory practices against franchisees as a result of their participation in associations of franchisees, dealers or distributors, judges and juries have had little trouble finding franchisors culpable, even in states where no statutory protections exist.

The courts have had little patience with franchisors' bad conduct towards members and leaders of franchisee associations. Juries have had even less patience with unfair, retaliatory and discriminatory practices. This may be due to the blatant and heavy handed conduct of some of these franchisors, which is clearly viewed as a violation of franchisee's rights.

The oldest decision concerning franchisees' rights to associate arose in the AAMCO Transmission franchise system. In McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F.Supp. 1232 (1978), a group of twelve (12) franchisees representing substantially all of the franchisees in the Detroit market and who were members of the National AAMCO Dealers Association ("NADA"), broke away from AAMCO in November 1973 to form a competing transmission repair business and operate independently from the franchise system. The franchisor sought, *inter alia*, money damages from the franchisees for destroying the goodwill associated with its rights as franchisor. Although the franchisees were held liable for damages of $412,000, the court endorsed the legitimacy of collective franchisee activities and the responsibility of the damages verdict was shared among the 12 franchisees. The decision is generally regarded as a clear victory for the franchisees.

The franchisor claimed that prior to the termination of their franchise agreements, the franchisees, through NADA, conspired to break away from the AAMCO franchise and devised a plan to start a new business together. The Court drew a parallel between the franchisees' freedom of association and the constitutional right to assemble and stated that "[f]ranchisees, like all persons in the United States, enjoy the right pursuant to the First Amendment of the United States Constitution to assemble, subject only to those exceptions specifically provided for by statute. Although a franchisee cannot combine with a competitor to fix prices, 15 U.S.C. §1, for example, franchisee gatherings, and joint activities which do not violate the law cannot, standing alone, be actionable." The franchisee association meetings, which began as a lawful vehicle to discuss legitimate business concerns, did not rise to the level of a tortious conspiracy, especially in light of the protections afforded by the Michigan Franchise Investment Law and the First Amendment.

In a passage that stands the test of time, the court stated that "[o]ne of the traditional control mechanisms of a franchisor has been to keep its franchisees disorganized", the Court held that "[f]ranchisees, by necessity, must have access to the franchise group in order to act together to deal with common problems, whether those problems be the oppressiveness of the franchisor or some less momentous concern."[23]

A 1982 Massachusetts case also dealt with a very clear attack on the legitimacy of collective organization and action by franchisees. Like the franchisees in in McAlpine v. AAMCO, the franchisee in Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc., 14 Mass.App.Ct. 396 (1982), was a Subaru automobile dealer who was accused by the franchisor of engaging in illegal activities in support of a franchisee association. These two cases are parallel in that they both relate to allegations of anti-competitive behavior and involve challenges to the legitimacy of a franchisee association. In Ricky Smith, the dealer had participated in and became the president of the New England Subaru Dealers' Council, Inc., which was created to deal with what the franchisees believed was an unlawful effort to expand the number of dealerships in New England. Members of the association combined their resources to gather information about the franchisor's business practices, to obtain legal advice and to support litigation against the franchisor for claimed violations of automobile dealer protection statutes.

The franchisor alleged that the franchisee association was an illegal conspiracy in restraint of trade, that the franchisees devised to prevent the franchisor from granting additional competitive motor vehicle franchises, and that the Council's members "illegally combined to create de facto horizontal territorial limitations controlled by, and for the benefit of, existing franchisees." The Court found that the Council was an example of the type of association contemplated by M.G.L. c. 93B, §10 and that there was no proof that the Council violated antitrust laws or did anything in restraint of trade. The Court further determined that "an association of automobile dealers handling the same line or make, formed for the purposes of processing mutual grievances against their common franchisor, and safeguarding market areas defined and entrusted to the dealers by state

[23] Cite.

statute, does not violate the antitrust laws absent proof of an illegal combination or evidence that illegal means were used to accomplish otherwise lawful ends."[24]

Not only do Courts directly protect franchisees' rights to associate, they also punish franchisors for intimidating or retaliating against franchisees who are members of franchisee associations in an attempt to deter such behavior from happening again.

The California case, Pepperidge Farm, Inc. v. Mack, Bus. Franchise Guide (CCH) ¶ 9530 (S.D. Cal. 1989), demonstrates the substantial risk a franchisor takes if it attempts to intimidate a franchisee from joining or supporting a franchisee association. In Pepperidge Farm, the judge assessed punitive damages in the amount of $1,000,000 against a franchisor for conduct designed to cause a Pepperidge Farm franchisee severe emotional distress.

The Court found that there was sufficient evidence that the franchisee was terminated as a result of his leadership role in the Pepperidge Owners Association and determined that a jury could have reasonably concluded that the franchisor intentionally inflicted emotional distress on the franchisee by making an example of him in order to deter other franchisees from joining the association. The franchisor's conduct included surveying and photographing the association's members' stores, placing the franchisee's products at the back of store shelves, terminating the franchisee regardless of his performance and prosecuting "an unprecedented and largely groundless breach of contract action" against the franchisee after his termination. The Court felt that the hefty punitive damage award was a sufficient punishment for Pepperidge Farm's actions and would help deter such behavior toward other franchisees in the future.

Another example of unlawful harassment and intimidation of members of a franchisee association can be found in State of New York v. Carvel Corp., 1985 WL 15454. The New York Appeals Court held that Carvel was not entitled to summary judgment because Carvel may have incurred antitrust liability for allegedly intimidating and harassing its franchisees at a franchisee organization meeting. The attorney general brought an action under the New York Donnelly Act. The defendant franchisor's attorney/director was accused of entering a franchisee meeting place with two other men, demanding permission to address the group, attempting to discover which franchisees organized the meeting and threatening to bring a lawsuit against them. The men the attorney/director brought with him confronted franchisees as they entered the building, warned them that 500 franchises had been lost as a result of their participation in similar activities and that they were risking serious consequences to their businesses by entering the meeting. The tone of one of the men was described as loud, intemperate and intimidating. The Court found that the allegations that the franchisor exercised inordinate control over the franchisees by "invad[ing] and dissent[ing] lawful meetings at which franchisees were attempting to organize support for franchise legislation and by employing fear, threats [and] harassment" were sufficient to state a cause of action.

[24] Cite.

In Jay Edwards, Inc. v. New England Toyota Distributor, Inc., 708 F.2d 814 (1983), a jury proved that there are serious consequences when a franchisor engages in retaliatory conduct towards a franchisee leader. Here, the First Circuit Court of Appeals affirmed a jury's determination that an automobile dealer had been denied a sufficient number of automobiles by the distributor in retaliation for his activities as president of a franchisee association.

The dealer participated in a presentation of a list of demands to the distributor. Immediately following the presentation, the distributor retaliated by making wrongful accusations of misconduct in sales promotions and knowingly filing a false complaint against the dealer with the state Attorney General. Most significantly, the distributor disregarded its own allocation formula and "shorted" cars to the dealer. The distributor offered the dealer 527 fewer cars than a comparable New Hampshire dealer which had previously received identical allocations, resulting in decreased profits. The distributor was unable to offer any explanation of why it had shorted the dealer but it was clear that it had engaged in action that was arbitrary, in bad faith or unconscionable.

The dealer's claim for lost profits went to the jury, which awarded $1.419 million in damages, exactly the same sum the dealer demanded. On appeal, the First Circuit affirmed the jury verdict but reduced the amount of damages by $950,000.

The lesson for franchisors here is clear: juries have little patience for franchisors that retaliate against franchisees for exercising their rights of free association. In this case, the distributor's retaliatory conduct was especially obvious.

Another and later retaliation case, brought in federal court in Missouri, is Darrell Dunafon v. Taco Bell Corp., Bus. Franchise Guide (CCH) ¶ 10,919 (W.D. Mo. 1996), where a Taco Bell franchisee was also able to demonstrate the consequences of retaliatory conduct.

Franchisees from around the country had banded together to form the International Association of Taco Bell Franchisees, whose mission was to bring issues concerning the franchisee community to the franchisor's attention. The association not only communicated its position on certain issues concerning member franchisees to Taco Bell directly but also discussed their concerns with the media, including the Wall Street Journal and the Restaurant Business Magazine as well as the United States Congress. Taco Bell did not appreciate these activities and openly referred to the association leaders as "renegades and scum."

Taco Bell publicly stated that the leaders of the franchisee association would not be granted expansion rights within the system. As in the Edwards case described above, where the distributor disregarded its own allocation formula and shorted cars to the dealer, Taco Bell changed an established process for expanding franchises specifically in retaliation against one franchisee. The plaintiff franchisee alleged that although Taco Bell had a previously established 3-step process for approving a franchisee's request to establish a new location, Taco Bell, in retaliation against the franchisee, established a 4th step to this process because of his “attitude problem”, making it more difficult for the franchisee to expand. Even though he had previously been approved for a new location, his request was denied.

The Court denied Taco Bell’s Motion to Dismiss and Motion for Partial Summary Judgment, stating that the franchisor’s exercise of discretion may have been in bad faith and based on retaliatory motives and that a general issue of material fact existed as to whether Taco Bell tortuously interfered with the franchisee’s business.

This case eventually settled after Taco Bell agreed to pay the franchisee $500,000.

Cherick Distributors, Inc. v. Polar Corp., 41 Mass.App.Ct. 125 (1996), another jury case, involved a dealer’s unlawful attempt to terminate an unwritten distribution agreement on the eve of a scheduled distributor association meeting. The Polar beverage distributor utilized the theories of breach of implied covenant of good faith and fair dealing, tortious interference with advantageous relationships and violation of the state’s unfair and deceptive practices act to win a jury verdict against the manufacturer.

In this case, the president of the distributorship had written a letter to other distributors inviting them to attend a meeting to discuss the possibility of forming an association to negotiate with Polar, the manufacturer. Upon discovering the letter and the scheduled association meeting, Polar terminated its oral agreement with the plaintiff distributor claiming that his letter of credit had expired, but Polar’s vice president later admitted that the grounds for termination was a pretext.

The jury found that the sudden termination of the plaintiff’s distributorship agreement, which happened to coincide with the planned meeting of Polar distributors, was calculated to put the plaintiff out of business and to discourage other distributors from attending the meeting. This provided ample support for the jury’s finding that the four days’ notice was unreasonable and that the termination constituted a breach of the covenant of good faith and fair dealing. The unreasonably short notice of termination also supported the jury’s finding that Polar tortuously interfered with the plaintiff’s advantageous relationships with Polar customers as well as the finding that Polar’s conduct amounted to an unfair or deceptive act under M.G.L. c. 93A, which provides treble damages. The Court referred to Polar’s “opportunistic timing” as “more than a mere coincidence” and, after correcting a mathematical error, the appellate court affirmed a $225,000 judgment in favor of the distributor.

In Popeyes, Inc. v. Yozo M. Tokita, et al., 1993 WL 386260, a Popeye’s Chicken franchisor refused to allow a multi-unit franchisee to transfer the franchise. The franchisee alleged that the refusal to grant consent was due to the franchisor’s dislike of the franchisee’s ethnicity as well as his activities on behalf of a Popeye’s Franchise Association and contended that the franchisor revised store evaluation reports and made derogatory remarks to other franchisees to discourage them from working with him to develop the Western Franchise Association. Although the Court was not inclined to agree with the franchisee’s implied covenant claims, it stated that the franchisee offered sufficient evidence of Popeye's hostility toward the franchise association and could present to the jury the question of whether the franchisor had acted reasonably in withholding consent to the sale. Consequently, the Court denied the franchisor's Motion for Summary Judgment on the franchisee's claims based on breach of contract and the implied covenant of good faith and fair dealing.

Oil Express National, Inc. v. John D'Alessandro, et al., Bus. Franchise Guide (CCH) ¶ 11,400 (N.D. Ill. 1998) involved bitter ligation in the federal court of Illinois. The quick oil change franchisor, Oil Express, named the franchisees' attorneys as proposed defendants in the litigation, claiming that the attorneys had induced a group of franchisees to breach their franchise agreements by refusing to pay royalties and advertising fees. The franchisor further alleged that the attorneys had made a demand that it lower its royalty rate from 5% to 1% and this this conduct amounted to extortion.

The Court was called upon to decide whether the claims against the franchisees' attorneys, on the basis on alleged tortious interference with a contract and on antitrust grounds, could be added by way of amendment to the then existing claims. The court denied the franchisor permission to add the claims on the basis that the franchisees had already decided to breach their franchise agreements before they contacted the attorneys. By this time, 25 of 58 franchisees had joined in the alleged boycott.

The court pointed out that the franchisor had already terminated the franchise agreements in question before the royalty reduction demand had been made. Therefore, there was no way any threats had been made against the franchisor. The court also stated that attorneys act under a qualified privilege when advising clients on matters pertaining to contracts which shield them from claims of tortious interference when that advice results in their clients breach of contract. The only way to overcome that qualified privilege is to prove that the attorneys acted with actual malice, which requires proof of their desire to harm the opposing litigant unrelated to the actual interests of the attorneys' client. Since there was no allegation or proof that the attorneys had any independent interest in or relationship to the franchisor, the franchisor's claim failed.

In a 2003 case involving Dunkin Donuts, a federal jury cleared a franchisee of claims of criminal tax fraud and evasion brought by the franchisor as a basis for termination. Dunkin' Donuts Inc. et al. v. H&Z Donuts Inc, et.al., No. 00-12496 (D. Mass. Sept. 22, 2003).[25] The franchisee claimed that he was in good standing with Dunkin until he began supporting franchisees' rights and organized an independent association of Dunkin' Donuts franchisees.

The franchisee initially filed a lawsuit in Florida alleging that Dunkin' Donuts interfered with franchisee association elections and, within three weeks of filing his complaint, the franchisee received the first of three termination notices. The franchisee continued to operate his locations and the franchisor brought a breach of contract action alleging that the franchisee, *inter alia*, engaged in massive tax fraud in violation of the

[25] Mass. Jury Clears Activist Dunkin' Donuts Franchisee On Tax Fraud Claim, Andrews: Franchise & Distribution, October 2003, http://02ae55a.netsolhost.com/files/article6.pdf

obligation under the franchise agreement to "obey all laws". After only two hours of deliberation, the jury returned a verdict finding that the franchisee did not breach his franchise agreements. The Dunkin' Donuts franchisee had not been charged and was not under investigation by any government agency and a key piece of evidence, an email from the franchisor's general counsel stating that the organization "had devised a long-term strategy in which Dunkin' Donuts 'committed itself to removing [the franchisee] from the Dunkin' Donuts system," revealed the franchisor's retaliatory tactics. This is yet another example of how juries have supported franchisees that faced this kind of discrimination.

Finally, in the most recent case in this area, Bray v. QFO Royalties LLC, 486 F.Supp.2d 1237 (2007), a Colorado federal court granted a motion for preliminary injunction brought by eight Quiznos franchisees. The court found that the franchisees were substantially likely to succeed on their claims that the franchisor terminated their franchise agreements in retaliation for posting a suicide letter of a former franchisee on the internet. Each plaintiff was an officer or member of the Toasted Subs Franchisee Association, Inc. (TSFA), and the court stated that there was "no dispute in this case that Quiznos had the Plaintiffs' franchise rights terminated as a direct result of the TSFA's actions in posting the… suicide letter."

After learning of the franchisee's suicide, the plaintiff franchisees contacted the franchisee's widow, who found her husband's suicide letter on his computer. The letter attributed the suicide to Quiznos and the litigation he and his wife had been engaged in concerning their franchise. The franchisees decided to notify the franchisee association members of the franchisee's death and their intent to establish a memorial fund on the TSFA website for him. As soon as the franchisor learned that the suicide letter was posted online, Quiznos' general counsel directed outside counsel to identify and terminate any franchisee affiliated with the franchisee association.

The Court determined that the franchisee organization was akin to a non-profit organization whose only mission was to provide an outlet for franchisees to express their frustrations and exchange ideas to further their interests. Quiznos made clear that its actions in terminating TSFA members "were purely punitive" and the court issued the preliminary injunction in order to protect the franchisees' rights while the case was pending.

In sum, although only 12 states formally protect the right of franchisees to freely associate for lawful purposes, courts nationwide are not forgiving of retaliatory conduct and juries are very willing to punish franchisors who engage in these activities. Not one of the cases cited above relied upon a freedom of association statute in reaching its decision, judgment or verdict. Due to the overwhelming support of franchisee associations, a well-counseled franchisor should steer clear of any retaliatory or discriminatory actions related to franchisee associations and their leaders.

The authors did not locate a single freedom of association case involving credible evidence of retaliation or discrimination where the franchisee did not prevail against the franchisor. Out of the 11 cases described above, franchisee rights to associate succeeded 11 times. Two (out of two) cases demonstrated the failure of franchisors' challenges to the legitimacy of franchisee associations, four (out of four) cases exemplify how juries have few qualms, if any, finding franchisors culpable of unlawful discriminatory or retaliatory treatment towards franchisees who participate in franchisee associations, franchisees have won four (out of four) dispositive motions and injunctions and the one time when a franchisor requested to amend its original claim to add claims against the franchisees attorneys, the Court ruled against the franchisor.

Notwithstanding this obvious winning streak, just last year fully 46% of franchisees stated that they had been told that they would be discriminated against as a result of their involvement with franchisee associations, according to the National Survey of Franchisees 2015 published by Franchise Grade.com.[26] Even though case law clearly demonstrates that discrimination and retaliation is unacceptable and unlawful, there are allegations that it continues to be present in some franchise systems. Responsible and informed counsel should discourage these unlawful practices because one thing is clear – this is a losing battle for franchisors.

CONCLUSION

In a world where franchising is often described as a three-legged stool comprised of the franchisor, the franchisees and key suppliers, a strong and effective franchisee association can add extra stability in the form of a "fourth leg." But for this fourth leg to increase the balance of that stool, the three other legs must be adjusted. And in the end, the level of adjustment made to each leg will determine whether the fourth leg enhances stability or creates imbalance.

So when asked whether a franchisee association is a "friend" or a "foe", the real question becomes, does it enhance or jeopardize the stability of the franchise system. For each system, the answer is likely different. But it always comes down to how willing the other components of the system are to adjust themselves in order to make room for the new leg.

[26] "46% of respondents answered Yes to at least one of "My franchisor has indicated that there could be negative consequences to participating in a franchisee association", "My franchisor has indicated that there could be negative consequences to speaking out about problems within the franchise system", or "My franchisor has increased the frequency of inspections or evaluations of my business after I raised questions or spoke out about problems in the system." http://franchisegrade.com/ctw/Nat-Survey-Franchisees-2015.pdf