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Fox Rothschild Podcast

Featuring Litigation Partner John Gotaskie in Pittsburgh

We are talking today about social media with John Gotaskie on Fox Rothschild Podcast. John is a partner and litigator with Fox Rothschild in Pittsburgh. He represents franchisors in diverse legal matters, including not only social media counseling but also complex commercial litigation, creditor's rights and franchising issues. John, good morning.

John Gotaskie: Good morning. Thank you.

Question: *Is social media really an appropriate tool for franchisors to use in promoting their businesses and reaching out to customers and other influential leaders of public opinion?*

John Gotaskie: Absolutely. Social media is a great tool for recruiting franchisees, branding a franchise and reaching a broad audience of consumers. In fact, franchises are beginning to use social media to interactively share information with customers regarding specials and price promotions, inform them about product offerings and distribute updates on industry trends. For franchisors who have not yet stepped into the brave new world of social media, they need to educate themselves about the various types of social media and “get in front” of new developments. More and more, franchisors will discover that, if they have not yet become involved in social media, their franchisees will.

Question: *Can you provide some examples of how social media benefits franchisors?*

John Gotaskie: Franchisors — and for that matter, franchisees — are using social media to build and reinforce their customers' strong bond with the brand. Tasti D-lite uses a “treatcards” rewards plan where customers accumulate points with every purchase toward free products. The treatcards are now linked to its social media sites, such as those at Foursquare and Twitter. Customers can earn extra bonus points if they enable the program to automatically update their Twitter and/or Foursquare accounts with every purchase. Even more impressive is how Tasti D-lite will send discount offers — coupons, really — to customers “checked-in” to Tasti D-lite via Foursquare when they are within walking distance of an outlet. Dunkin' Donuts for another example has a dedicated group that actively monitors and responds to posts made by its one million Facebook fans and 56,000 Twitter page followers about their experiences with the franchise. And Hampton Hotels uses Twitter to inform its followers about special rates, promotions and new locations. The franchise promotes posts by offering followers the opportunity to win a free stay if they offer feedback.

Question: *John, this all sounds wonderful. What are the risks?*

John Gotaskie: For every story about how social media has enhanced the brand, there is often another compelling story about how social media was misused by a franchisee or franchisee employee, wreaking



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havoc on the brand's image. While many franchise companies are—and should be—jumping on the social media bandwagon, they often lack a basic understanding of what social media is, what rules apply to the use of social media and issues they should be aware of in protecting the brand.

Question: Are there laws or rules governing how social media may – or may not -- be used?

John Gotaskie: Social media has changed the way companies advertise their brand. What used to be a one-way communication in which franchisors created a message and conveyed it to consumers has now become a two-way dialogue between the company and its customers. While this new form of interactive marketing has a huge benefit in terms of expanded exposure and customer bonding with the brand, there is also a risk in the form of loss of control over what is being said about the brand. Nowadays, consumers can post comments on their Facebook pages, tweet about a product, either promoting or bashing a brand at whim. In navigating this new world, franchise companies must be mindful of the Federal Trade Commission's rules on deceptive and unfair advertising.

Question: Can you be more specific about the FTC?

John Gotaskie: The FTC prohibits unfair or deceptive advertising in any medium. The FTC has indicated that it will continue enforcing its consumer protection laws online to ensure that products and services are described truthfully in online ads and that customers get what they pay for.

Just because advertising has moved online and into the realm of social media, it does not mean that the rules have changed. The same rules that apply to other forms of advertising also apply to advertising on the Internet, or through social media. For example, an advertisement is considered unfair or deceptive if it misleads consumers and affects their behavior or decisions about the product or service. An advertising claim is considered misleading if relevant information is left out or if the claim implies something that is not true. Advertising claims must be substantiated, especially when they concern health, safety or performance.

Question: What about endorsements or testimonials?

John Gotaskie: This is a growing area that businesses and franchisors need to be extremely careful about. Recently, in 2009, the FTC revised its guidelines on endorsements and testimonials in advertising. Franchise companies now may be found liable for false or unsubstantiated statements made through endorsements, or for failing to disclose what the FTC calls “material connections” between themselves and their endorsers. As an example, take a skin care products advertiser that might request that a blogger try a new body lotion and write a review about the product on her blog. Although the company does not make any specific claims about the lotion's ability to cure skin conditions, and the blogger does not ask the advertiser where there is substantiation for the claim, in her review the blogger goes ahead and writes that the lotion cures eczema. According to the FTC, the company would be subject to liability for misleading or unsubstantiated representations made through the blogger's endorsement and the blogger could also be subject to liability both for the misleading claim and for failing to disclose that she was being paid for her services. And this is true even if the blogger has no connection to the company.



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Question: What about the issue of employee conduct online?

John Gotaskie: Let's be honest, employees aren't always happy, and they don't always act in the best interests of their employers, either, despite the best efforts of employers. They have, probably since time immemorial, vented about a variety of workplace issues such as their fellow employees, their boss, customers and sometimes the company itself. What is different today is that social media offers an entirely new outlet for such discussions. And, when complaints are made on a social media platform, they go to a much wider audience and have greater impact.

Franchisors are not immune to this phenomenon. For example, there is a website called UnhappyFranchisee.com, which is a convenient web platform where franchisees may vent, usually to the detriment of their brand.

Question: Do employers have legal liability for their employees' online activity?

John Gotaskie: While every case is different, yes, there can be liability for employers for their employees' online conduct. I'll highlight a couple of examples. In one case, *Blakey v. Continental Airlines*, a female pilot filed hostile work environment and defamation claims against Continental Airlines based on derogatory comments posted about her on another pilot's electronic bulletin board. In denying the airline's motion to dismiss the hostile work environment claim, the District Court of New Jersey held that the airline had a duty to take effective measures to stop co-employee harassment when it knew, or had reason to know, that such harassment was occurring in a workplace-related setting.

Two cases against Cisco Systems also illustrate the risk of defamation liability that can result from online employee conduct. The cases involved anonymous blog comments posted by Cisco's in-house counsel on his Patent Troll Tracker blog, quite a name. Aside from his immediate supervisor, no one at Cisco knew the employee was the author of the blog. After settling defamation cases brought against it for comments posted on the blog, Cisco revised its blogging policy, mandating that if an employee comments "on any aspect of the company's business or any policy issue the company is involved in where you have a responsibility for Cisco's engagement, you must clearly identify yourself as a Cisco employee in your postings or blog sites and include a disclaimer that the views are your own and not those of Cisco."

Question: John, this is all so very complex, and so very potentially confusing. How can franchisors learn more?

John Gotaskie: Listeners may be interested in a white paper I've co-authored regarding franchising and social media. It covers social media platforms, the laws governing the use of social media in advertising and privacy concerns. It also highlights best practices in dealing with brand crises, legal limitations on controlling these crises, recruitment of franchisees via social media and development of a comprehensive social media policy.

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***Narrator:** Well, thank you John. To receive a copy of the white paper, or to discuss any aspect of social media administration in your company, please contact John at 412-394-5528 or at jgotaskie – that’s J-G-O-T-A-S-K-I-E – at foxrothschild.com.*

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