

DEFENDER

THE NADC NEWSLETTER

Register Today for the NADC Fall Workshop: Anatomy of a Buy-Sell

The workshop will be held November 3-4, 2005 at the Hilton San Diego Gaslamp Quarter. Join your colleagues for an in-depth treatment of buy-sell transactions. The four, hour-long sessions will be followed by facilitated small group discussions, one for each of the presentations.

Visit www.dealer counsel.com/events to register online. You can also specify states for CLE credit and reserve your hotel room.

The NADC member workshop will provide ample time for members to get to know each other.

Eugene J. Kelley, Jr., NADC meetings and conference chairman, and Oren Tasini, chairman of NADC's Buy-Sell



Eugene J. Kelley, Jr.



Oren Tasini

Agreements Section, planned the single topic workshop in response to suggestions in evaluations following the conference in April.

The program begins with a reception the evening of November 3. Friday's program starts with breakfast at 7 a.m. and continues until 3:15 p.m. The reception, breakfast and lunch are

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Sidebar

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D. Gerald Coker

AFL-CIO Fragments - Labor Union Declares "Managed Warfare"

D. Gerald Coker

In a recent statement, the top lawyer at UNITE HERE was quoted as saying, "American labor allows managed warfare." Citing alleged problems with the National Labor Relations Act processes, David Prouty went on to say, "What we're left with, like it or not, is a system where the union uses every legal means it can to convince the employer it should recognize the union and bargain. And that is managed warfare. That's where we are and that's why we use corporate campaigns." *Source: "Attorney Warns Activism Is Replacing NLRB Process in Unionization Drives," Michael Bologna, Daily Labor Report*

(BNA, Inc.); August 9, 2005.

To understand what is going on, some context is in order. Labor unions are not dead, but some are on life support. Unions have seen their dues-paying membership rolls decline to an all-time low — only about eight percent of the workers in the U.S. private sector are union members. Organized labor's image suffered another blow recently when bitter disagreement over how to "fix" big labor's problems caused several major unions to boycott the AFL-CIO Convention. Three of these high-profile unions, the Service Employees

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AFL-CIO Fragments... from page 1

International Union, the Teamsters Union and the United Food and Commercial Workers Union, then announced their withdrawal from the AFL-CIO. At the time of publication, UNITE HERE had not decided whether it would pull out as well.

A major reason for the fracture was the dissident unions' strong belief that the AFL-CIO was not willing to make unionizing unrepresented employees a top priority. In the view of the three unions, job one has to be bringing in new members. The big question is how.

Look for all unions to accomplish their goal of improving "market share" (the percentage of union-represented workers in the U.S.) in two ways. One way is through traditional organizing drives where employees at a facility are solicited and, if there is sufficient interest, an election petition is filed with the NLRB. This has been the primary method for resolving representation disputes since the NLRA became law in 1935, and it can still be an effective tool for unions. For example, the most recent government statistics reflect that unions win about 57 percent of the elections conducted by the NLRB. But what frustrates unions like UNITE HERE is that winning an election does not guarantee that the union will be able to secure a first contract with improvements in wages, benefits and other terms and conditions of employment. Which leads to method number two: corporate campaigns, the "managed warfare" to which Mr. Prouty of UNITE HERE recently made reference.

So just exactly what is a "corporate campaign?" Simply stated, it is a multi-faceted effort to pressure the targeted employer to agree to do what the union wants. While it sometimes is used during contract negotiations, the typical corporate campaign is unleashed against a company with the goal of forcing the employer to agree to something called a neutrality/card check agreement, which gives the union an easy way to become the employees' collective bargaining representative without an NLRB election and with lit-

tle or no opposition from the employer. The SEIU, UFCW and UNITE HERE probably have conducted more corporate campaigns than all other labor unions combined.

Corporate campaign tactics vary (think "guerrilla warfare"). With that in mind, however, the key components of a "corporate campaign" typically are: (1) building coalitions with local civil rights groups, politicians, religious leaders, community activists, etc.; (2) getting the union's message out through "media events" and demonstrations of various kinds; (3) establishing "lemon web sites" and "educating" the public on campaign issues and alleged employer misconduct; (4) subjecting the employer to charges and audits by regulatory agencies, including OSHA, the Department of Labor, the EEOC and the FDA, and mobilizing opposition before zoning authorities; (5) organizing boycotts of company goods and services; (6) pressuring lenders and creditors; (7) urging large pension funds not to invest in the targeted employer; (8) appealing to sympathetic stockholders to bring pressure to bear on the company through various initiatives; (9) utilizing workplace tactics short of strikes, including periods of "work-to-rule," mass refusals of overtime and other forms of concerted activity; and (10) conducting traditional organizing drives at "targets of opportunities" (i.e., facilities where the company may be particularly vulnerable).

Can you defeat a union "corporate campaign?" Yes, but it requires planning, determination and patience – corporate campaigns at some companies have gone on for years! The forward thinking employer should be proactive far in advance of the launch of a cor-

porate campaign. Some important action items are: (1) anticipate the union's primary "message points" and tactics; don't wait until the union starts the campaign, forcing you to play "catch up"; (2) establish a high level task force to develop a defensive and offensive game plan; (3) build a "coalition" with your employees centered on the union's efforts to harm the business; (4) develop a sophisticated public relations function and campaign; (5) publicize (internally and externally) the union's campaign for what it is; (6) identify vulnerable areas and fix them; don't forget to focus on "product integrity," as well as compliance with all federal, state and local laws; (7) consider all legal options (e.g., NLRB charges, defamation claims); and (8) train/educate every member of the management team; be sure to get buy-in from first level supervisors – they are key.

What's the bottom line? All unions are going to do more organizing. Some will be more active than others. Some will rely more on corporate campaigns, while others will use the election procedures of the NLRB. The companies that remain union free will be the ones where all managers treat every employee with dignity and respect while providing a competitive wage and benefit package and opportunities for advancement.

D. Gerald Coker is Chair of the NADC Labor Law Section. He is a senior partner in the Atlanta office of Ford & Harrison LLP, a national law firm which represents dealerships in labor and employment matters. He can be reached at 404-888-3820 or jcoker@fordharrison.com.



10 Questions for Michael Maledon

Mr. Maledon is General Counsel for Automotive Investment Group (AIG). AIG, together with VT, Inc., provides management services to over 50 franchised automobile dealerships. Prior to joining AIG, Michael was an attorney with Cooley Godward, LLP in San Diego, specializing primarily in mergers & acquisitions and general corporate representation. Michael obtained his B.A. from the University of Arizona, and J.D. from the University of Notre Dame School of Law.

Defender: How many attorneys does AIG/VT, Inc. have in its legal department?

Maledon: We have three attorneys, each with separate areas of responsibility.

D: How much of your time is devoted to each of the following: managing litigation, compliance efforts, and mergers and acquisitions?

M: Probably about 1/3 each. In that, I'm including all real estate and transactional work in M&A, of which we do quite a bit. And I'm including early intervention into customer disputes as "managing litigation." I try to monitor any complaints that get filed with the attorney general or other consumer protection agency to make sure that any potential problems are addressed swiftly.

D: What do you look for in selecting outside counsel?

M: Competence and accessibility. Obviously, the attorney needs to understand the industry and the relevant issues that dealers so often face. Accessibility is important. When an attorney is too busy to get back to me promptly, or has a junior person become the primary contact, it usually means to me that he or she isn't giving sufficient attention to my case.

D: Do you retain small firms?

M: We use a variety of attorneys from both small firms and larger firms. I learned early that you need to select the attorney, not the firm. I've made the mistake of hiring a firm based upon reputation, only to be disappointed in the lawyer assigned to my case. I'm much more diligent now about making

sure that we engage the best attorney for the given task. Most of our routine dealership litigation is defended by attorneys at smaller firms with a concentrated practice in that area. Other situations, such as, for example, federal compliance, employment, or real estate may call for a different attorney at a different firm with a particular expertise in that area.

D: Are individual stores allowed to hire their own attorneys?

M: In each market we have relationships with one or two excellent attorneys that the dealerships know to call. Typically, I won't get involved in that decision-making as I already know the attorneys and have full confidence in their abilities. However, if it's an unusual or unique matter, I may get more involved and recommend engaging a different attorney if I think that the particular circumstance calls for it.

D: What compliance efforts are you currently focusing on?

M: Like everyone else, I'm continuing to monitor the evolving case law concerning negative equity, adverse action notices and some of the other topics that are hot right now. F&I is an area that has received intense media and legal scrutiny recently, so a big part of our compliance efforts focus on F&I. I think we do a very good job with training, and I stay proactive in our efforts to design procedures that help ensure that our policies are being properly followed.

D: In working with outside counsel, would you describe yourself as

"hands on" or do you prefer to set objectives and ask for periodic reports?

M: Unless it's a particularly unusual or high-risk case, I usually only request periodic updates from outside counsel.

D: What are some common mistakes outside counsel make while representing your dealerships?

M: I've been frustrated in the past with some lawyers' inability to think in practical business terms. Some lawyers respond to every issue, whether it's a \$5,000 matter or a \$5 million matter, with a one-size-fits-all litigation strategy. It's impossible to eliminate all of the risk of doing business, so lawyers must take a reasoned approach.

D: What is the most common type of lawsuit you see these days?

M: It doesn't seem like anything is common these days. I am continually surprised with the creativity of the plaintiffs' bar. One of the most recent lawsuit I encountered was one in which a consumer complained that as a result of our inability to obtain financing for him, he was unable to get transportation, resulting in his loss of work, subsequent arrest, and physical abuse while incarcerated.

D: Can you describe a notable, recent legal victory?

M: Well, I'm happy to say that the dealership was let off the hook for allegedly turning the aforementioned consumer into a convicted criminal.



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from page 1

included in the \$375 registration fee.

The major presentations are:

The Buyer's Buy-Sell Agreement, Jonathan P. Harvey, NADC President, Harvey and Mumford LLP, Albany, NY



A Word to the Wise: Address These Employment & Labor Issues in Every Buy-Sell, D. Gerald Coker, Ford & Harrison LLP, Atlanta, GA

Protecting the Selling Dealer, Joseph S. Aboyoun, Aboyoun & Heller, LLC, Fairfield, NJ



Details of the Buy-Sell Agreement, Ronald L. Coleman, Davies Pearson, PC, Tacoma, WA

Facilitators of the small group discussions are: Oren S. Tasini, Haile, Shaw & Pfaffenberger, PA, North Palm Beach, FL; Lyne A. Richardson, Ford & Harrison LLP, Los Angeles, CA; Gordon E. Devens, AutoNation, Inc, Fort Lauderdale, FL; and John P. Hickey, Planet Automotive, Coral Gables, FL

Visit www.dealer counsel.com for registration and updated program information.

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President's Letter



We are beginning our second year of existence, and it feels as if we have been here forever. There are now 330 members, every element of the Association is flourishing, and we are about to have our second conference, a fall workshop entitled "Anatomy of a Buy-Sell." Think of it, a few people decided to get something done, they met, they did a bit of work, and "presto," it happened. We have a national (actually international with our Canadian members) Association that has been recognized in

the industry by lawyers, car dealers, publications including Automotive News and, most of all, by you, the members. Thank you for supporting this wonderful group, and thank you for believing it was necessary.

The fall workshop (in response to thorough and insightful evaluations from those who attended our April meeting in Atlanta) will consist of an in-depth treatment of a buy-sell agreement and the transaction itself. There will be four speakers talking about various elements of the deal, and four separate, break out workshops to give those in attendance an opportunity to share their knowledge and talk with the speakers

and among themselves about topics which interest them. I have decided to put my money where my mouth is and present one of the sessions. I am absolutely certain I will learn more than I will teach. Preparing for such a task, meeting with and sharing experiences with other lawyers who have been there, is inevitably the best way to improve your skills. I encourage you to come to San Diego, learn a little, teach a little, get some CLE credit, and enjoy a beautiful city.

Jonathan P. Harvey of Harvey and Mumford LLP is President of the NADC and can be reached by e-mail at jpharvey@harveyandmumford.com.

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About Gil Van Over

- Speaker at CPA, CFO, Dealer Association conferences
- Published monthly in *Dealer Magazine*
- Available for expert witness services
- Who's Who – *F&I Management & Technology Magazine*
- Association of Finance & Insurance Professionals mentor

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Each month we list members who joined the previous month.

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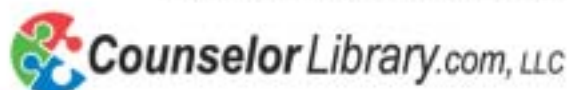
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Volume I, Number 11

October, 2005

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Defender, The NADC Newsletter

is published by the National
Association of Dealer Counsel

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