



## In this Issue:

Feature Articles .....	1, 6
New Members .....	3
Executive Director's Message...	4
Advertising Opportunity .....	8
Board of Directors.....	10

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## Consumer Complaints – Avoiding and Dealing With Them

By Ramón G. Vega Dorticós, Esq., *Autos Vega Group*

Any attorney directly or indirectly involved in the automotive industry is well aware of administrative consumer complaints, principally related to service issues. Every state and jurisdiction has laws and regulations that facilitate the filing of complaints by consumers against dealerships and manufacturers. Some states/territories (like Puerto Rico<sup>1</sup>) have specialized consumer rights agencies that receive, investigate and hold administrative hearings based on such complaints. Some consumer right agencies (“CRA”) are more active than others. In my jurisdiction, the local CRA is very active. It accepts all complaints against dealerships and manufacturers, and it rarely filters out frivolous ones as part of the process.

The CRA administrative process can involve various preliminary hearings, technical inspections and a thorough discovery of evidence. As a result, dealer managers, technicians, executives and in-house counsel may have to devote extensive hours to handle a complaint. Time-wise, it could take more than a year to reach the final administrative hearing, which is like a trial, with attorneys, testimony, and evidence. In the best case scenario, the dealer prevails at the final hearing and only has to pay for its attorney costs. In the worst case scenario, the dealer does not prevail and may end up buying

back the vehicle, having to refund the customer all payments made without an allowance for depreciation, plus paying the customer’s legal costs if an attorney is involved.

Consumer complaints must be taken seriously and dealt with effectively. Unattended or badly managed complaints can cost a dealer a substantial amount of money and time. Moreover, an unattended or badly managed complaint could become adverse legal precedent, possibly opening the door to future complaints by many other customers.

A good part of my time as general counsel for a dealership group is dedicated to dealing with these types of complaints. Experience has taught me some pointers in effectively managing or even preventing these complaints from turning into unpleasant and expensive dealer headaches. These are a few suggestions that may help us help our dealers:

**1. Have a well-trained and proactive team of service advisors.** The service advisor is the first person to face a service customer. He is the one that can listen, understand and quickly try to respond and resolve the customer’s concerns and needs. It is also essential that service advisors have at least a basic knowledge of the local automotive consumer laws and regulations. As dealer counsel we should prepare educational material to keep the service advisors well informed in a general and simple manner about the pertinent

<sup>1</sup> Puerto Rico is a territory of the United States where all federal laws and regulations apply, in addition to state level laws and regulations.

consumer laws and regulations. Providing them with simple guides and best practices can prevent simple service issues from turning into complicated legal claims.

**2. Have an involved and well-informed service manager.** The service manager is the key person in defusing a potential consumer complaint. The service manager must have ample discretion-within the established policies of the dealer and the manufacturer- to deal with an unsatisfied customer. He can offer a "loaner", speed up service, approve discounts and provide customers with multiple other benefits. He must deal with any unsatisfied customer situation and intervene quickly and expeditiously. It is very important the service manager has an intimate knowledge of the local consumer laws and regulations. He must also be aware of the entire administrative complaint process. This is important because, more than likely, he will be the dealer's main

witness in the process. As dealer counsel we should provide service managers with a thorough knowledge of the local laws and regulations regarding consumer complaints.

**3. Listen to the customer.** In my experience, most consumer complaints emanate from a lack of effective communication. We should advise dealers to train their service and sales teams to try to understand the consumer's needs. Most issues can be resolved with minimal expense and little time in the dealership. The objective should be to prevent the filing of a complaint with the CRA, whenever possible.

**4. Involve the manufacturer.** This is probably the most important rule for me. If the issue involves any perceived product flaw (real or not), it is a must to quickly involve the manufacturer. The same holds true if the dealer followed manufacturer policies, advice, or instructions when correcting a mechanical issue.

Depending on the contractual arrangement, it may be the manufacturer who ends up paying your legal fees or appointing an attorney to work with dealer counsel. Not involving the manufacturer early on can be a costly mistake. If the administrative agency holds for the consumer, the dealer may be stuck with substantial costs. Some manufacturers require the dealer to inform them of any consumer complaints with a CRA in order to indemnify the dealer. Thus, it is important that the dealer counsel involve the manufacturer early.

**5. Have the dealer involve counsel.** We should recommend to our dealer clients to involve an attorney as soon as a complaint is filed with a CRA. Even if the participation of an attorney representing the dealer may not be required in an administrative procedure, it is always advisable for the dealer to have an attorney, particularly if the customer has retained an attorney. Thus, we should encour-

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age dealers to always involve counsel early in a formal administrative process or when one seems inevitable.

#### 6. Effectively sort out frivolous complaints.

In my experience, a substantial number of consumer complaints filed with CRAs are frivolous. Some customers have a personal issue against a dealer's service or sales personnel, others are seeking to get out of an unaffordable car payment, and others are just naturally litigious individuals. It is important to quickly answer these complaints and make it known an attorney is representing the dealer. A vexatious complaint will usually die out early in the process if the claimant knows early on that the dealer will defend it vigorously. A reason-

able complaint is a different matter. These should be evaluated carefully, and if possible settled. Consumer complaints before a state administrative agency have the potential of becoming long drawn out processes, costly in terms of time, money, and potentially dealer reputation. These suggestions are just some of many ways that counsel can help dealers avoid or minimize the adverse consequences of consumer complaints. ■

*Mr. Vega Dorticós is General Counsel for the Autos Vega Group. The Group has a Ford, Lincoln, VW, Hino and used car dealers in San Juan, Puerto Rico. Mr. Vega Dorticós is an attorney in Puerto Rico and the state of Florida.*

## NADC Welcomes New Members



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# webinar

## SAVE THE DATE NADC Webinar

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Mark A. Eich, CPA, CISA  
Principal  
Information Security, CliftonLarsonAllen LLP

**November 4, 2014**  
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## Executive Director's Message



Erin H. Murphy  
*NADC Executive Director*

It is hard to believe that summer is over and the kids are already back to school. If you live in a metro area that means your morning commute has just gotten a good deal longer! For NADC, that means we are in full preparation mode for the Fall Conference. Once again, we will be back at the Trump International Hotel & Tower in Chicago, IL, October 26 – 28. The Fall Conference will offer 9 critical sessions that will cover important issues facing dealer counsel today. The full agenda can be found on our web-site, [www.dealercounsel.com](http://www.dealercounsel.com).

Aside from the education component, we will have a little fun as well! The Fall Conference event sponsors allow us to offer breakfasts, lunches, cocktail receptions, coffee during breaks, gifts, lanyards, flash drives and complimentary wireless internet to all attendees!

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We encourage you to network with all of our sponsors and to visit the Associate Members at their respective tables in the registration foyer, to learn how they can help you and your clients.

To switch gears, please also note that the NADC Strategic Plan is now available to all members for viewing. The plan is posted to the eLibrary in the "General" section of the members-only portion of the website. The Strategic Planning Committee and Board of Directors synthesized the discussion and work into a proposed strategic framework (mission, vision, goals and action plan) that we will begin implementing this fall. A special thanks to all of you who filled out the member survey. The responses to the survey served as a critical component in the planning process. The strategic plan will help to further enhance the value of the organization and offer maximum benefits to our members.

As always, we would like to encourage you all to contribute to the organization by writing articles for *The Defender*, presenting webinars, posting helpful documents to the eLibrary section of the web-site and helping out your fellow members on the list-serve. If you have an idea for an article you would like to write or a webinar you would like to present, please contact me at:

[emurphy@dealercounsel.com](mailto:emurphy@dealercounsel.com).

We hope to see you in Chicago! ■

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### Session Topic Descriptions

#### MONDAY, OCTOBER 27

7:30 – 8:30 am

##### **In-House Counsel Breakfast Session How to Defend your Dealership Part 1**

Jami Farris, *Parker Poe Adams & Bernstein*  
Scott Silverman, *Silverman Advisors, PC*

There are many intangible threats that can affect a dealership. This session will deal with reputation management and how to deal with disgruntled customers, bad reviews online and social media.

8:45 – 9:45 am

##### **Session 1: Dealership Data – Security and Sharing in Today's Business and Legal Landscape**

Steve Cottrell, *Dealervault and Authenticom*  
Beth Hill, *FordDirect*  
Brad Miller, *NADA Attorney*  
Gerry Stegmaier, *Goodwin Procter LLP*

Sharing customer and other data raises critical legal, franchise, regulatory, and business issues for dealers. This session will be an in-depth panel discussion among industry experts addressing dealership data sharing and protection. Hear differing viewpoints among the parties in the automotive data ecosystem as to what is really happening "behind the scenes" with respect to dealer data today, and why. What problems does this sharing raise for dealers? What are the implications for dealers with their manufacturers and vendors? What should dealers be worried about from regulators and the plaintiffs' bar? What advice can dealer lawyers give their clients to prevent problems? What tools do you have to protect your clients?

10:00 – 11:00 am

##### **Session 2: Recall Madness**

Aaron Jacoby, *Arent Fox, LLP*  
Russell McRory, *Arent Fox, LLP*

In this session, we will take a deep dive into recent events culminating in the recall of millions of vehicles. As of late, manufacturers appear to be pulling the recall trigger prematurely, leaving dealers to manage customer relations with little direction. What is the result? As always, more exposure and less certainty for dealerships. Some of the topics we will discuss include:

- Not Ready for Recall Recalls: The manufacturer notice indicates that a recall is pending, with no recall notice issued to the consumer, no repair recommended, and no date specified for the availability of replacement part(s); and yet, a stop-sale order is given and a service drive notice is "required."
- Multi-brand Dealer Response to Single Brand Recall: What does a multi-brand dealer do upon receipt of a stop-sale or other significant recall notice received by one operating entity with regard to the dealer group's other, non-brand entities? What do you do at the Ford store with a Honda airbag notice that applies to used cars on your Ford lot?
- Status of VIN-searchable Recall Databases: Are the manufacturers meeting their regulatory obligations? Is safecar.gov helpful to dealers?
- Best Practices: What should dealers be doing to reduce exposure?

11:15 – 12:15 pm

##### **Session 3: Insights and Perspectives of a Consumer Advocate and Government Regulator**

William L. Brauch, *Special Assistant Attorney General, Director – Consumer Protection Division, Iowa Department of Justice*

William Brauch, director of the Iowa Department of Justice Consumer Protection Division and founder and chairman of the National Association of Attorneys General Automotive Working Group shares his perspective on the regulation of automobile dealers and his insights into the complaint, investigation and enforcement processes with special emphasis on advertising compliance and fair credit issues.

1:30 – 2:30 pm

##### **Session 4: Advertising Compliance: Hot Topics and Live Review**

Rob Cohen, *Auto Advisory Services, Inc.*  
Jonathan Morrison, *Auto Advisory Services, Inc.*

In this session Jonathan Morrison will begin with a discussion related to recent advertising enforcement actions brought by the FTC. He will then discuss challenges that dealers face while trying to satisfy manufacturers through compliance with advertising guidelines and participation in novel manufacturer-sponsored programs. Lastly, Rob Cohen will conduct a live, unscripted review of random dealership websites.

2:30 – 3:30 pm

##### **Session 5: The Latest Factory Intrusions: The Right of First Refusal in Buy-Sells; and Framework Agreements**

Leonard Bellavia, *Bellavia Blatt Andron & Crossett, PC*

This session will address the recent proliferation of factory disruptions of the buy-sell process through the rebuffing of buyers in signed buy-sell agreements by the exercise of the right of first refusal ("ROFR") in order to exert further control over who enters the dealer network.

For years, attorneys have known about the ROFR provision in Dealer Sales and Service Agreements but didn't pay close attention to it as the right was rarely exercised. And a seller was even less concerned, as it didn't matter who wrote the check. Now, both buyers and sellers are being adversely affected by imperfectly executed ROFRs and the resulting litigations that have been filed in the last 2 years to sort out the respective rights of the parties. The various issues under litigation will be discussed.

Leonard Bellavia will discuss how transactional counsel can draft language in buy-sell agreements to reduce the likelihood of a factory ROFR and the attendant problems and delays.

The challenges will be discussed from both the buyer and seller perspective.

Also part of the presentation will be factory Framework Agreements and how they should be handled.

3:45 – 5:00 pm

##### **Session 6: List-Serve Open Mic Session**

Moderator:  
Oren Tasini, *Haile, Shaw & Pfaffenberger, P.A.*

Once again, the NADC member list-serve will jump from the computer screen to an in-person discussion during this session. Attendees can delve

deeper into the hot topics and issues discussed on the list-serve such as bank disclosure notices, wage and hour, internet advertising, lemon laws and much more. In addition, conference attendees will have the opportunity ask questions and get advice from their colleagues.

#### TUESDAY, OCTOBER 28

7:30 – 8:30 am

##### **In-House Counsel Breakfast Session How to Defend your Dealership Part 2**

Mike Rayfield, *Security Consultant, Private Investigator and FBI Special Agent (Ret.)*

Mike Rayfield will speak to the group on real-life implications of workplace violence and the active shooter, focusing on Awareness, Prevention, and Response relative to the dealership environment.

8:30 – 9:30 am

##### **Session 7: NADA Update**

Paul Metrey, *Chief Regulatory Counsel, Financial Services, Privacy & Tax, NADA*

This session will include an update on several active federal regulatory issues affecting automobile and truck dealers, with the main focus on recent developments concerning the CFPB's Disparate Impact initiative.

9:45 – 11:15 am

##### **Session 8: Working Through Common Conflict Issues in Dealer Litigation and Transactions**

James Christian, *Tiffany & Bosco, P.A.*  
Beth Heath, *Tiffany & Bosco, P.A.*  
Steve Linzer, *Tiffany & Bosco, P.A.*

This presentation will focus upon ethics-related issues tied to the following topics: (1) representing dealers and employees in litigation; (2) joint-defense agreements; (3) issues related to the buy-sell process and buy-sell agreements; (4) indemnification and tender issues; (5) appropriate use of e-mail in dealer representations, and (6) issues related to taking direction from the dealer's representative/employee.

11:30 am to 12:30 pm

##### **Session 9: The Transport of Recently Purchased Automobile Overseas: The State of Law, Current Issues and Trends**

Christopher M. Santomassimo, *Nicoll Davis & Spinella LLP*  
Jack Spinella, *Nicoll Davis & Spinella LLP*

Automobile dealers all have to wrestle with the competing forces of maximizing sales without jeopardizing the manufacturer-dealer relationship. The illicit shipping of new automobiles from the United States to overseas, and particularly China, has been a growing concern for many dealerships across the country. The knowing sale of a new automobile by a dealer to a customer who intends to ship the vehicle overseas is often a breach of the dealer-manufacturer franchise agreement that can result in significant charge-back penalties. While a few U.S. Attorneys have brought criminal actions and obtained guilty pleas in connections with such trade, the law is not settled on the many issues surrounding the shipping of recently purchased automobiles out of the United States.

This session identifies the dominant legal issues surrounding the transport of recently purchased vehicles overseas, explores the legal definitions of "new" and "used" in connection with such shipments, examines the state of current civil case law and recent criminal actions concerning such trade, and discusses tips and recommended tools for dealerships to limit risk associated by such illicit activity.



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## Caution: Not Taking Proper Precautions When Handling Client-Attorney Privilege in a Sale or Merger Could Have Major Consequences

Andrew J. Weill, *Benjamin, Weill & Mazer*

Robin O'Donnell, *Benjamin, Weill & Mazer*

You have represented a dealership and its owner for years when the owner decides to sell the dealership. The owner asks you to represent the dealership in the negotiations, sharing with you his less-than-favorable opinion of the acquiring owner, problematic relationships that may arise with dealership employees, and the like. After the sale is complete, you receive a polite email from counsel for the new owner, announcing that she is now counsel for the dealership. She asks you to immediately forward all files and communications from the prior owner. As this article explains, unless you have taken proper precautions, your client and you could face embarrassing and expensive consequences.

Recent case law indicates that when a corporation is acquired, the corporation's attorney-client privilege will typically belong to the buyer. This is because the privilege belongs to the corporation as the client, and thus the privilege passes with the corporation.<sup>1</sup> Because of this, a selling shareholder may have no right to assert a claim of privilege after an asset sale, merger, or other similar corporate transaction is completed. There is some controversy over whether pre-transaction communications regarding the transaction itself pass to the buyer or surviving corporation. On the other hand, pre-transaction communications made in the general course of business are generally agreed to belong to the acquirer unless explicitly carved out.

One of the leading cases addressing this issue is the New York case *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 651 N.Y.S.2d 954, 674 N.E.2d 663 (1996). *Tekni-Plex* involved the sale of a corporation, which was structured as a merger of the corporation being acquired into a shell acquisition corporation. *Id.* 89 N.Y.2d at 128. A law firm represented both the owner of the selling corporation and the selling corporation itself. *Id.* The privilege dispute arose when the

buyer brought suit against the seller after the acquisition had been completed. *Id.* The buyer alleged breach of representation and warranties and demanded all files relating to the firm's prior representation of the old entity. *Id.* at 129. Although the seller argued that it retained the right to the privileged communications of the old entity, the court held that all privileges passed from the old corporation to the acquiring corporation, except for pre-merger communications relating to the merger. *Id.* at 138-39.

Other cases have eliminated even the narrow exception for pre-transaction communications relating to the transaction itself that *Tekni-Plex* carved out. Notably, the Delaware Court of Chancery recently rejected the exception in the case *Great Hill Equity Partners IV*,

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<sup>1</sup> A large part of the problem arises from the unique issues associated with dual representation of the dealership and the owner, and the possibility of those interests being in conflict. Under the ABA Model Rules, when the client is an organization, the attorney's duty is to the organization as an entity, and not to its constituents. See Rule 1.13. However, the Model Rules allow for dual representation, subject to compliance with Model Rule 1.7 and 1.13. In practice, it is common for an attorney to represent both the selling shareholder(s) and the corporation in these types of transactions where the company is owned by one shareholder or a small group of shareholders. The general issues relating to dual representation are outside the scope of this article. Before agreeing to represent both a shareholder and corporation in the transaction, an attorney should always ensure he is in compliance with the ethical rules for dual representation in the jurisdiction. The attorney should also assess possible conflicts and the likelihood that those conflicts may manifest.



*LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155 (Del. Ch. 2013). In *Great Hill*, after the completion of a merger, the buyer brought an action against the seller for fraudulently inducing the buyer to acquire the company. The seller had not taken any steps to preserve or conceal the privileged information from the change in control of the corporation. *Id.* at 156. The court held that all of the attorney-client privilege passed to the surviving corporation, including the privilege related to the communications about the transaction itself. *Id.* at 159. However, the court acknowledged that by providing provisions within the merger agreement, the seller's pre-merger privilege could have been protected. *Id.* at 101.

The rule may differ where there is merely the purchase of assets, with no continuation of the pre-existing business operation. See *Orbit One Comms., Inc. v. Numerex Corp.*, 255 F.R.D. 98 (S.D.N.Y. 2008). In *Orbit One*, the seller sold all assets and rights of the company in order that the buyer could continue the operations. *Id.* Because the rights and assets transferred under the asset purchase agreement included all rights the court held that the privilege covering the seller's pre-transaction communications in the regular course of business belonged to the buyer. *Id.* at 106. The court held the seller retained the pre-transaction privilege only with respect to communications relating to the transaction. However, the privilege regarding pre-transaction business operations may not necessarily pass to a buyer in an asset sale where the buyer is not attempting to continue the pre-existing business operations. See *Tekni-Plex*, 674 N.E.2d at 668.

These cases provide some guidance as to what attorneys should pay close attention when representing both the seller and a selling shareholder in the change in control of a company, as well as ways to avoid any major consequences. To some extent, the result may differ depending on how a transaction is structured and which state's law controls the entities and the transaction. Counsel should bear in mind the conflicting law in Delaware and New York, as well as the uncertainty as to how other state courts may handle the issue. In addition, it should be noted that it is not entirely clear whether an acquisition of a company through a stock acquisition would be treated more like a merger or an asset sale, but in the authors' opinion, it is more analogous to a merger.

Practitioners generally agree this new case law indicates a seller can preserve its rights to privilege by contract, but there is no guarantee. At a minimum, in order to avoid possible liability, an attorney should ensure at the outset of negotiations there is contractual language in the transaction agreement protecting transaction-related privileged communications. As noted in *Great Hill Equity Partners*, it is possible for the parties to include contract language explicitly excluding transaction-related communications and work product. 80 A.3d at 160. It may also be possible to exclude other pre-transaction communications, at least in the context of an asset sale, but it is less clear whether such exclusions will be permissible in the context of mergers or stock sales.

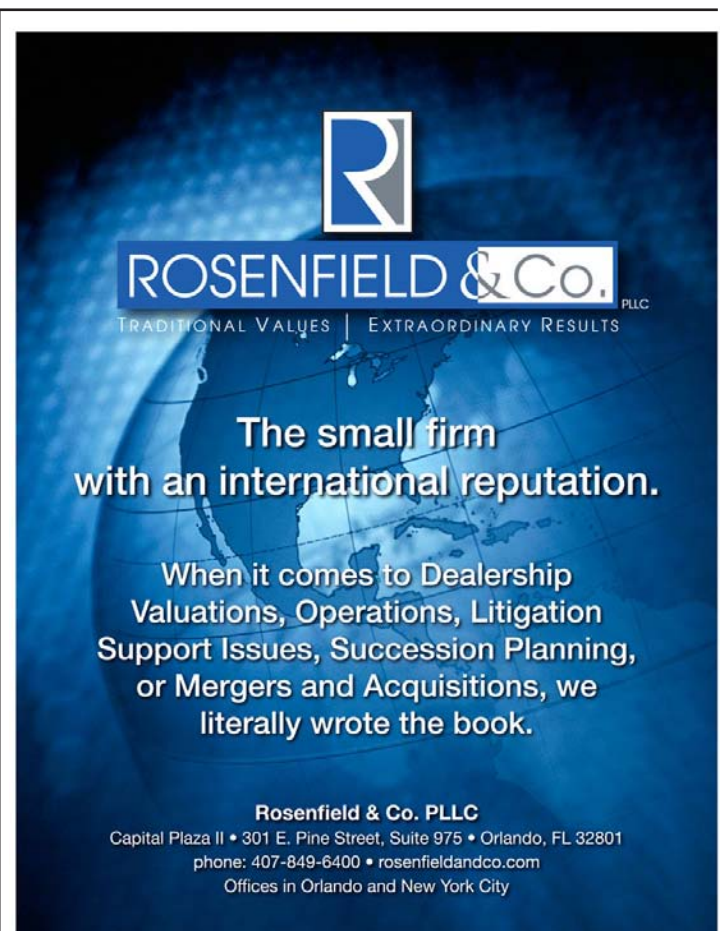
## NADC Member Announcements

Do you have an announcement or an accomplishment that you would like to share with the NADC community?

We are starting a new section where we will highlight member's achievements. Please send any news you would like to share to: [emurphy@dealercounsel.com](mailto:emurphy@dealercounsel.com).

Regardless of the form of transaction, a merger or acquisition agreement should include provisions specifying which person or entity will retain the pre-transaction privilege and which types of communications are covered. If a seller wishes to retain control over the pre-transaction privilege, the provisions must clearly indicate what sorts of communications are covered by the privilege.

In addition to the steps listed above, the seller must take steps to ensure that any privileged information is protected, such as removing all privileged communications from company computers, ensuring all physical documents containing the privilege are segregated, and clearly informing the buyer that these documents will be withheld on the grounds that they contain privileged information. ■



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