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Do Dealerships Need Gatekeepers?

By Deborah Dorman, *ENYCAR*

When any agency goes to a dealership to do some kind of inspection, what procedure is followed, if any? Most dealerships have many entrances, from the showroom to the service area or body shop. Someone may approach any entrance, flash a badge or business card, and then what?

- They are sent on their own through the dealership to reach a particular person or department?
- They are accompanied through the dealership to the person or department they need, with or without “chatter”?
- They wander aimlessly through the facility, looking for what or whom they want?
- They are sent away rudely?
- They are stopped politely and asked to identify themselves and their purpose before the right individual is brought to them to guide them appropriately?

If you think the last option is what is taking place at most dealerships, think again. The first four scenarios are much more prevalent. The first four can lead to a much more involved inspection than what was originally planned, which originally may have been limited in scope.

Would you let a stranger wander through your law office? You can usually control a single entrance with a receptionist and waiting area, but dealerships cannot. Government agency personnel often arrive with an aura of authority, and the random person they first encounter will generally yield to that. Even worse, they may offer information that leads to problems which were not part of the original inquiry.

The best plan is to train those working near entrances in the appropriate procedures. First, have the “guest” sit down and fill out a form, on company letterhead, that provides their full identity, the purpose of the visit, and possible outcomes (fines, criminal prosecution, research only, etc.). The dealership has every right to ask for this information (barring an emergency situation with police). The frontline employee



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needs to explain politely and in a friendly manner that this is company policy. In years of working with this system, our dealerships have encountered only one person who resisted this process.

Using the form provides several benefits. First, it stalls the inspection, so someone can be alerted to make some quick fixes. This provides time to call for assistance from the dealer association or counsel or both. Second, it psychologically turns the tables to put the dealership in charge of the situation, instead of the inspector. You should discuss warrants with the dealership, so that someone does not just angrily send someone away, saying to get a warrant. This often results in a much more extensive inspection, from an irritated inspector. On the other hand, if the issue is serious and might lead to criminal prosecution, the dealership might want to request a warrant. That is why it is good to have a minute or two to place a phone call.

Depending on the purpose of the visit, certain persons of authority at the dealership should be brought to the inspector (not the other way around), whether it is a safety supervisor, general manager, or someone else. This avoids the walk through the facility that might turn up extra problems. Employees should not discuss any prior inspections or audits by anyone of the facility. In other words, keep the cards close to the chest. If no one of authority is immediately available, ask the inspector if it is possible to reschedule the visit for a day or two, to ensure the proper personnel are available. OSHA is often willing to do this, when asked nicely. If not, be sure the inspector is escorted through the least "dangerous" route to what they came to see, which might be walking outside and back in another entrance, rather than through other departments.

If the inspection proceeds, in the case of OSHA, bring someone handy along to do immediate fixes, wherever possible. For example, it is common to impose a fine for the guard on the bench grinder being out of place. The fine may now be thousands of dollars. But a bench grinder costs less than \$100, so why not pick it up and throw it out, instead of incurring a fine?

When the dust settles, and the inspector leaves with the innocuous statement that the dealership will get a "report" (*i.e.*, fines), that is the time to contact counsel and/or the dealer association, and again as soon as the "report" arrives, not the day before the deadline to respond. The dealership should not respond without advice as to the content, as they often go overboard in providing extra content that could be used to establish willful violations, such as copies of e-mails or prior inspections.

A little training on NOT having an "open door policy" can go a long way to prevent mistakes and costly fines. Show your clients how to take control of these situations for a much more positive outcome. ■

Deborah Dorman has been the President of the Eastern New York Coalition of Automotive Retailers for 24 years, and is licensed to practice law in NY and DC. She is honored to be serving on the Board of Directors of NADC. She is an active member of ATAE, and in her "spare time," she directs, acts, writes and designs for community theater.

Updated Member Contact Information

Please make sure to notify NADC Staff (info@dealercounsel.com) if your contact information has changed so that your records can be updated accordingly. We will begin to list updated contact information in *The Defender* so all members can be aware of the change.



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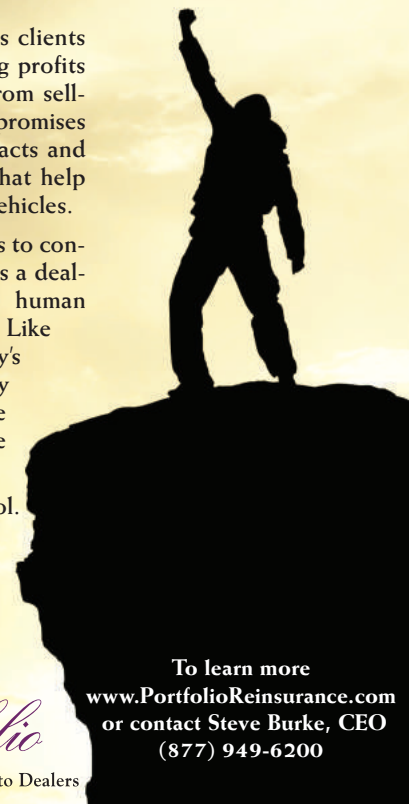
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President's Message



Andy Weill
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A few year-end reflections:

First and foremost: Many congratulations for the arrival of Erin's daughter, Katherine Frances Murphy (Kate). Our newest associate member was born November 14, weighing 9 pounds and measuring 20½ inches. Erin reports Kate and family are doing well. They have our best wishes.

This also gives me an excuse to thank the AMS team for covering so well during Erin's maternity leave. The Fall Conference was supported by Jennifer Polo-Sherk, Moira Skelley, and our Interim Director Justine Coffey. All has stayed well on track, and best holiday wishes to them.

Now to turn to a more substantive, and challenging, issue: Often, the Board needs to consider issues regarding who should or should not be a member of the NADC. The question arises because there are situations where a potential or current member has a representation that in some respect is adverse to a dealer.

In wrestling with these issues, Rob Cohen made a point that I think bears repeating. This is a professional association, made up of lawyers who frequently have to juggle competing perspectives and make judgment calls on what serves our clients' interests. These judgments are not always neat and easy. Often, reasonable people could reach different conclusions based on the same facts. Our first and best protection to adherence to our membership pledge is the informed, good faith judgment of our membership. Mechanistic rules cannot replace a sound internal ethical compass.

But this raises a challenge: we must be willing to take a close look at our own conduct at times and be willing to engage in some critical self-evaluation. Let me make this personal. I think of myself as a lawyer aligned with dealers and have represented hundreds of them over the years. At the same time, I have represented F&I providers and in some situations in which a dispute has arisen between them and a dealer. The situation is rare and usually involves a failing dealership that has failed to perform on a contract obligation. I do not see this as disqualifying me from NADC membership or violative of my pledge. But it is important for me to at least recognize this situation, and to see it clearly. While it has not happened yet, it is conceivable that a client could ask me to take a position that would be of general disservice to the dealer population. If confronted with that situation, I would be in a pickle. By being aware of this possibility, I can hopefully steer myself away from that unfortunate situation ever arising.

These will not always be easy situations. I have a great resource at my disposal, however: my fellow members of NADC, who have seen these issues from all angles. Discussions with my wealth of colleagues is likely to bring clarity to any issue and practical suggestions on how to proceed.

I invite anyone facing issues or questions about a potential ethical question related to representation of a client and NADC membership to reach out to me or to any NADC Board member for input and assistance.

In that spirit, I offer a holiday statement of gratitude for the wealth of wisdom, generosity of spirit, and character that has been my experience as member, officer, and now President of NADC. This is a group that engages with tough issues, talks openly and constructively, and works toward our common goals. It has enriched my professional and personal life immeasurably.

Happy holidays to all. ■

PLEASE NOTE: OUT OF OFFICE

Executive Director Erin Murphy is out on maternity leave from November 10th through April 2nd. Please contact Justine Coffey, Interim Executive Director, at jcoffey@dealercounsel.com or 202-868-4423 in Erin's absence.



NADC Member Announcements

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

Please send any news that you would like to share to: jcoffey@dealercounsel.com.

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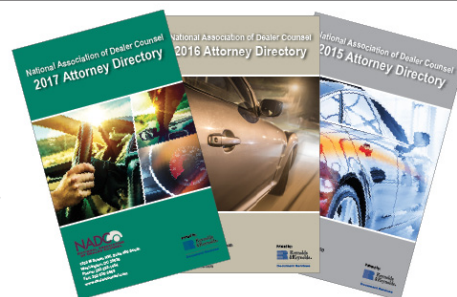
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Smith



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Ringless Voicemail Drops: Regulated or Not?

By Ronald C. Smith and Joel T. Nagle, *Bose McKinney & Evans LLP*

Feature Article

I have observed over the years that third party vendors in the retail automotive industry show a great deal of ingenuity in coming up with “new” and “innovative” products that are purportedly not subject to regulation by the appropriate federal or state agencies. A new one that is now making the rounds touts ringless voicemail drops that are exempted from FTC and FCC laws and regulations. The technology allows these vendors to directly link to a telephone company’s voicemail server and drop a voicemail onto a customer’s cell phone without it ringing. Messages often come with voicemail scripts, which feature lines that have appeared in promotional mailers, such as, “I have customers looking for a vehicle like the one you are driving.”

The provider claims that its technology is essentially computer-to-computer communication—not a call or a contact between the message provider and the customer. Because a call is never made, the vendors’ promotional materials exclaim that its ringless voicemail technology is excluded from FTC and FCC oversight. This promotion will undoubtedly spark interest among many of our dealer clients. But before jumping in with both feet, it is important we caution our clients that the current regulatory landscape is not as clear as has been advertised.



Regulators Have Yet to Leave a Message

At best, it is unclear whether federal regulatory authorities will consider ringless voicemail to be exempt from regulatory oversight and the Telephone Consumer Protection Act (TCPA). This uncertainty is because there remains no definitive regulatory interpretation on whether a ringless voicemail would constitute a call under the TCPA.

The TCPA makes it “unlawful for any person within the United States ... to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party)

using any automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.” 47 U.S.C.A. § 227(b)(1)(A)(iii). Two separate companies that offer the technology (VoApps, Inc. and All About the Message, LLC) filed petitions for declaratory ruling with the FCC. Both petitions requested that the FCC declare that the delivery of a voice message directly to a voicemail box does not constitute a “call” that falls under the strict requirements of the TCPA. Both companies, however, withdrew their petitions before the FCC ruled on the matter. Neither company explained the reasons for their withdrawal. Presumably, these pre-ruling withdrawals were likely the



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result of significant opposition on various fronts. For example, the petition filed by All About the Message was strongly opposed by several consumer advocate groups, a few state attorneys general, and a group of U.S. Senators. These opponents asserted that ringless voicemails would circumvent the spirit and purpose of the TCPA to prevent unwanted robocalls and would open the floodgates for companies to place unlimited unwanted calls to consumers.

The petition did have its supporters though, including the Republican National Committee and the U.S. Chamber of Commerce, who argued that ringless technology was not intrusive and that an adverse finding by the FCC would infringe on the First Amendment rights of companies like All About the Message.

Without Further Clarification, Advise Caution

We wanted dealer lawyers to have this information so that they could properly advise their clients based upon solicitations your clients might receive. Our two cents: without further clarification from the FCC, caution your client that there remains a possibility, if not probability, that the FCC will consider a ringless message to constitute a call. ■

Ronald Smith is a partner at the law firm of Bose McKinney & Evans in Indianapolis, Indiana and is chair of the firm's Automotive Law Group. He has represented several hundred franchised vehicle dealerships throughout the Midwest, Southeast, and Eastern United States along with various vehicle trade associations for over 45 years.

Joel Nagle is a partner at the law firm of Bose McKinney & Evans in Indianapolis, Indiana and is a member of the firm's Automotive Law Group. He represents franchised automobile dealers and vehicle trade associations in various civil litigation, legislative, and regulatory matters.

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