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Legal Considerations for Sweepstakes

By Kyle C. Sipples
In-House Counsel
Autosaver Group

In today's highly competitive marketplace, automobile dealers are increasingly relying on promotions to entice potential customers through their door. One of the more common promotions is a sweepstakes. While these are effective marketing tools, our automobile dealership clients often fail to appreciate the legal requirements for running this type of promotion.

The most common method of advertising a sweepstakes is by sending promotional materials through the mail. This triggers the provisions of the Deceptive Mail Prevention and Enforcement Act (DMPEA).

Under the DMPEA, a mailed solicitation to enter a sweepstakes must contain the following information:

1. A statement that no purchase is necessary to enter the sweepstakes;
2. A statement that a purchase will not improve an individual's chances of winning;
3. A statement of the terms and conditions of the sweepstakes, including rules and entry procedures;
4. Disclosure of the sponsor or mailer of the sweepstakes and the principal place of business at which the sponsor or mailer may be contacted; and

5. Rules that identify:
 - a. The estimated odds of winning each prize;
 - b. The quantity, estimated retail value, and nature of each prize; and
 - c. The schedule of any payments made over time.

Sweepstakes mailings may not:

1. Represent that individuals not purchasing products or services may be disqualified from receiving future sweepstakes mailings;
2. Require that a sweepstakes entry be accompanied by an order or payment for a product or service that has been previously ordered;
3. Represent that an individual is a winner of a prize unless that individual has won such a prize;
4. Contain a representation that contradicts or is inconsistent with the sweepstakes rules or any other required disclosure; or
5. Contain documents that are intended to be seen as negotiable checks or government documents.

Any required statements under the DMPEA must be clearly and conspicuously displayed. This means that the information must be

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presented in a manner that is readily noticeable, readable, and understandable to the person reading the mailing. Statements that no purchase is necessary and that a purchase will not improve odds of winning must be more conspicuously displayed than other required disclosures.

The DMPEA allows recipients to request to have their names removed from receiving similar sweepstakes mailings from the sponsor in the future. A record of these requests must be maintained for a five-year period from the date of the request.

There are similar, but different, rules for contests of skill. Although less common than sweepstakes, automobile dealerships have used contests of skill for promotional purposes. One of the most popular is a basketball shooting contest, usually a half-court shot. Attorneys should give careful consideration before advising their dealer clients on running contests of skill. Not only do the legal requirements differ from a sweepstakes, but also other laws may unintentionally trigger. For example, any contest involving physical dexterity is an open invitation for a complaint to be brought against the dealer under the Americans with Disabilities Act.

Once the sweepstakes mailer has been properly designed, attention should be given to other documents that should be in order prior to the commencement of the sweepstakes. These include, official rules, winner and guest releases, and any necessary authorizations.

Make sure that all entrants are on equal footing to win the sweepstakes, whether they have purchased a product or not, and

regardless of how they have entered. Proper documentation is especially important if a purchaser is the ultimate winner of the sweepstakes. Entries should be stored and processed in a secure location both during and after the sweepstakes.

Once the sweepstakes has run, the dealer should be advised to keep all entries and winner lists for a minimum of four years from the date the last prize was redeemed. The dealer should also be able to provide a list of winners upon written request for at least six months after the entry period has ended. For any prize valued over \$600, the sweepstakes sponsor must report the value to both the winner and the Internal Revenue Service on a Form 1099-MISC.

Keep in mind that state laws are often more restrictive than federal law and are not superseded by federal law. Some states, for example, require sweepstakes to be registered and bonded depending on the value of the prizes. Disclosure requirements also vary from state to state.

Sweepstakes are a tried and true method of generating interest in a product or service. As attorneys, it is our job to make sure that these promotions do not place our dealer clients in legal peril. With just a little attention to detail, this type of marketing can be effectively used by our clients in a way that minimizes their liability. ■

Kyle Sipples is in-house counsel for the Autosaver Group. The Autosaver Group has fourteen dealerships in Vermont, New Hampshire, and New York. Kyle lives in St. Johnsbury, Vermont with his wife and two children.

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HOTEL RESERVATIONS

Attendees can make reservations online or by calling reservations directly. The room rate is \$295 a night plus applicable taxes. **Please see reservation instructions below:**

All attendees must use capital letters when entering the block code. Please make sure that you do not copy and paste the block code when making your reservations. If you attempt to make a reservation online outside the dates of Friday, October 5 - Wednesday, October 10, 2018, the code will come up as invalid. If you would like to make a reservation before or after those dates, please call 312-280-8400 and ask for reservations.

To Book Online: <http://www.fourseasons.com/chicago/>

Step 1: Click link to «Make a Reservation»

Step 2: Enter dates traveling, # of people

Step 3: Click on «Corporate/Promo Code» and type in your code NA1006 and then «Find Rooms»

Step 4: The following information should appear stating «2018 NADC Fall Conference» with the rate of \$295.00 showing for a City-View Room. Click on «Select Room» and follow prompts to confirm reservation

To Call In:

Please call the hotel directly at 312-280-8400, and ask for the Reservations department. When speaking to the Agent, please reference the code «NA1006» or «2018 NADC Fall Conference» to make a reservation in the block.

President's Message



Andy Weill
Weill & Mazer
NADC President

For several reasons, I have been thinking about the impact of changing technology and economic models on the industry, and our role as counselors to our clients.

We heard plenty about industry developments at the Annual Member Conference. (For those of you who were unable to attend, I urge you to review the presentations, available in the eLibrary of the member section of the website.) There can be no doubt that autonomous driving, ride-sharing and subscription models, and other innovations will have many impacts on our clients and thus on our function.

But that is only the tip of the iceberg. I see numerous technological and other trends of note. For example, during the conference, Oren Tasini used a tool called Slido that allowed direct interaction with the audience, posing questions and getting instantaneous reactions. In my view, this added a dynamism and interactivity that elevated the presentation from a more passive mode. It engaged a different dimension of interest. I predict that this is a forerunner of increased

expectations of interactivity both in our practices and in the dealership universe. There is lots of opportunities, and corresponding risks, in this developing area.

I am sure I am not the first to note that there are many transactions that are far different from the traditional visit to the dealership, test drive, and shuttling negotiation of the deal. I recently got a Nissan Leaf as our second car. (As a proud card-carrying resident of the Berkeley, California area, of course I must have a zero-emission vehicle powered by my home solar.) The negotiations were swiftly done by email with a distant dealership. I have never visited that dealership; they drove the car to my door, gave me paperwork to sign that I had previously reviewed, and we were done in about half an hour. I have no idea how common this is, but it illustrates a major change in how business can be done today – and the certainty that more change is on the way.

These developments also are reflected in the way we practice law. My law library is now virtual. I no longer order physical copies of the Internal Revenue Code. I now can be sure I have an up-to-the minute version of the Code online, and of increasing importance, I can enlarge the font as desired to make sure I can read the darn thing. More and more of my business is done telephonically or by email, and client visits are a rarity.

One of my goals is to make sure that NADC continues to be a resource for the various dimensions of the practice of law to benefit our clients. I think the conferences do a great job of delivering substantive, crucially important information from the best in the business, and we intend to keep that up. And the list-serve provides one of the most valuable forums for immediate assistance and recommendations on challenges we face. Beyond that, I will be curious to hear from you about some of the other aspects of the practice of law that are changing with the times and to see if there is anything you want from NADC in that regard.

I am sure each of you could tell stories about ways in which your practice is evolving, and I would like to get some of your thoughts on how NADC can be a resource in that regard as well. I look forward to any thoughts you have on this and other topics. This is your organization, and we serve you best when we hear from you. ■



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:
emurphy@dealercounsel.com.

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 list updated contact information in *The Defender* so all members can be aware of the change.

Lesli Wager Hudock
Buchanan Ingersoll & Rooney PC
Phone: 813-222-3376
Email: leslie.hudock@bipc.com



Are you interested in presenting at the NADC 2018 Fall Conference?

The Conference will be held October 7-9 at the The Four Seasons Hotel Chicago in Chicago, IL. If you have an interesting and timely program idea, please submit the following to emurphy@dealercounsel.com by **Friday, June 22, 2018**:



- Session Topic
- Outline and/or short description of session
- Names and bios of presenters
- Requested length of time

The Program Planning Committee will review all proposals. Proposals not chosen for the Conference will be considered for future webinars, articles and/or the 2019 Annual Member Conference.

Please contact Erin Murphy at: emurphy@dealercounsel.com with any questions.



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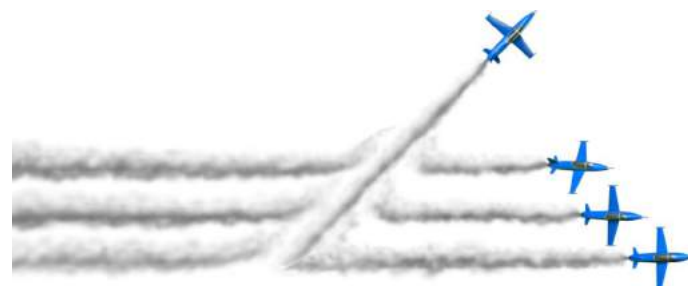
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Best Practices to Avoid Email Phishing Scams

By Jennifer Polo-Sherk, NADC Program Manager



The following best practices for avoiding email phishing scams was gathered as a resource for NADC members due to issues and concerns raised on the NADC list-serve. Of course, please use your best judgement.

DEFINING PHISHING

Phishing is an attempt by a cybercriminal to steal personal and financial information or infect computers and other devices with malware and viruses. It is accomplished in the following ways:

1. Designed to trick you into clicking a link, opening an attachment or providing personal or financial information;
2. Delivered in the form of emails and websites;
3. Disguised to look like communications from legitimate companies, organizations or known individuals; and
4. Designed to exploit natural disasters, epidemics, health scares, political elections or timely events.

Types of Phishing

There are several types of phishing:

1. **Mass Phishing** – Mass, large-volume attack intended to reach as many people as possible.
2. **Spear Phishing** – Targeted attack directed at specific individuals or companies using information gathered from a website or other public source to personalize the message and make the scam more difficult to detect.
3. **Whaling** – Type of spear phishing attack that targets “big fish,” including high-profile individuals or those with a great deal of authority or access.
4. **Clone Phishing** – Spoofed copy of a legitimate and previously delivered email with original attachments or hyperlinks replaced with malicious versions and sent from a forged email address so it appears to come from the original sender or another legitimate source.
5. **Advance-Fee Scam**: Requests the target to send money or bank account information to the cybercriminal.

BAIT TACTICS

Phishing scams typically attempt to take advantage of you by:

1. Delivering file attachments that can infect your computer with harmful software;
2. Enticing you to click on links to Web sites that infect your computer with harmful software; and
3. Tricking you into sharing your username and password so hackers can gain access to your network or other sites.

Social Engineering – Cybercriminals rely on public information to engineer a message. These days, it is easy to find emails via FB, LinkedIn, company website, etc.

Link Manipulation - Most methods of phishing use some form of deception designed to make a link in an email appear to belong to the spoofed organization or person. Misspelled URLs or the use of subdomains are common tricks used by phishers. Many email clients or web browsers will reveal where a link will take the user in the bottom left of the screen or while hovering the mouse cursor over a link.

Phishing works because humans keep falling for it. No measure, technical or not, is going to stop every spear phishing email 100% of the time. Individuals should educate and equip themselves with the tools they need to make smarter decisions and refuse the bait.

1. **STOP. THINK. CONNECT.**
 - a. Before you click, look for common baiting tactics.
 - b. If the message looks suspicious or too good to be true, treat it as such.
2. Install and maintain antivirus software on your electronic devices.
3. Use email filters to reduce spam and malicious traffic.
4. Be wary of messages asking for passwords or other personal information.
5. Never send passwords, bank account numbers or other private information in an email.
 - a. Do not reply to requests for this information.
 - b. Verify by contacting the company or individual, but do not use the contact information included in the message.
6. Do not click on any hyperlinks in the email.
 - a. Use your computer mouse to hover over each link to verify its actual destination, even if the message appears to be from a trusted source.
 - b. Pay attention to the URL, and look for a variation in spelling or different domain (*e.g.*, ndsu.edu vs. ndsu.com).
 - c. Consider navigating to familiar sites on your own instead of using links within messages.
7. Examine websites closely.
 - a. Malicious websites may look identical to legitimate sites.
 - b. Look for “https://” or a lock icon in the address bar before entering any sensitive information on a website.
8. If you have received a phishing message:
 - a. Notify your IT department if possible; and
 - b. **DELETE** the message.

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New Tax Law's Plaintiff Tax: No Deduction for Legal Fees

By Robert W. Wood
Wood LLP

Feature Article

Many plaintiffs will face higher taxes on their lawsuit settlements under the recently passed tax reform law. Some will be taxed on their gross recoveries, with no deduction for their attorney fees, even if their lawyer takes 40 percent off the top. In a \$100,000 case, it can mean paying tax on \$100,000, even if \$40,000 goes to their lawyer.

The new law should generally not impact qualified personal physical injury cases, where the entire recovery is tax free. It also should generally not impact plaintiffs who bring claims against their employers. They are still allowed an above-the-line deduction for their legal fees (although there are new wrinkles in sexual harassment cases).

However, for many other types of claims, if you cannot find a way to position your claim as a trade or business expense, or to capitalize your legal fees into the tax basis of a damaged asset, you get no deduction for legal fees or costs. That means you are taxed on 100 percent of your recovery.

Examples of settlements that may face tax on 100 percent include recoveries:

1. From a website for invasion of privacy or defamation;
2. From a stock broker or financial adviser for bad investment advice, unless you can capitalize your fees;
3. From your ex-spouse for anything related to your divorce or children;
4. From a neighbor for trespassing, encroachment, or anything else;
5. From the police for wrongful arrest or imprisonment;
6. From anyone for intentional infliction of emotional distress;
7. From your insurance company for bad faith;
8. From your tax adviser for bad tax advice;
9. From your lawyer for legal malpractice; and
10. From a truck driver who injures you if you recover punitive damages.

In fact, the list of lawsuits where this will be a problem seems almost endless. The new tax law wiped away miscellaneous itemized deductions, and deductions for investment expenses (they return as deductions in 2026). But part of the tax problem is historical.

In 2005 the U.S. Supreme Court held that plaintiffs in contingent fee cases must generally recognize gross income equal to 100 percent of their recoveries. See *Commissioner v. Banks*, 543 U.S. 426 (2005). That means plaintiffs must figure out a way to deduct the fees paid to their lawyers. Fortunately, at about the same time, Congress enacted

an above-the-line deduction for employment claims and certain whistleblower claims.

An above-the-line deduction is almost like not having the income in the first place. For employment and some whistleblower claims, this deduction remains in the law, so those claimants will pay tax only on their net recoveries. Yet, plaintiffs in employment claims that involve sexual harassment face new tax problems.

The new law denies tax deductions for legal fees and settlement payments in sexual harassment or abuse cases, if there is a nondisclosure agreement. Of course, virtually all settlement agreements include confidentiality/nondisclosure provisions. As worded, even legal fees paid by the plaintiff in a confidential sexual harassment settlement could be covered. Congress probably intended only to deny defendant tax deductions, but it remains to be seen how this new law will be interpreted.

Up until now, if you could not deduct your legal fees above the line, at least you could deduct them below the line. A below-the-line (or miscellaneous itemized) deduction was more limited, but it was still a deduction. Now, there is no below the line deduction for legal fees (until 2026).

Do two checks (one to lawyer, one to plaintiff) obviate the income to plaintiff? Not according to Banks. The Form 1099 regulations generally require defendants to issue a Form 1099 to the plaintiff for the full amount of a settlement, even if part of the money is paid to the plaintiff's lawyer.

One possible way of deducting legal fees could be a business expense if the plaintiff is in business, and the lawsuit relates to it. Some may claim that the lawsuit itself is a business. Some plaintiffs in tax cases have argued that their lawsuits amounted to business ventures, so they could deduct legal fees. Plaintiffs usually lost.

Suing someone might be regarded as income producing activity, but not a business itself. And remember, after tax reform, investment expenses—whether legal fees or otherwise — do not qualify for a tax deduction.

There will also be new efforts to explore potential exceptions to the Supreme Court's 2005 holding in Banks. The Supreme Court laid down the general rule that plaintiffs have gross income on contingent legal fees. But general rules have exceptions, and the Court alluded to some in which this general 100 percent gross income rule might not apply.

For example, court awarded fees could provide relief, depending on how the award is made, and the nature of the fee agreement. Statutory fees are another potential battle ground. How about a partnership of lawyer and client?

If a fee agreement says it is a 60/40 partnership, can't that partnership report 60/40? Ethics rules may say that lawyers are not supposed to be partners with their clients, but it is not clear if this prohibits a tax partnership. One factor in how such partnerships will fare with the IRS will be documentation and consistency. A partnership tax return with K-1s to lawyer and client might be hard for the IRS to ignore.

For many types of cases, the lack of tax deductions for legal fees will come as a bizarre and unpleasant surprise. We should expect plaintiffs to aggressively try to avoid sidestep having to take the legal fees their lawyers receive as gross income in the first place. Plaintiffs who are stuck with the gross income may go to new lengths to try to somehow deduct or offset the fees.

Some of these efforts may be sophisticated and well thought out. Others may be clumsy, if not downright desperate. Few plaintiffs receiving a \$100,000 recovery will think it is fair to pay taxes on the full amount when legal fees have consumed a third or more of their recovery.

Add higher contingent fees and high case costs, and the tax problem may get even worse. Contingent fee lawyers can be expected to try to help plaintiffs where they can. But how this tax mess will resolve in each case could be terribly important to plaintiffs after-tax recovery. ■

*Robert W. Wood is a tax lawyer with www.WoodLLP.com, and the author of numerous tax books including *Taxation of Damage Awards & Settlement Payments* (www.TaxInstitute.com). This discussion is not intended as legal advice. This article originally appeared in The Daily Journal.*

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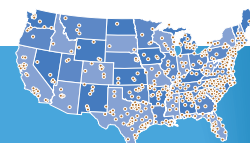
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Volume XIV, Number 5
MAY 2018

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*Defender, The NADC Newsletter is published by the
National Association of Dealer Counsel*

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