

Auto Dealer Law

*The Definitive Legal Guide to the Purchase,
Sale, and Operation of Vehicle Dealerships*

First Edition

Michael Charapp, Esq.
Charapp & Weiss, LLP
8300 Greensboro Drive, Suite 200
McLean, Virginia 22102
www.cwattorneys.com

Rob Cohen, Esq.
Auto Advisory Services, Inc.
14771 Plaza Drive, Suite A
Tustin, California 92780
www.autoadvisory.com

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About the Authors

Michael Charapp, Esq.



Michael G. Charapp, a partner in the law firm of Charapp & Weiss, LLP, has spent his life in and around the automobile business.

Mr. Charapp, the son of a Dodge dealer in western Pennsylvania, spent his teenage years working in all departments of the family dealership. Following graduation from the University of Pittsburgh (B.A. 1971), Mr. Charapp enrolled in Georgetown University Law Center where he received his J.D. in 1974.

As an associate and later a partner with the law firm of Stein, Mitchell & Mezines, Mr. Charapp did extensive business trial work and represented various types of businesses, including numerous automobile dealerships. In 1984, Mr. Charapp joined the Rosenthal Automotive Organization, then one of the ten largest auto dealer groups in the country, where he later became Executive Vice President and General Counsel. In his position, Mr. Charapp was in charge of operations of Geneva Management, the company that oversaw management of all Rosenthal Automotive businesses including: franchised auto dealerships, independent auto dealerships, real estate partnerships, an advertising agency, a supply company, cellular telephone operations, an air charter, and ground operations for the air charter. Mr. Charapp was in charge of starting, operating, buying and selling businesses for the Rosenthal Automotive Organization. In 1996, Mr. Charapp left that position to found his present law firm specializing in the representation of businesses, particularly auto dealers and auto dealer associations.

Mr. Charapp is a member of the Bars of the Commonwealth of Virginia and the District of Columbia. Today, he represents and advises numerous business clients, including over 200 automobile dealers and several automobile dealer trade associations, including the Virginia Automobile Dealers Association, the Maryland Automobile Dealers Association, the Washington Area New Automobile Dealers Association, the Richmond Automobile Dealers Association, and the Hampton Roads Automobile Dealers Association.

Mr. Charapp is a founding director and past-president of the National Association of Dealer Counsel. He specializes in the representation of auto dealers in all aspects of their businesses.

Rob Cohen, Esq.



Rob Cohen started with Auto Advisory Services in 1994 and he became President in 2006. Prior to devoting his full time effort to Auto Advisory Services, Rob represented dealers in litigation for four years. Rob specialized in the defense of consumer claims and represented licensees before DMV administrative hearings. He developed a strong background inside dealerships by working as a car salesman and doing F&I during law school. Rob received his B.A. and M.B.A. from the University of California, Irvine and then went on to earn his J.D. from Whittier College, School of Law.

Rob is a founding director and past-president of the National Association of Dealer Counsel (NADC). He is editor of *Transmission* (Auto Advisory Services' monthly newsletter), a past editor of *The Defender* (the NADC newsletter), and has been published in *Ward's Dealer Business*, *Orange County Business Journal* and *F&I Management and Technology*. Rob co-authored the top-selling *Automotive Dealership Information Safeguards Manual*, the *Automotive Dealership Identity Theft Guide*, as well as the popular *Red Flags Rule Guidebook*.

Rob is a frequent speaker and trainer on a wide range of subjects pertaining to dealership sales and finance compliance. Some of his key seminars include: *Top Legal Trends for 2011*, NADA CONFERENCE, San Francisco, CA, February, 2011; *Red Flags Rule, Identity Theft Prevention Program Workshops*, California, Colorado (multiple sessions), August – September, 2008; *Compliance Exposure That Can Crush Your Dealership*, NADA CONFERENCE, San Francisco, CA, February, 2008; *Common But Potentially Dangerous F&I Practices*, NADC F&I WORKSHOP, Baltimore, MD, November, 2006; *Changes for 2007*, REY-

About the Authors

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Auto Advisory Services is a leading compliance consulting company. With a client base of nearly 500 dealerships, Auto Advisory Services offers comprehensive sales, finance, advertising, and DMV compliance services. Auto Advisory Services performs over 100 on-site compliance audits each month and the compliance hotline receives approximately 150 calls per week. Auto Advisory Services

conducts industry workshops, publishes informative compliance publications, and is a contracted second line partner in conjunction with the California DMV's Business Partner Automation program.

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Preface and Disclaimer

When car dealers ask questions like, “I’m thinking about doing this thing. Tell me what I should know.” Whether that “thing” is selling or buying a dealership, revamping F&I compliance training, or any of a host of other “things,” some dealers expect that lawyers relish the opportunity to spend hours on a letter for which they can send a whopping bill. This is simply not true.

In reality, lawyers prefer discrete questions with clear answers. “How long after the deal can the customer who claims we violated the Truth in Lending Act sue us?” Or, “When do I have to file a cash report with the government for the \$12,000 in currency that I received as a downpayment?” The statute of limitations for a TILA action is fairly clear – one year. The time period for filing an IRS 8300 report is also clear – fifteen days after receiving the qualifying amount.

Completing “Tell me what I need to know about...” assignments requires a combination of knowledge, experience, thoughtfulness, and hard work.

- *Knowledge.* Knowing how the car business works and the legal principles that apply are essential to analyzing the issues a dealer should know.
- *Experience.* The layout of the minefield of potential problems becomes somewhat clear only after years of handling car dealer problems.
- *Thoughtfulness.* It’s never enough to just describe the issues and give answers. A lawyer must think about the complex permutations of what can go wrong to provide appropriate warning flags.
- *Hard work.* A list of what a dealer should know doesn’t just appear on the paper (or computer screen). Providing sound advice on the various problems that may arise is hard work.

This is not to say that us lawyers are afraid of hard work. We have no problem digging in and doing the work necessary to help our clients. However, the “Tell me what I need to know” assignments are particularly stressful insofar as the answer, no matter how elaborate, comes with potential liability. Lawyers know that there is a real

chance for an unhappy client to call up and claim that something was missed. If that client suffers losses because the lawyer failed to address an important issue, the client may bring a lawsuit. Lawyers like lawsuits, but not when they are defendants. So, to avoid this fate, lawyers when faced with these types of assignments spend an exorbitant amount of time researching all possible scenarios. This, of course, results in a bill that approaches the gross domestic product of some small countries.

Once a dealer is hit with one of these bills, he or she may never issue the “Tell me what I need to know” assignment again. Instead, dealers end up doing that “thing” – whether it is closing a dealership, dealing with the franchisor, drafting a pay plan, or designing a new sales form – without the benefit of sound legal advice.

That’s where this book comes in. It contains chapter after chapter of what a dealer needs to know before doing that “thing.” The authors are lawyers who are foolhardy enough to claim the knowledge, experience, thoughtfulness, and hard work to produce the lists of what dealers should know.

In the end, because we are lawyers who fear unhappy clients who sue their lawyers, we have a disclaimer: *we don’t represent you.* Nothing in this book is legal advice. It is general information designed to enhance your knowledge and enable you to ask your lawyer solid questions when you set out to do that “thing.”

Consulting your own lawyer is important. This book is written based upon federal law and general legal principles. However, sound legal advice must be based upon: knowledge of applicable state laws, local regulations (at times), the enforcement policies of state and local regulators and law enforcement, and the litigiousness of the local plaintiffs’ lawyers.

Introduction

For Dealers

Auto Dealer Law (ADL) won't teach you how to sell cars. We assume you already know how to do that. Rather, ADL will help you avoid some of the mistakes dealers commonly make. While nothing can substitute for the gut instinct required to be a successful dealer, there are many legal pitfalls that can be avoided simply by seeking proper advice. But in seeking that advice, dealers are often derailed by bad information. There are a lot of legal myths and misconceptions that "everybody knows" in the car business. This book is well-researched and authoritative. Our goal is to dispel these myths and clear-up some of the misconceptions in the industry.

ADL should provide you with a healthy dose of legal reality by identifying the legal traps that exist not only within the dealership, but also within the dealership acquisition/divestiture process. Put simply, ADL will help you reduce risk and avoid liability.

Make no mistake, we understand the paralysis that lawyers can sometimes induce. We understand that a key attribute of the highly effective dealer is the ability to properly assess and take risks. Yet, lawyers are all about avoiding risk. So, even when the dealer overcomes the fear of the whopping legal bill, the dealer and the lawyer aren't always on the same page (or even the same planet it would seem). The lawyer's perspective is often entirely different from the dealer's. Dealers ask "How can I do this?" but the lawyer responds "Why would you want to?" Lawyers are constantly looking for reasons why things can't be done whereas dealers are always trying to get them done. These competing vantage points often cause dealers to avoid discussions with lawyers, which is understandable. Who wants to pay \$500 per hour to have an argument? Heck, you can have one of those for free when you get home. In reality, this yin and yang, if done constructively, will give you a bit more clarity when it comes time to make the decision. At the very least, regular conversations with your attorney will serve as a reminder as to just how complicated dealer operations have become.

Borrowing from an Alcoholics Anonymous catch phrase (perhaps inappropriately), recognizing you have a problem is the first step towards fixing it. Dealers must appreciate now more than ever that nearly every aspect of their operation is regulated; and not just lightly. Over the last five years, dealership sales and finance practices have come under more scrutiny than any other business practice we know. This combined with public perception concerns and massive amounts of new federal regulations makes running a dealership seem downright dangerous. Fortunately, though, the litigation and regulatory minefield can be navigated so long as you have a compass and a good map. We hope this book will serve as your map. As for the compass, that's the gut instinct we already mentioned.

For Dealer Attorneys

As veteran dealer attorneys know, dealership representation can be complicated and dealership retail operations are anything but standard. This is not to say that dealerships don't operate similarly to one another. They do. Rather, dealerships are run quite differently than standard retail operations. There is a considerable amount of dealership-specific jargon, laws, regulations, processes, and paperwork. All of which need to be thoroughly understood by attorneys representing dealership interests. This book will help attorneys gain a better understanding of dealership operations while providing authoritative guidance on a variety of legal topics.

If you are new to the industry, the best thing you can do to properly represent auto dealers (other than read this book) is to learn the business. Spend some time in dealerships and ask a lot of questions. Go through some deal jackets (folders that contain customer paperwork). Sit in on some F&I (finance and insurance) closings. Watch a sales manager desk a deal (providing sales and payment terms to sales personnel to present to the customer).

A great resource where dealer attorneys can turn to for help, networking and continuing education is the National Association of Dealer Counsel. Both authors of this book are founding directors and past-presidents of this solid organization. The NADC holds two meetings per year where highly relevant, dealer-specific legal topics are

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discussed at length. The NADC also has an active email list serve and searchable website. With over 500 members, this is a resource that no dealer attorney should be without. For more information on the NADC, please visit www.dealercounsel.com.

Periodic Updates

This book provides clear direction on legal subjects for dealers and their attorneys. But, please note that things change quickly (particularly in the current political environment). Therefore, registered subscribers to ADL will receive periodic updates, amendments and enhancements.

Organization of Book

This book is divided into three parts,

- Part I: Buying and Selling the Dealership
- Part II: Running the Dealership
- Part III: Compliance

Part I discusses the many aspects of dealership buy/sells including what both the buyer and the seller should be looking for, standard and essential contract terms, and factory approval issues. In addition, this part addresses issues related to bankruptcy and the closing of dealerships.

Part II focuses on the myriad of legal issues involved with running dealerships. These issues include public, employee, vendor, factory, and finance company relations. This part also discusses litigation management, insurance, parts and service, antitrust concerns, record retention, and emergency preparedness.

Part III of the book is devoted entirely to legal compliance. Dealers continue to struggle with an ever-expanding array of laws and regulations relating to sales, finance, advertising, and vehicle titling. These compliance issues are as numerous as they are complex. This part sets forth federal compliance requirements in easy to understand terms and, for you overachievers, provides citations to specific laws, regulations and court decisions for further analysis. This part also provides some best-practices in the sales and finance arenas while mentioning some state law compliance issues to look out for.