

CAR DEALER

Profit Making Secrets for the Competitive Dealer

INSIDER

Implementing Best Practices in 2014 and Beyond: Eric Chase's Legal Audit Checklist for Auto Dealers[©]

This checklist is a suggested guide for all automotive dealers (1) to use in their ongoing efforts to assure their files and operations are current in matters of legal importance; (2) to provide reminders for ongoing and periodic legal requirements; (3) to have a simple, handy way of auditing their legal "health;" and (4) to trigger action(s) that might otherwise be overlooked. The checklist does not constitute legal advice.

Annual/Quarterly Internal Legal Audit

Done by: _____

Date: _____

| | STATUS* | | |
|---|--------------------------|--------------------------|--------------------------|
| | OK | Follow-Up | N/A |
| I. Franchise Relationship Files | | | |
| A. Current Sales and Service Agreement, with all amendments and modifications | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| i. Should keep an up-to-date and complete copy of each Sales and Service Agreement, with all amendments, and related correspondence. | | | |
| ii. Advisable to have both hard copy <u>and</u> electronic copy. | | | |
| iii. Keep in a nearby, easy-to-access file drawer. | | | |
| iv. Alternate Dispute Resolution (ADR) provisions, if any. Be sure to read and know when you have alternatives to the courtroom. (Note: Federal Law prohibits auto franchisors from imposing mandatory binding arbitration for all disputes as part of a dealer agreement. See 15 U.S.C. § 1226.) | | | |
| v. Letters of Intent (LOIs) | | | |
| B. Factory Bulletins, Announcements, Programs | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| i. Watch for "zingers" in otherwise routine correspondence (sometimes references to these show up in termination notices). | | | |

* OK (*i.e.*, no action required)
Follow-Up (should specify *what* you need to do and *when*)
N/A (not applicable to dealer at this time)

- ii. Carefully review any communications that refers to any change (s) in the brand’s dealer agreement.
- iii. Keep a complete file on ongoing programs (e.g., GM’s “Essential Brand Elements”), and monitor your progress and commitments.

C. Possible or Actual Disputes or Disagreements: correspondence, memos, notes and other documents regarding actual or potential controversy, or other communications addressing items that are specifically applicable to your dealership. Keep copies of all correspondence that’s addressed directly to you on all these subjects:

- i. Sales
- ii. Service and CSI
- iii. Allocations
- iv. Warranty
- v. Dealership Audits
- vi. Facilities
- vii. Location of Dealership
- viii. Dualling/Undualling
- ix. New agreements/amendments
- x. Availability of (desirable) product
- xi. Incentive Programs and Compliance with Terms/Conditions
- xii. Factory Programs
- xiii. Floorplan

D. Franchise Termination File (if applicable): Threats regarding possible termination/nonrenewal. On this one, if you are getting threatening or coercive comments – keep a separate file, and *responsibly respond to all such mail* from your franchisor. If a termination threat is even hinted, talk to an experienced lawyer.

E. “Required” Business Plans

- i. Some, but by no means all, brands require periodic (usually annual) business plans.
- ii. Sometimes, the franchisor will require a business plan from a dealer perceived as underperforming.
- iii. Be careful on these. If you puff your plans, the factory may argue that you made promises. If your franchisor has already pre-printed your plans or “promises,” don’t sign on to those that are not fair or realistic. Watch for “zingers” that might set you up for termination.

F. Financial Statements and Related Documents

- | | | | |
|---|--------------------------|--------------------------|--------------------------|
| i. Monthly financial statements: keep at least a full set of monthly financial statements as reported to the franchisor for at least <i>three years</i> . | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| ii. Keep end-of-year cumulative factory statements for at least <i>seven years</i> . | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| iii. Keep 13th month statements for at least <i>seven years</i> . | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| iv. Keep copies of all state, federal and local tax filings, and associated correspondence for at least <i>seven years</i> . | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| v. Other financial statements, audits, reviews. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| vi. Related financial correspondence. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| vii. Procedures to protect confidentiality of and limited access to all financial documents | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

- G. Document Retention for Litigation:** If you are in litigation, or a formal dispute is imminent, you *must* retain and safeguard everything that may be relevant, including all electronically stored information. The Federal Rules of Civil Procedure (and similar state rules) now incorporate sensible and *very detailed* requirements regarding such electronically stored records. Coordinate with your counsel on this. Make sure all impacted employees are properly instructed. Continue to safeguard and monitor litigation retention requirement. As soon as litigation becomes likely, there should be a clear “litigation hold” letter in effect, and periodically refreshed. Talk to your lawyer about storing everything in this category on discs.
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- H. Franchisor Financial Health:** In the aftermath of the GM and Chrysler bankruptcies, keep a file of articles or correspondence that may assist you in monitoring your franchisor’s financial wherewithal.
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II. Legal Advisor/State Legal Issues**A. Your Legal Advisor**

- i. Every dealer should have one: an attorney you can talk to with confidence.
- ii. Make sure your lawyer has experience in franchise/auto, and work with specialists on matters of importance (i.e., transactional, litigation, etc.)
- iii. Don’t be shy. If you’re looking for a lawyer, interview more than one.

B. State Legal Questions

- i. Keep mailouts from your association that address legal topics.
- ii. Call your association with questions.

- iii. Keep a copy of state franchise laws and regulations that affect dealers: *Read them!*

III. Business Structure Records; Minutes

- | | | | |
|---|--------------------------|--------------------------|--------------------------|
| A. Structure: Corp.; LLC, etc. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| B. Basic Documents: Articles of Incorporation; S-election; LLC. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| C. Minutes: Be sure to timely update your minutes in compliance with corporate requirements. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| D. Licenses: E.g., state operating licenses; environmental; etc. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

IV. Real Estate

- | | | | |
|---|--------------------------|--------------------------|--------------------------|
| A. Ownership: Deed, mortgage documents, etc | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| B. Lease | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| C. Acquisition Documents (e.g., buy-sell) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| D. Other Realty Records: Taxes; environmental issues | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| E. Site Control Documentation , if applicable. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| F. Appraisal/Valuation Records | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

V. Financial Records/Business Insurance

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|--|--------------------------|--------------------------|--------------------------|
| A. Monthly Statements, submitted to factory, and all accounting tax files. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| B. Tax related files | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| i. What kind of an entity is your dealership and why? <i>LLC? C-Corp? S-Corp?</i> | | | |
| ii. LIFO | | | |
| iii. Assurance of timely sales tax payments | | | |
| iv. Withholding for employees | | | |
| v. Disputed Tax Matters | | | |
| vi. Copies of all state/federal tax filings – keep for at least 7 years | | | |
| C. File Destruction Policy: Make it clear, and in writing. Assure consistency with legal retention requirements. <i>Keep</i> everything related to ongoing or imminent litigation. Insure all employees instructed not to delete electronic information related to dispute. <i>Do it in writing</i> , with a proper litigation hold memo. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

- D. Insurance**
- i. Periodic audit/update with agent
 - ii. Affordable Care Act compliance
 - iii. Coverage adequacy
 - (1) Check coverage for consumer disputes: defense, and liability coverage
 - (2) Business interruption
 - (3) Errors and Omissions
 - (4) Environmental
 - (5) Standard omnibus coverage
 - iv. Be aware of what constitutes timely notice for a claim or potential claim to insurer for coverage.

VI. Loan Documents/Bank Relationships

- A. Mortgages, credit lines, cap loans, but, especially, floor plan(s)**
- i. Floorplan compliance (out-of-trust avoidance procedures)
- B. Bank account files and statements**
- C. Bank/Lender correspondence**

VII. Consumer Relations/Sales Practices

- A. Complaints from your customers**
- i. Written procedures to follow
 - ii. Follow-up
- B. Litigation/Arbitration Records**
- C. Required Recordkeeping/Customer Privacy/Identity Theft/Loan Actions and Notices** *(Excellent publications available from NADA)*
- i. Security measures/limiting access
 - ii. Safeguarding Customer Information/Deal Jackets: Written policy and employee confidentiality agreements
 - iii. Consideration in referrals of credit applications of the requirements of the Equal Credit Opportunity Act (ECOA) and the Fair Credit Reporting Act (FCRA): Does dealership policy/practice avoid necessity of sending adverse action notices?

iv. Staff/Employee Trained in Privacy/Safeguard Rules - *Keep training records*

D. Assignment of Responsible Employee to (a) Stay current on legal/regulatory requirements; (b) Monitor Consumer Relations at the Dealership, (c) and respond to inquiries/complaints

i. Updating all sales personnel on requirements

E. Clear and Consistent F&I Practices and Policies

i. Forms in compliance

ii. Written Standard Policies

iii. Document fees, etc. in compliance with state law

iv. Assignment of responsible person to monitor and/or enforce

F. Consistency and Legality of RO Itemization (*Do you have a documentary fee issue?*)

G. Arbitration Clause in all Consumer Contracts

i. Must be fair and mutual

ii. Should bar multiple claimants and class claims

iii. Should be reviewed in the light of State laws and case decisions

VIII. Regulatory Compliance

A. All dealers nationwide need to assume compliance with federal laws and regulations. For an excellent summary of federal requirements, you should have a copy of the NADA and ATD *Federal Compliance Chart*, and the NADA publication, *The Regulatory Maze*.

B. Dealers should inquire of their state associations for a list of state regulatory requirements.

C. Keep current with periodic seminar participation available at NADA and through state associations.

IX. Promotions/Advertising

A. Know and Monitor State Laws and Regulations on advertising.

B. Have a “Duty Expert” to Assure Compliance in All Print and Broadcast Advertising.

C. If you use an agency, *assurance of compliance* is a must, because you may be liable for *their* mistakes.

D. Compliance with Do-Not-Call Rules and Faxing Regulations

X. Work Force/Employment

A. Posting of All Required State and Federal Notices.

i. Equal Opportunity (EEOC)

ii. Wages

iii. Family Leave (FMLA)

B. Compliance: Affordable Care Act, ADA, FMLA, COBRA, Immigration Law

C. Laws applicable to Military reservists and National Guard (e.g., Uniform Services Employment and Reemployment Rights Act – USERRA)

D. Plans/Policies/Correspondence regarding benefits: (e.g., health, dental, 401(k), profit sharing, vacation, etc.)

E. Individual Personnel Folders (Ensure Privacy!)

F. Dealership Employee Policy Manual, including clear policies on sexual harassment and discrimination. Be sure to make clear that manual is not a contract, and does not change at-will employment status.

G. Confidentiality Agreements: Especially as to consumer information in deal jackets.

H. Training Programs

i. In-house: Periodically (not less than once a year and as part of initial indoctrination with *all* new employees) provide guidance on: sales practices, discrimination, sexual harassment, integrity. *Keep files on all training.*

- ii. Factory: Tech Training

- I. **Unionization Issues:** Policies to properly deal with unionization efforts; bargaining in good faith when there is a union.

- J. **Be sure to have an attorney knowledgeable in this specialized area**

XI. Succession

- A. **Estate Planning:** Do you have a will that reflects your current situation and what you want?

- B. **Successor Addendum to Sales and Service Agreement:** *If you haven't done this, you should do it now!*

XII. Co-Ownership Issues (if applicable)

- A. Shareholder (or Member) Agreement(s)

- B. Employment Agreements

- C. Buyout and Valuation Provisions

- D. Insurance to Protect Against Financial Consequences of Owner of Death/Disability.

XIII. Environmental

- A. State Requirements

- B. Federal Requirements (EPA)

- C. **Any ongoing issues:** *(e.g., underground storage tanks, spills, Hazardous waste disposal)*

- D. Periodic Environmental Audit

XIV. Safety/Emergency Procedures

A. Compliance with All Applicable Statutes, Regulations and Ordinances

B. Posted Procedures for Employees

C. Emergency Call List

D. Fire Drill/Alarm and Sprinkler Inspection

E. Special Circumstances (*e.g., Hurricane or Earthquake Vulnerability*)

XV. Document Retention Policy

XVI. Miscellaneous Legal Matters (This would include all other miscellaneous law-related items not covered by I-XIV, such as, for example, contracts or disputes with vendors or outside service suppliers, spousal issues in divorce of principal, etc.)