

## Getting Your Client's House in Order September 2008

*Oren Tasini, Esq.*

As I was preparing this article, I received two emails that reflect the challenges facing our clients. The first reported that “The Big Three” continue to seek to reduce their dealer body. This comes as no surprise. The second reported on the flurry of bankers, lawyers and consultants flying to and from Detroit working to save the domestic automobile industry. This may be good for the airlines and the professionals but not so good for our



dealer clients. With these uncertain challenges in mind, it is worth examining some advice we can give our clients so they are ready for the future, no matter what it holds.

**Succession Planning.** This is one of the most difficult conversations I have with my clients. Everyone thinks they are immortal. Sadly, there are far too many occasions where a dealer principal dies or becomes disabled without having an orderly plan in place to ensure the dealership can continue to operate. This problem is amplified by the fact that a dealership, its value and cash flow, is a significant, if not primary component of a dealer's wealth. The failure to plan for death or disability, burdens, and sometimes bankrupts a family.

The threshold question is, *does your client have a current will?* Note the word “current”. If the will does not reflect the current state of facts, and/or the intended plan, it is likely to provoke disputes. For example, consider the situation where a specific son or daughter is contemplated to take over a dealership and the will leaves the dealership to all of the children.

Litigation is almost a certainty. Additional areas of concern are related to the failure to adequately consider the estate taxes due at death and ways to minimize such taxes (or at least fund the payment of the tax through life insurance).

**Legal Audit.** I am surprised by how poorly clients keep track of their important legal documents. At the NADC, we spent a good deal of time discussing how our clients must deal with their customers' records. We do not spend very much time discussing how our clients should deal with their own internal documents. At a minimum, your clients should have the following legal documents up-to-date and easily accessible:

1. **Corporate Records.** Your client should have a copy of the Articles of Incorporation or Articles of Organization which were filed to form the company, a copy of all corporate minutes, and a copy of all Shareholder Agreements or Operating Agreements. If the dealership is owned by more than one individual, it is critical that the individuals have in place a written agreement which sets forth their understanding regarding the ownership and operation of the dealership, as well as the future exit strategy in the case of the death or disability of an owner, a disagreement, or divestiture. As with the failure to have a current will, the failure to have these agreements in place (and up to date) could prove to be costly.

2. **Franchise Agreement.** Your client should have a complete and current copy of the Franchise Agreement for each line make he/she is authorized to sell. This should include all bulletins or other communications from the manufacturer which purport to either amend the Franchise Agreement or change policies and procedures as they relate to the manufacturer/dealer relationship.

3. **Insurance Policies.** Your client should have a complete copy of each insurance policy related to dealership operations.

4. **Material Contracts.** Your client should have a copy of each material contract (indexed by vendor and subject matter) and a system to identify when these contracts either terminate or automatically renew. The vendors of dealers typically have automatic renewal provisions and the dealer's failure to monitor these may result in the unexpected renewal of a contract that the dealer intended to terminate.

It is difficult to have your clients focus on these issues as they perceive this as spending money needlessly. However, by maintaining these records and consistently and continually updating them, your client can avoid significant expense and aggravation in the future. In the case of a death of a dealer, or a dispute among dealer owners, having current records easily accessible will ease the transition and/or allow for an early resolution of any potential dispute. The absence of these records usually leads to chaos. In the event of a dispute regarding either the Franchise Agreement, or any policy or procedure of the manufacturer, a dealer with complete and accurate records will face a much better chance of success than one who has to rely upon either the recollection of the dealer or documentation from the manufacturer. In the context of a buy-sell, the lack of adequate record keeping impedes (and can sometimes prevent) the parties from reaching an agreement. In addition, a buyer who is unable to determine what he/she is buying, may seek a price concession from the seller to compensate the buyer for the risk of assuming unknown obligations which the seller is unable to adequately identify. On the other hand, a seller who is seeking to have a buyer assume contractual obligations in connection with

the purchase of a dealership might very well be stuck with an obligation if the dealer failed to identify it in sufficient time to the buyer as part of the buy-sell process.

In these difficult economic times, it is a hard sell to get your clients to spend legal fees on what may be perceived as “house cleaning”. Although perhaps trite, it is still true that an ounce of prevention is worth a pound of cure.