

Dealer

F&I Special Section

by Gil Van Over



Partners Against Crime

Litigation defense strategy and criminal sentencing guidelines

Some of the dealerships that retain me to implement a litigation defense strategy tend to balk at having a written policy and procedure. One of the common objections I hear is, "I know what the policies are, the employees only have to ask." To which I reply, "So what happens when you are at an all-day dealer meeting?" I guarantee you that either the dealership grinds to a halt or the employees start making policy decisions that may run counter to what the dealer would want.

Sentencing guideline amendment

Now, not only does it make sense to have a written policy and procedure in place as part of an overall litigation defense strategy, but a recent amendment to the sentencing guidelines for violations of federal law that went into effect on November 1, 2004 almost makes it a requirement to have one. These new guidelines put greater responsibility on the dealerships' management and owners to have a compliance and ethics program. This responsibility includes:

- Know what the program's content is
- Provide oversight of the program
- Ensure the program's effectiveness

A business that has such a policy in place is not guaranteeing that a rogue employee will not violate a federal law in the course of business. A business that has such a policy in place is likely to have its penalty (fines and/or restitution) reduced by up to 95 percent if a rogue employee violates a federal law and your policy.

Sentencing commission guidelines

The sentencing commission has outlined the elements it considers necessary for an effective compliance and ethics program:

- Standards and procedures to prevent and detect criminal conduct
- Personnel screening related to program goals
- Training
- Auditing, monitoring, and evaluating program effectiveness
- Non-retaliatory internal reporting systems

- · Incentives and discipline to promote compliance
- · Reasonable steps to prevent further offenses upon detection of a violation

Implementing the sentencing guidelines

Not surprisingly, most of these components are included in an overall litigation defense strategy (see *Developing Your Defense Strategies for the Coming F&I Suits, Dealer*, February 2004). Here are some thoughts on how to comply with the sentencing commission's recommendation:

Standards and Procedures

A dealership must develop and implement a written policy and procedure (P&P) for all areas of the dealership. The P&P should contain, at a minimum:

- · An acknowledgement that the employee signs asserting she has read and agrees to the provisions contained in the P&P
- · A non-negotiables list of offenses that will lead to immediate termination
- · Job descriptions of the various employees outlining specific job responsibilities
- · Verbiage that violations of the P&P is cause for disciplinary action, up to and including termination
- · Identifying common situations that occur and the employees requirements on appropriate handling

Personnel screening

Too many dealers continue to hire sales and F&I personnel during the interview process based on a gut feeling or prior experience with the applicant. I do acknowledge that a gut feeling is usually right on point: I can often tell what a dealership's compliance situation is after looking at three to five files. But sometimes the gut can be wrong, just like when I ate too much barbeque in Austin recently.

A dealer should require that every applicant be screened before agreeing to hire the applicant. This background check should include:

- · Contacting previous employers
- · A credit bureau report
- · A criminal background check
- · A DMV check
- · An OFAC check

Finally, someone other than the manager who wants to hire the applicant should conduct this check.

Training

In an industry racked by employee turnover statistics, some dealers continue to believe that on-the-job training is still the best type of training. After all, they reason, what if I train the employee and she leaves?

My experience shows that dealers that take the time to train employees on how to perform their jobs to the dealer's requirements are experiencing fewer turnovers than dealers that conduct no training.

Now, the federal sentencing guidelines take away any excuse to avoid employee training.

Some of the training a dealer should put into place includes:

- Association of Finance & Insurance Professionals (AFIP)
- The Institute For Ethical Behavior
- Sales training from F&I product providers, most of which address ethical compliance
- A legal compliance seminar conducted by an attorney
- Nuts and bolts training on the dealer's policy and procedure
- Safeguards training as required by the Safeguards Rule

One final point on training: Make sure to take attendance at each training session by having the employees sign a sign-in sheet. The sign-in sheet should have the date, the training conducted and the name of the trainer. Keep this sign-in sheet as proof you conducted the training.

Auditing

Once a dealer sets forth her expectations of how employees are to conduct their jobs, auditing is the only way that I know of to ensure that the employees are acting in accordance with established policies and procedures.

An effective, time-efficient auditing program should look like this:

- Daily: The billing clerk checks the deal jacket against a checklist looking for compliance to the dealership's guidelines as she is billing out the deal. These checks should be such items as signatures on all forms, all necessary forms in the file and appropriate customer identification.
- Monthly: The general manager or his designee (not the F&I manager) should select at least five deals from every F&I manager on a monthly basis. Select the deals with the most F&I products sold. Now flyspeck these deals like a plaintiff's attorney would. Are the signatures consistent or worse yet, is "signature on file" still being used? Are the products priced consistently from menu to Buyer's Order to Retail Installment Sales Contract to product enrollment form?
- Quarterly: Retain your attorney, accountant or consultant to conduct an independent review of selected deal files.

Reporting system

This feature is similar to a whistle-blower feature. The sentencing commission is saying that a process must be in place so that employees can report violations of a dealer's policy and procedure without fear of retaliation.

Some dealers have retained a vendor to manager an employee hotline. This hotline features a toll-free phone number and anonymity.

You can also take this a step further. Some dealers view a failure to report policy and procedure violations to be a non-negotiable offense, which results in the employee's termination.

Incentives and discipline

Dealers are very good at incentivizing and disciplining. Sales incentives are rampant at the Saturday morning sales meetings. Pay a spiff for the oldest car on the lot. Sell three, get

more money. Likewise, employee discipline never seems to be lacking. "Blew that manager out because" Demotions are common.

If you have carefully crafted your policy and procedure manual, you spelled out the disciplinary actions for violations.

Most dealers need to work on compliance incentives. You may want to consider a monthly bonus based on the results of the general manager's compliance review.

Corrective steps

The final element in the sentencing commission's recommendations logically says that if you find issues in your auditing or employee notification process, you need to put measures in place to ensure it doesn't happen again. This may require that you update your policy and procedure manual or revise your employee screening process or assign a different employee to conduct the monthly audit. Regardless of the violation or the corrective action, absolutely make sure that you document the issue and the corrective action put into place.

Possible cost savings

There may be an ancillary benefit available to your dealership as you move forward in the process of documenting your processes and outlining your expectations so that your litigation defense strategy is aligned with the elements recommended by the sentencing commission. One of my clients recently negotiated a premium reduction in his garage-keepers liability premium because he implemented a litigation defense strategy. In fact, his premium reduction was in excess of the fee he paid me to assist in the implementation.

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