How Your Commission Is Expressed And Determined Is Important

by **STEPHEN K. VALENTINE, JR.**

Most reps work on a commission basis that is expressed as a percentage of the dollar amount of sales or profit. But, some define commission on another basis, such as an amount per pound, per item or some other measure that does not use a percentage of the sale price or profit. The problem with measuring the rep's commission on a nonpercentage basis is that some (probably most) of the Sales Representative Commission Protection Acts (SRCA) may not be applicable because they define "commission" in a manner that requires it to be measured as a percentage.

So, if you do not normally express your commission as a percentage, you may want to do so if the opportunity arises. This can be done by renegotiating with the principal. However, this may not be wise if there are other issues that may arise that affect your continuing relationship with your principal.

To define how to measure your commissions, you can use language, such as a percent of sales or profit, and then limit it to an amount not to exceed certain dollar amounts (e.g., 5% of sales not to exceed $0.02 per pound or 5% not to exceed $1.00 per piece, etc.).

Examine Contracts

It is a good idea for reps to examine their contracts (both oral and written and memos or correspondence relating to the arrangement) to see how their commission is expressed. If the commission is not expressed as a percentage, talk to a knowledgeable lawyer to review and assist in restating the method of compensation used if applicability of a SRCA is an issue. Obviously, being able to do anything helpful will depend on a variety of facts and circumstances. But, at least, you will know what to do when the time comes to renegotiate or change the agreement in a way that benefits you, the rep.

Waiver or Modification of Terms in Written Agreements (The Good News/Bad News)

It is not unusual for a rep and a principal to change the scope of the engagement or otherwise amend a relationship that is in a written contract as things develop. These changes, among others, frequently entail expansion or contraction of assigned customers, industries or products and, also a favorite of reps, a cut in commissions (seldom an increase). A typical example is when the principal unilaterally sends the rep a notice that commissions are cut from 5% to 3% and/or makes some other unfavorable change in the agreement.

In a written agreement there may be a provision that states any and all changes must be in writing and occasionally must be signed by a specified officer of a party or has other specific provisions as to how a change must be done to be effective. And, sometimes these written provisions are so one-sided that only the rep needs to get the change in writing, but the principal is not required to do so, which can pose another problem and may require a different strategy.

Oral Changes

In most jurisdictions, the law of contracts permits

these changes to be made orally or impliedly by a course of conduct, without the requirement of a formal written amendment signed by the parties or other formalistic procedure, even though the written contract states that amendments must be in writing. It is just the way business is done.

Recently, the Michigan Supreme Court was asked by a principal to abolish the right of the parties to make amendments or modifications orally or impliedly where there is a written agreement containing an anti-waiver clause and/or a written modification or amendment requirement.

The good news is the court refused to require a writing in all instances.

The bad news is the court heightened the requirements to establish that the parties mutually agreed to the non-written amendment.

The court ruled that a party who is merely silent (i.e., did not specifically say that they agree to the change) could not be determined to have mutually agreed to the modification. In this case, by virtue of written documents periodically submitted by the rep to the principal as the business was being developed by the rep, the principal knew but did not object to the fact that the rep was calling on customers that were outside the assigned customers (listed in the written agreement), received periodic reports on the status of the sales efforts, knew as things progressed and in advance of the ultimate sale that the rep expected a commission and even knew the amount of the commission claimed.

Still, the court said that this was not enough because the principal did not need to tell the rep he or she was not going to get paid and could just say nothing until after the business was placed. This writer strongly disagrees with the majority opinion, particularly under the facts (it was essentially a 4-3 split decision after a motion for rehearing) and believes that most jurisdictions do not and will not follow the Michigan Court's rulings and will continue to follow the established law. This law was essentially set forth in the dissenting opinions and is to the effect that if a party does not speak when they ought to, they may be estopped from asserting rights alleged to exist under a contract.

Don't Agree to Change

However, for the time being, in Michigan, we will have to live with the court's decision. So, let us use it to the rep's advantage. As a rep, here is what you should do when presented with a unilateral change by a principal in a jurisdiction that has (or might) adopted this legal philosophy: ***do not agree — say nothing.***

If a principal wants to cut your territory, customers, products or commission rate, do not agree. I repeat, do not agree if you can avoid it. Say nothing in the way of approval and if given the opportunity to do so, contest the principal's proposed changes. Because, if a court says mere silence does not constitute mutual waiver and modification of a written agreement with an anti-waiver/anti-modification provision without a writing signed by the parties, the change may not be effective against you. In those circumstances where there is no written agreement or one that does not have an anti-waiver/anti-modification provision, it is probably best to go on record as to your disapproval of a change that adversely affects you.

Every circumstance is different, and not all jurisdictions are the same. The determination of whether or not there has been a mutual waiver of the written modification requirement and mutual agreement to the change to be effected must be evaluated and determined on a case-by-case basis.

Because of the importance of these issues in the successful operation of your business, it is incumbent on you to discretely seek knowledgeable counsel every time one of these circumstances arises. ❒

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