
MANA Hosts Rep-Savvy Attorneys

If any message came through loud and clear during MANA's second Legal Symposium earlier this year, it was the critical need for independent reps to have legal counsel available that is experienced in "rep law" in order to see them through the challenges of operating their businesses.

Building on the success of last year's initial effort, this year's symposium in Chicago was attended by 13 rep-savvy attorneys. The one-day meeting worked through an agenda that included discussions of:

- Intellectual property.
- Legal ramifications of representing foreign principals.
- Modifications that can impact the rep/principal contract.
- A review of important clauses in MANA's Contract Guidelines.

In each of these areas of discussion the point was made that from the day an agency opens its doors for business one of the key

advisors the rep should have available is his legal counsel. Just as important as it is to have an attorney at the ready, so too is it important that the attorney have extensive experience in rep law. As one participating attorney advises, "An awful lot of time is wasted when the client has to explain to his attorney what a 'principal' is."

The Value of Experienced Counsel

"In addition to saving time and money, the experienced attorney can guide the rep away from po-

tential problems." A mistake that many reps make, for instance, is to "save" the \$300-\$600 that it might cost to have an attorney review a principal's contract before the rep signs it. Several years later, when a large commission is on the line because the contract language does not favor the rep's point, that initial amount often seems very small indeed.

Why is it "so expensive" to conduct a contract review? The reason is that most attorneys will want to provide the client with a written analysis after reviewing the contract. This has the dual benefit of letting the rep use that document to negotiate with his principal and to be sure there are no misunderstandings that can occur with a verbal discussion. Again, a few hundred dollars is a small price to pay when tens of thousands of dollars are at risk later after years of hard work building the territory for the manufacturer.

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Intellectual Property

In a far-ranging discussion that covered what is and what is not considered “intellectual property,” the point was made that the rep would be wise to address such questions at the time their initial contract is being negotiated with a principal.

Attorneys experienced in the medical and automotive industries stressed the importance of thinking ahead when it comes to negotiating with principals at the beginning of the rep-principal relationship. “In general, reps are loyal and trusting business-people,” offered one attorney. “In the heat of battle (i.e., negotiating a contract) the rep may not be thinking about protecting what he considers to be his intellectual property. However, he would be well served to do so before visiting his attorney to unwind after a problem has developed.”

It was also mentioned that there is no obligation on the part of the rep to “create” for his principal. At such time when the rep does “create,” whether it’s a new product or a service, the rep should be sure he has taken steps to protect that which he has contributed to the relationship. “Then in the absence of such protection, the question raised is whether or not to terminate the relationship; and if it is terminated, what are the repercussions for the rep?”

As new products are developed and services made available to customers that might fall under the heading “intellectual property,” it was agreed that reps could open themselves to product liability and other legal concerns. As a result, reps are advised to con-



Left to right: (standing) Charles Ashdown, John Anderson, Thomas Kammerait, Jay Ownby, Mitchell Kramer, Charles Melville, Dan Beederman, Joe Miller, (sitting) Abe Brustein, Florentino Ramirez, Steve Valentine, Adam Glazer, Victoria Valentine and Gerald Newman.

sider creating a “separate business entity” that will protect all business activities not strictly related to sales and marketing. “It’s critical that the rep protect his revenue stream. Such entities provide that protection.”

A discussion of customer lists as intellectual property followed and the advice was offered that whatever the rep considered as intellectual property should “be kept locked up and treated as intellectual property, including ‘proprietary’ stamps, etc.”

Representing Foreign Principals

Caution was urged for reps entering into agreements with foreign principals. In the process of conducting due diligence, every effort should be made to learn as

much as possible about potential principals. Complicating such relationships, according to one attorney, is that “there can be unexpected legal consequences when some foreign courts fail to enforce judgments against companies located in their respective countries.”

Once again, the issue of due diligence and the need to have the assistance of experienced

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counsel was emphasized.

In terms of due diligence, one attorney volunteered that in addition to being able to garner considerable information concerning foreign principals via the Internet, “reps should also ask the principal if they are willing to

share with them the names of other reps, vendors and customers with whom they conduct business. The rep should then follow up with those sources relative to the manufacturer’s credit history and performance. In addition, learn if that company has any as-

sets located within the state where the rep conducts business.”

There was considerable discussion about how reps can insure payment in cases where foreign companies fail to pay agreed-upon commissions. An effective technique suggested by one participant was to have the rep request that the foreign principal post a performance bond equal to the value of one year’s estimated commissions. Florentino Ramirez, member attorney from the Dallas area, entertained the group with a 10-minute presentation of other perils to be considered when representing foreign principals. It’s clear that reps should get legal advice when contracting with off-shore companies!

Contract Modifications

A discussion of contract modifications that ultimately result in a change of the rep’s commissions was opened by one attorney who said, “the 30- or 60-day termination contract is the bane of the rep’s existence. The terms of these contracts weren’t good when they were originally conceived and they aren’t good for the rep today. Unfortunately, too many reps won’t quit their existing lines no matter what happens unless they’re able to land a better line for themselves.”

When modifications — often unilaterally imposed by principals — occur, the need was stressed for reps to “memorialize” any changes that have been made to existing contracts with principals. For instance, cases were cited where the principal asked a rep to take a lower commission on a sale. The rep countered with a willingness to do so, “for this time only.” A

Attorneys who participated in MANA’s second Agent Law/Legal Symposium were:

John Anderson, Law Offices of John H. Anderson, San Clemente, California

Charles Ashdown, Strauss & Troy, Cincinnati, Ohio

Dan Beederman, Schoenberg, Fisher, Newman & Rosenberg, Ltd., Chicago, Illinois

Abe Brustein, DiMonte & Lizak, Park Ridge, Illinois

Adam Glazer, Schoenberg, Fisher, Newman & Rosenberg, Ltd., Chicago, Illinois

Tom Kammerait, Von Briesen & Roper, Milwaukee, Wisconsin

Mitchell Kramer, Kramer & Kramer, LLP, Rydal, Pennsylvania

Charley Melville, Strauss & Troy, Cincinnati, Ohio

Gerald Newman, Schoenberg, Fisher, Newman & Rosenberg, Ltd., Chicago, Illinois

Florentino Ramirez, Ramirez & Associates, Dallas, Texas

John Riccone, Aronberg, Goldgehn, Davis & Garmisa, Chicago, Illinois

Stephen Valentine, Valentine & Assocs., West Bloomfield, Michigan

Victoria Valentine, Valentine & Assocs., West Bloomfield, Michigan

failure to document the temporary nature of this commission reduction could come back to bite you in the future. In such cases, the rep is wise to follow any agreements or conversations with a dated note to the principal outlining exactly what was agreed upon. Such notes have proven to be valuable in legal proceedings.

An additional bit of advice that was forthcoming from the discussion of contract modifications was “the rep should never sign a contract modification

agreement before he consults with a rep-savvy attorney.” In addition, it was offered that when agreeing to contract modification, the rep should “ask for something in return,” whether that’s a higher commission rate on new business or an extension of the post-termination commissions period.

MANA Contract Guidelines

As the attorneys studied the existing MANA Contract Guide-

lines, it was agreed that an ad hoc group would closely study the guidelines and forward their recommendations for input to the entire group. As any changes are made to the guidelines, those changes will be communicated to the MANA membership.

The symposium was moderated by MANA President/CEO Joe Miller. Also in attendance were Ray Hall, executive vice president and CEO of ERA, and Jay Ownby, MANA’s manager of strategic alliances.