
Attorney Advises Put It In Writing

Documentation is a key legal ingredient in the relationship between the independent manufacturers' representative and his manufacturers. If you hear nothing else in a conversation with Charlie Melville, your time is well spent.

According to Melville, it's critical for the rep to detail in writing exactly what the terms of the relationship are between himself and the manufacturer. "In general terms, I'd have to say that a written contract is better than an oral one. However, in the absence of the former, the rep should make every effort to commit — even if it's in the form of a self-serving memo — what was agreed upon, and what the expectations are between his agency and the manufacturer. I would even go so far as to advise that if the rep has proposed a written contract with the manufacturer and the manufacturer has refused that offer, that should be put in writing."

Melville, an attorney with the law firm, Strauss & Troy, in Cincinnati, Ohio, concentrates

his practice in the areas of intellectual property, contracts, restrictive covenants, and business torts, including manufacturers' representative and distributor matters and litigation. He has been active in MANA and with its members; has written articles for *Agency Sales* and has also been a participant in the annual MANA Legal Symposiums.

Melville started his practice in 1962 and is currently an Adjunct Professor at Northern Kentucky University. He is a member of the Cincinnati and American Bar Associations, and the Cincinnati Intellectual Property Law Association. Melville gradu-



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ated from Princeton University (A.B. with honors, 1959) and the University of Cincinnati College of Law (J.D., 1962), where he was editor-in-chief of the *University of Cincinnati Law Review* and a member of the Order of the Coif.

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Rep Specialization

The law firm of Strauss & Troy, with a staff of more than 45 attorneys, has offices in Cincinnati and Northern Kentucky. Melville notes that the firm developed its rep law expertise under the guidance of Leon Wolf. “We’ve had the very good fortune over the

years to represent prominent MANA members, and we were the firm that originated the ‘Life of Product, Life of Project (LOP-LOP)’ concept for our independent rep clients.”

While the law firm’s prominence in the Cincinnati and Northern Kentucky region allows reps in need of legal counsel to know where to go for assistance, Melville advises that reps in other parts of the country have a couple of avenues they can follow to find professional legal advice. “Two things that any rep should do is contact MANA or seek recommendations from fellow reps. MANA does a great job of maintaining contact with several attorneys who have had rep experience. And what better place to get a recommendation than from a rep who has had a positive experience with an attorney?”

When asked what is the most common reason a rep would need legal assistance in the first place, Melville is quick to point his finger in the direction of unfair termination.

“I spent several years working for a manufacturing company,” he explains, “and in that capacity, I negotiated perhaps 30 to 35 agreements between manufacturers, reps and distributors. I would venture to say that now, 30 years later, most of those agreements are still in place. The key to any agreement between a manufacturer and rep is that it be fair. I’ve had manufacturers come to me asking for assistance in writing a contract for them. What some of them have asked for is ‘a contract that is so tight, the rep can’t wiggle.’ When I hear that, my response is, ‘Don’t

waste my time and your money.’ The key to any relationship — and that includes relationships between manufacturers and reps — is that it be fair to both parties. It’s when that element of fairness isn’t there that we have the level of contentiousness we so often hear about.”

The emergence of the word “fairness” in the conversation leads Melville to what is perhaps that most common rep concern that comes across his desk — unfair termination.

According to Melville, here’s how unfair termination commonly develops. “You have a rep who has been working long and hard to develop business. He calls on an account for three years before any real business develops. But his time is hardly misspent. He’s developing, maintaining and nurturing relationships. Then, as happens so often in large manufacturing companies, you have a change in management. One numbers guy sees that a rep is being paid in excess of \$100,000 annually. He decides that all you have to do is eliminate the rep and that \$100,000 falls to the bottom line. This is nothing more than a complete lack of recognition for what the rep puts on the table. Remember, products and services don’t sell themselves. It’s the rep who sells them, and he sells them as a direct result of the relationships that he’s worked so hard to develop. The rep that earns a five percent commission on what he sells is worth his weight in gold to a manufacturer — and he should be treated accordingly.”

Guaranteeing Fair Treatment

The fact is that the rep isn’t treated that way, and that’s when it’s so important for the independent rep to have competent legal counsel. To ensure proper — “fair” — treatment, one of the first orders of busi-

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ness between a rep and his attorney is the contract. Flowing out of that is the importance of the rep discussing the termination clause when he begins working with a manufacturer.

“I have a very good rep client that I’ve been working with for a number of years,” explains Melville. “He forwards all of his rep contracts to me before he signs them. I’ll admit that occasionally I tell him that ‘This is the worst contract I’ve ever seen.’ But the key here is termination. When I say that to him, often he’ll respond: ‘Look, I know that. But I figure that I can make more money over the course of the agreement and overcome the negative points of this

miserable contract before they fire me.’” Melville admits that at least this client is entering his agreement with his eyes wide open.

If he has one critical message to independent sales representatives who are reading this article, Melville refers back to the importance of documentation. “In general terms, I’d say that a written contract is much better than an oral agreement. They’re both equally enforceable, but the terms have to be agreed upon. In the absence of a written agreement, however, something in writing must document the agreement. That’s where it falls on the shoulders of the rep to document all that he can.”

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