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# SEEKING COUNSEL

## ATTORNEYS TACKLE REP ISSUES

EDITORIAL | JACK FOSTER



## JACK FOSTER

**Jack Foster**, president of Foster Communications, is the editor of **Agency Sales Magazine**. In addition to his duties in working with MANA, Jack writes for several other major marketing publications. His experience in publishing includes writing, editing, photography, production and printing. This, combined with Jack's understanding of the independent sales rep function, can provide the winning formula for your communication needs. Email: [jfoster@manaonline.org](mailto:jfoster@manaonline.org).

Whether the subject is **a rep's rights upon termination, strategies for dealing with foreign principals or how to react when a customer interferes with the rep-principal relationship**, there is no shortage of conversation points when rep-savvy attorneys put their heads together. That was exactly the case last fall when, for the sixth time, **MANA sponsored its annual legal symposium**. Attended by 19 attorneys and several rep association executives, the one-day meeting addressed many of the concerns facing independent manufacturers' representatives.

If there was a single thread that ran through the discussions during the legal symposium, it was the critical need for reps to avail themselves of competent legal counsel. That point was driven home as discussions ranged from:

- ✦ Reps' post-termination commission claims.
- ✦ Disagreements over when commissions are *earned* and when they should be *paid*.
- ✦ Efforts by customers to remove reps from the marketing/sales equation in an effort to gain pricing benefits.
- ✦ Possible perils and pitfalls when dealing with foreign principals.

### Making a Claim for Unpaid Commissions

In a wide-ranging discussion covering post-termination commissions, the attorneys outlined a number of scenarios to describe what awaits the rep when a company he represents goes out of business, consolidates or is otherwise victim of a challenging economy.

"It's hardly unusual for the rep or reps to make a claim for unpaid commissions when they find themselves in the position of victim once they've been terminated," explained one attorney. "Generally, the scenario plays out this way: a principal consolidates, merges, or is sold. Part of the fallout is that one rep — if not all reps — is terminated. Ultimately, the principal's new ownership acquires the benefits of the rep's good work preceding his ownership. Simply stated, he's the recipient of all the benefits as he captures 100% of the rep's work stream. And, as is so often the case, he doesn't feel he has to pay commission to the rep(s)."

The attorney continued that he's presently working on such a case, one dealing with a "handshake agreement" that began 25 years ago.

"If there had been a written agreement at the beginning of the relationship, that would probably be the end of any dispute. But since this wasn't the case, the rep is seeking some form of protection. Complicating the matter is the fact the former owner of the manufacturing firm took the proceeds from the sale and left."

The new owner maintains, "We have our own sales force of reps or direct and plan to continue business on our own terms." The former rep is left out in the cold as his numerous requests and demands are ignored.

A number of attorneys referred to the "rep as procuring cause" theory as a means to address this problem. Among the rationales cited for a belief in the strength of this course of action was that the new principal benefits from the work of the rep who was the procuring cause of the business. At the same time, the selling principal was unjustly enriched as a result of the rep's efforts.

The attorney who was presently dealing with this case explained, "The theory hasn't been tested in this case, but I know it is coming."

Some additional attorney views that developed on this matter included the following:

In a similar case an attorney related, "We put both the old and the new company ownership on notice that we were going to lay claim to commissions based on life of the product. We were 'summaried' out by the court, but appealed. We eventually prevailed and received a large settlement for our client.

"The moral of this story is that if there is a claim that is legitimate and viable, the rep should pursue it with rep-knowledgeable counsel. Another moral is that if a rep smells that there is some sort of sale in the offering, he should

**"There's a pressing need to perform due diligence."**

## “If there is a claim that is legitimate and viable, the rep should pursue it with rep-knowledgeable counsel.”

seek the advice of his attorney. This is nothing he should do himself. Choosing the latter course will only harm himself.”

“It’s very important for reps to have a provision in their written agreement regarding payment to reps if a similar scenario develops.”

“We advise the reps that we work with to speak with their principals if such situations develop. Simply say to them, ‘If you’re going to sell your business, please give me assurances in writing that I’ll have a position with the company. If I don’t get assurances that I’ll have the line this time next year, I might as well leave now.’”

“If there isn’t a written agreement in such situations, the rep is further ahead than if there is a written agreement that is poorly written or unfavorable to the rep.”

### When Does the Rep Get Paid?

When it comes to determining when reps should be compensated for their efforts, it was emphasized how important it is for the rep and the principal to be on the same page. According to one attorney, “Here’s what we like: an agreement whereby commissions are earned at any point in time that the business will be placed with our client’s principal. It may not be payable until a future event and it’s up to the rep and the principal to agree upon what that future event might be.”

In a related conversation, an attorney noted the experience of one rep who took on a line where there was already existing business. “As things developed, the principal claimed that the rep did not actually get the customer. As a result, the principal maintained that the rep wasn’t entitled to the commission which developed. Our position was that while we know he didn’t get the customer *per se*, he did get the customer to buy the product. Therefore, the rep has earned the commission. Furthermore, if you didn’t need his efforts regarding this customer, why did you hire him in the first place? The products wouldn’t have been sold to the customer without his efforts. Therefore, he’s earned the commission.”

### Attempts to Remove the Rep

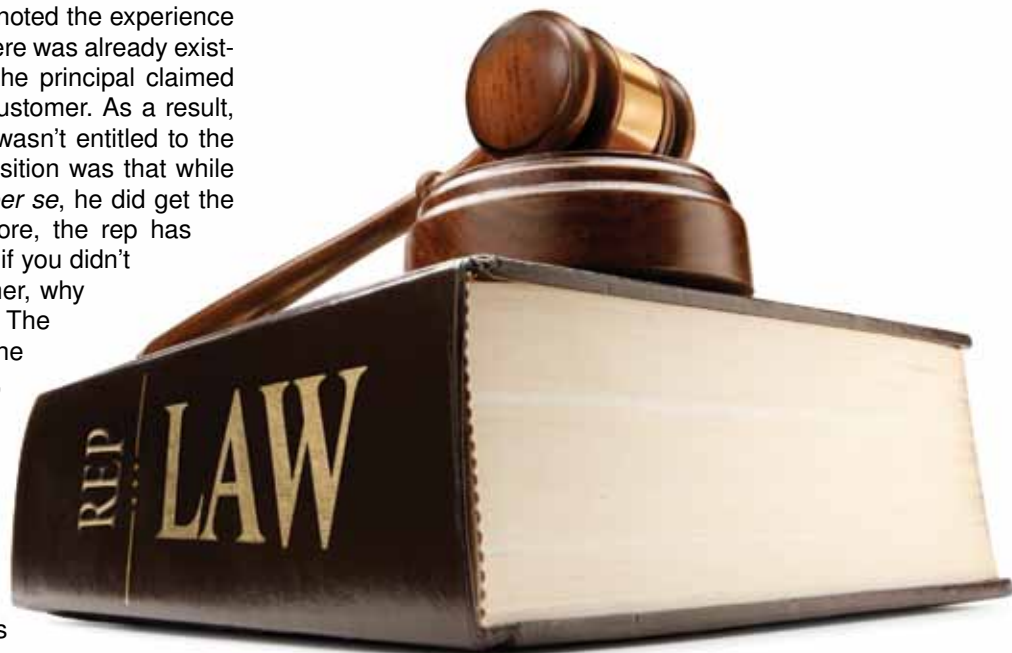
According to participants of the legal symposium, they are encountering more and more occasions where customers are inducing their principals

to terminate reps. Typically their demands are couched in these types of words: “We don’t want to deal with reps anymore. We want what you’re paying the reps to be taken off the bottom line to us.” Other times, they simply want the reps to be terminated. “We don’t care if you owe them or not. Don’t pay them and pass along a cost reduction to us.”

With that as an introduction to this subject, the question was asked: “Has anyone had success dealing with these situations?”

Short of litigation — “because none of our clients want to do that” — education was suggested as a viable option for the rep faced with this situation. According to one participant, “A customer was pushing to get rid of the reps that called on him. Reps working in that industry put together a PowerPoint presentation that explained/educated the customer concerning the rep’s value add. It was emphasized that there is a cost associated with getting the business, and no matter what the principal does, that cost will never go away.”

Another participant related an instance where the customer made a similar request. In response, the manufacturer was right on the ball. He said, “Sure, we can replace the rep. What we’ll have to do, however, is assign someone from headquarters to support you. So what will result is that we’ll have to increase our cost to you.” The customer quickly rescinded his request.



### Dealing with Foreign Principals

The immediate response attorneys offered to reps dealing with foreign principals is, "There's a pressing need to perform due diligence. Reps are short on performing their due diligence in this area and they sign on with foreign principals with more hope than reality. If anything, before the rep takes on a foreign line, I'd advise him to complete his due diligence to determine what he's buying into. The reason this is so important is that no matter what else happens, you need a source of 'collectability' in a venue that will allow you to collect. If a dispute arises and you have to go to an

unfriendly jurisdiction, don't waste your time unless it really makes business sense.

"We preach due diligence because among other considerations, you have to determine whether it really makes business sense to take on this foreign line — will it fit in with all your other business? Then, what happens if they (the foreign principals) don't pay you? Where are you going to go to collect? We maintain that if you can't resolve a dispute in your own backyard, don't go to their backyard. If you travel to their jurisdiction, the chances of you collecting are minimal." <sup>AS</sup> ■

### Additional Articles on Sales Representative Issues

Various members of the **Schoenberg Finkel Newman & Rosenberg, LLC**, law firm, Chicago, Illinois, have published and presented a diverse collection of articles on topics of interest to both independent sales reps and manufacturers. These articles cover sales rep law issues, including past due commissions collections, drafting proper contracts, contract interpretation, business succession plans, product liability, bankruptcy of a principal, etc. In many instances, these articles detail actual legal controversies in which the law firm has represented sales reps.

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Attorneys who were participants in **MANA's Sixth Legal Symposium** last fall were: Dan Beederman, Adam Glazer and Gerald Newman, **SCHOENBERG, FINKEL, NEWMAN & ROSENBERG, LLC**, CHICAGO, ILLINOIS; Victoria & Stephen Valentine Jr., **VALENTINE & ASSOCS.**, WEST BLOOMFIELD, MICHIGAN; John Anderson, **THE LAW OFFICES OF JOHN H. ANDERSON**, SAN CLEMENTE, CALIFORNIA; Douglas Andrews, **SCHOONOVER, ANDREWS & ROSENTHAL, LLC**, CLEVELAND, OHIO; Matt Benson & Clarinda Comstock, **BENSON COMSTOCK, LLP**, HOUSTON, TEXAS; Abraham Brustein, **DIMONTE & LIZAK, LLC**, PARK RIDGE, ILLINOIS; Randall Gillary, **RANDALL J. GILLARY, P.C.**, TROY, MICHIGAN; Florentino Ramirez & Mark Smith, **RAMIREZ & ASSOCIATES**, DALLAS, TEXAS; Gene Hoff, **MINENKO & HOFF, P.A.**, MINNEAPOLIS, MINNESOTA; Thomas Kammerait, **VON BRIESEN & ROPER, S.C.**, MILWAUKEE, WISCONSIN; Lema Khorshid, **FUKSA KHORSHID, LLC**, CHICAGO, ILLINOIS; Mitchell Kramer, **KRAMER & KRAMER, LLP**, RYDAL, PENNSYLVANIA; John Riccione, **ARONBERG GOLDGEHN DAVIS & GARMISA**, CHICAGO, ILLINOIS; Scott Sanders, **SANDERS & MONTALTO, LLP**, TORRANCE, CALIFORNIA.

Also in attendance were: Henry Bergson, **NEMRA**; Susannah Hart, **MRERF**; Dennis McGillis, **ERA SOUTHERN CALIFORNIA**; Bryan Shirley, Helen Degli-Angeli, Jerry Leth and Jay Ownby, all of **MANA**.

The articles and presentations are now compiled into a legal library on the Schoenberg Finkel Newman & Rosenberg website and can be accessed at **replawyers.com**. They have been grouped in general categories, along with a synopsis of each article. The firm believes that this information will be useful to reps, manufacturers and others presented with similar legal issues. They will continue to update the library as additional articles are written and published and invite you to contact them if they can provide any additional information. Contact information is available on their website.

FOR A COMPLETE LISTING OF ATTORNEY AND ATTENDEE CONTACT INFORMATION, **SEE PAGE 58**



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