A Rep's Perspective Of This Year's MANA Legal Forum

by **JERRY LETH**

Owners of professional sales companies must have some funds budgeted for legal services. Practicing law on your own can be very, very expensive. That's the message this former rep received after attending this year's MANA Legal Forum.

For example, the first issue discussed by the 15 attorneys who participated dealt with the question: "If a rep is terminated by a principal and the principal agrees to pay all the commissions due per the wording of the agreement, can the rep collect additional revenues?"

Although the expected answer was "no," the presentation by Barbara Kramer, Gerald Newman and Adam Glazer emphasized that there are some instances when the rep may be able to receive additional compensation. The typical layman may ask, "Am I educated sufficiently to understand the legal theories behind 'Implied Duty Of Good Faith/Promissory Estoppel,' or 'Implied Contracts/Unjust Enrichment'? How about 'Quantum Merit'?"

Even the spell checker has trouble with some of these words. The point is there are a number of issues involved when a contract is terminated, and the typical rep doesn't have a clue as to what those issues are. You may be saying to yourself, "I'll just hire the attorney when I'm confronted with such a situation." The truth of the matter is you would have done much better had you retained an attorney at the time the contract was being written. As Vicky Valentine, commented, "You never think about the divorce when you are getting married." Incidentally, if you haven't figured this out already, attorney fees for reviewing a contract are significantly less than those for going after a manufacturer who has unfairly terminated your agreement.

Another issue discussed dealt with non-compete clauses. What evolved from this discussion was that there is a notion among the rep population that non-compete clauses are not enforceable. That is a myth, as there are several legal ways manufacturers have discovered to keep the rep from working with competitive principals after the termination of the agreement. If you must have a non-compete clause in the contract, make sure there is consideration for agreeing to it, such as no termination without cause, or that you will receive compensation for the duration of the non-compete period. These non-compete issues are a lot easier to discuss when negotiating an agreement, and it's almost impossible to go back to a manufacturer and renegotiate a contract once it's been signed. A knowledgeable attorney can anticipate these issues up front. By the way, as a rep, do you have a clause in your contract that protects you from your

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Nexus Rears Its Head

In these days when state governments are looking for every source of revenue they can lay their hands on, the Nexus issue remains critically important for reps.

In case this is new to you, Nexus occurs when a rep receives a letter from the state next to where his office is located, informing him that he needs to file a tax return in their state for that portion of his business performed in that state.

While there is a federal public law that protects selling activity on the part of a rep, the new taxes states are levying are based on the transactions and are considered business taxes, rather than income taxes. It was suggested that reps seek indemnification from principals for Nexus issues. Tom Kammerait suggested this might not be a good idea, as it provides evidence that there might actually be a tax liability.

There was also considerable discussion about possible wording for commission protection acts MANA is working on. While it would be ideal to have wording for a model act, each state wants to modify the proposals so we never end up with the ideal wording. One of the unresolved issues is, Do we want the commission protection acts to require a written contract? What good does it do to have this requirement in the act if there are no teeth to enforce the requirement? The attorneys also agreed that reps are better off with no written agreement than they are with a poorly written agreement. Would the written agreement requirement cause more poorly written agreements between reps and principals?

For those working with foreign principals with no U.S. presence, Tino Ramirez recommends reps learn about surety bond provisions in foreign countries. With a surety bond, the foreign principal agrees to pay the amount of the bond, and the premiums typically run 1-3% of the bond value, depending upon the principal's credit rating. If the rate for a prospective principal is on the high side, do you really want to represent them? The surety bond is a fairly inexpensive way of ensuring you will get some payment from the foreign principal.

salespeople being hired by principals? How expensive is it to find, hire and train new employees?

Protecting Customer Lists

What about customer lists? Who owns them? Reps should be forewarned concerning language in the agreement regarding reporting information, as it may include contact information. Are you in a position to legally define what is the customer list? Is it the person who places the order, or is it the decision maker? Another point brought out by the attorneys was that principals are sloppy about defining what is an order. How would you define "order" in a contract so that when the relationship goes south, you end up getting what you expected? Another point, do you understand the difference between using "selling" and "soliciting" in contract wording? You'd better — it can have enormous financial consequences if you don't.

Avoiding Litigation

A trend in the rep legal arena is towards arbitration and mediation as opposed to litigation. Something to understand is that arbitrators are not subsidized by taxpayers like the court system is, so there are numerous and significant expenses involved with arbitrating a case that you won't see if it goes to litigation. If you are dealing with an international issue, it is more complicated because you first have to file a minimum fee, then following discovery, there is an additional fee. They will do the arbitration even if you don't file the additional fee, but the awards are substantially reduced if you don't. Make sure the principal's country is a party to the enforcement treaties, otherwise you may win the battle, but lose the war. A more desirable scenario is to ensure your foreign principals have assets in the United States. The bottom line is, you don't want to go into arbitration with a copy of Arbitrating for Dummies under your arm.

Standard Contract

The attorneys turned their attention to the "standard" rep contract that is an integral part of the agreement guideline package offered by MANA to its membership. It was pointed out that members from the New York/New Jersey Metro Chapter have been working on revising its wording and the recommended changes were presented to the group. The consensus is that there are too many variables to a rep-princi-

pal agreement (e.g., the industry involved, how much existing business there is to turn over to the rep, etc.) for a "standard contract." The attorneys also stated that in most of the cases they see, the manufacturer provides the contract. However, as there are a number of manufacturers who are new to outsourcing the sales function and have not yet created their own contract, Barbara Kramer has agreed to review the proposed wording and provide MANA with recommendations. Reps must remember that when they negotiate long-term initial contract terms that preclude no-cause termination, the terms also keep the rep from terminating the agreement as well.

The Cost of an Attorney

There is reluctance on the part of many reps to retain an attorney for contract review purposes because they are concerned about the cost. The cost to review is based on many variables. For this reason, the attorneys' recommendation is for reps to make the initial call and at least get an estimate. Then ask the question, "Is the cost of a contract review how much you pay the attorney who reviews it, or is it in the lost revenues that occur when the relationship with the principal terminates and you don't collect what you earned because of a poorly worded contract?"

We've said this earlier, and it's worth repeating: It's a lot easier to negotiate these issues at the beginning of the relationship when everyone is feeling friendly towards each other, rather than after you've signed an agreement, when it's much more difficult to go back and renegotiate terms.

At the end of the Forum, had MANA members been sitting in the room, the thought might occur that all rep-principal relationships terminate badly. As a result, we need to put things into perspective. The attorneys are there to assist when things do go bad. That's the service they provide, so that's what they focus on and that's what they discussed during the Forum. The truth of the matter is, however, that many rep-principal relationships are founded on the "partners in profits" philosophy and work very well for both parties. If it were not this way, few reps would ever get into this business. As a result, this former rep recommends biting the bullet up front and investing in an attorney when you are negotiating with a prospective principal. You're going to pay them sooner or later; the problem is, when you pay them later, you pay a lot more. ❒

ABOUT THE AUTHOR:

Jerry Leth became MANA's manager of membership in August 2000. Previously, Jerry owned and operated Letco Tech Sales, Inc., a MANA member, multi-line professional outsourced sales agency, for 10 years. Before starting his own agency, he was vice-president of sales and marketing for Torque & Tension Equipment, an importer of a UK-manufactured line of electronic torque analyzers sold through a network of sales agencies. Jerry graduated from Stanford with a degree in mechanical engineering and worked for Hills Brothers Coffee in San Francisco in engineering and production before embarking on a sales career.

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