

A photograph of four business professionals in dark pinstriped suits and light blue shirts. They are looking towards the right of the frame. The man in the center has his hand to his chin in a thoughtful pose. The woman in the foreground is slightly out of focus.

When it Comes to Legal Issues,  
the Message is Loud and Clear —  
**Reps Prepare!**



EDITORIAL | JACK FOSTER

### **Be Prepared!**

That's the number-one lesson to be taken away from the Legal Symposium sponsored by MANA earlier this year.

The "Be Prepared" part of the daylong meeting (headlined by 13 rep-savvy attorneys) translated into an important message for attendees: manufacturers' representatives would be wise to count as their confidants, attorneys who are well-versed in rep law. The need to have well-qualified legal counsel applies to everything the rep encounters in the course of practicing his profession. That includes:

- ☑ International issues that impact reps.
- ☑ Succession planning and the purchase and sale of rep firms.
- ☑ Preparation and execution of contracts with principals.
- ☑ How to act or react in the face of a principal's bankruptcy.

This year marks the fifth time MANA has assembled in Chicago attorneys who are familiar with rep law, and just as in past meetings, there was no shortage of expertise brought to bear on a number of subjects of interest to independent manufacturers' representatives.



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### Working Internationally

As if determining whether an overseas manufacturer will be a viable principal for a rep to conduct business with long-term isn't enough of a concern, attorneys discussed some of the other matters that can weigh heavy on a rep. Among the matters that reps and their attorneys had better be up-to-speed with are:

- ✦ **Jurisdiction** — While there was a consensus of the group that jurisdiction (i.e., in what country will disputes be settled) is important in the rep-principal relationship, the rep's interests aren't necessarily served by having a dispute adjudicated in the principal's home country.

One attorney warned, "Many times in matters of dispute, the principal desires to have a dispute litigated in his country. Almost invariably what that says to the rep is that the rep doesn't stand a chance of getting any post-termination commission or other considerations. I make it a habit to warn reps that if they venture into the jurisdiction of their principal, they won't recover anything."

Another attorney countered, "I'm not saying you can't get justice, but you may be tied up for a long time trying to accomplish what you want. If nothing else, I'd advise the rep to be sure he follows the letter of the law if the principal fights for jurisdiction. There are significant hurdles that must be overcome."

In one interesting jurisdictional matter, one of the attorneys described how a potentially difficult case worked out quite well in the end. "A manufacturer from Mainland China had left the matter of drafting a contract entirely up to the rep. When a dispute ultimately resulted, we had to bring suit against the Chinese manufacturer. Theoretically in order to get this case heard — in China — we would have had to go to the trouble and expense of getting the contract translated into Chinese. Once that was done, we'd have to serve papers on the Chinese embassy in this country. Thankfully, the legal firm on their side waived that requirement, and we were able to easily proceed with the case."

- ✦ **Written vs. verbal agreements** — While one attorney voiced the opinion that "While the subject of the value of a written vs. a verbal agreement has been raised many times before, I'd maintain working in the absence of a written agreement is not the way to go."

Another attorney countered with, "Sure, if you have the perfect written agreement and a guarantee that it will be interpreted the way you see it, then that's fine, but that's not always the case."

A third lawyer ventured that "Having a good oral agreement is certainly better than a poorly written contract."

It was emphasized, however, that it's during the negotiation process that the rep had better exert any influence he can to ensure that he gets what he wants from the agreement. That's especially important when it comes to matters affecting post-termination commission.

- ✦ **To arbitrate or not to arbitrate** — There was hardly any groundswell of approval for the arbitration process as it applies to reps settling disputes with foreign principals. Among the objections noted by the group of attorneys were the expenses involved and the length of time it takes to get a decision.

According to one attorney, "Arbitration is hardly quick or inexpensive. Then you have collection issues. We received an award via arbitration and the principal refused to pay. We had to go to court to have the award reaffirmed. After 14 months, we think we're finally going to get something."

### Dealing with a Principal's Bankruptcy

Being prepared is probably no more important to the rep than in cases where their principal declares for bankruptcy. In a presentation entitled, "Treatment of the Sales Rep in Bankruptcy Cases," it was emphasized how important it is for the rep to be well-organized and to take action quickly.

According to one attorney, "With Chapter 11 (which is a going-out-of-business procedure) the real action you see is the sale of a business. A sophisticated buyer realizes that it's safer to buy an insolvent going concern than to buy a business that has officially gone out of business.

"Generally what happens is that a buyer will lead the seller to bankruptcy. Then, what happens to the rep is important. And the real issue for the rep is to get an answer to the question, 'How do I know I'm going to be paid if they're in Chapter 11?'"

**"I make it a habit to warn reps that if they venture into the jurisdiction of their principal, they won't recover anything."**

“It’s the rep’s constitutional right to sign a dumb contract.”



“Oral promises aren’t really all that bad when you consider that a written contract can be absolute death for the rep.”



PICTURED, ABOVE LEFT (L TO R): Jay Ownby, MANA; Paul Greeberg, ARONBERG GOLDGEHN DAVIS & GARMISA; Mark Smith, RAMIREZ & ASSOCIATES. PICTURED, ABOVE CENTER (L TO R): Abraham Brustein, DIMONTE & LIZAK, LLC; Mitch Reilly, MAFSI; Alison Cody, MAFSI; Stephen Valentine, Jr., VALENTINE & ASSOCIATES. PICTURED, ABOVE RIGHT (L TO R): Douglas Andrews, SCHOONOVER, ANDREWS & ROSENTHAL, LLC; Bryan Shirley, MANA; Matt Benson, DUNBAR, HARDER & BENSON, LLP; Clarinda Comstock, DUNBAR, HARDER & BENSON, LLP.

The key in such cases is for the rep to locate an ally within the company and communicate to them immediately that you are at risk.”

He continued, “The rep’s exposure in Chapter 11 is designed to be a negotiated end result, and that end result imposes minimum standards. It is built upon dynamic alliances. The rep must determine who your economic allies are in order to achieve a result, all the while knowing you don’t have years to litigate — you want to get the process over even if it is painful.”

The attorney urged that on the day Chapter 11 is filed, “Recognize that your biggest concern is whether the company will find a way to finance itself. Convince someone in management or their lender that the rep’s commissions must be paid even if the company fails during the process. At the same time, the rep wants to convince the lenders that you want to assist in saving this company. Communicate that I am a part of the process. That’s why it’s important for you to ensure that my commissions are paid.”

### Buying and Selling Rep Agencies

The transitioning of rep firms is a process that affects everyone in the profession — reps, associations and attorneys. According to two attorneys who addressed this subject, “America is aging, and accompanying that aging process is a great deal of activity in terms of buying and selling businesses. The process was slowed a bit by the activities of 9/11, however, it has picked up again.”

As reps consider how they will transition their businesses, they should be thinking of a number of things, not the least of which is their principals and where they stand in their respective markets. “Reps always should be thinking two principals ahead and considering what is going to happen to those principals in the future. When you better understand those factors, you can better assess the viability of a transition for your agency.”

Once the viability of transition is determined, the attorneys went on to describe various valuation procedures and the steps to take to proceed through an orderly sale.

### Remedies Outside of the Contract


“It’s the rep’s constitutional right to sign a dumb contract.” That’s how one attorney opened his comments on the subject of contracts reps sign — but shouldn’t sign.

The attorney continued, “I don’t know how many times I’ve had this happen. I’ll get a call from a rep that I previously counseled not to sign a specific contract. The rep went ahead and signed it any way. Now he says ‘Is there any way you can save me? Can you get me out of this contract?’”

Another lawyer agreed that this was all too common and he related, “When I get those calls, I look for something to hang my hat on, but most of the time nothing comes up. If I could just get in front of a judge and jury, I’d let them know that the rep spent two years of their lives developing business for a manufacturer and now the manufacturer wants to terminate them with no plans for compensation. I go through a laundry list of considerations, and too often nothing develops because the rep signed a contract that was unfair to them from the beginning.”

Invariably the subject of a written contract vs. oral promises came up, and one attorney noted, “Oral promises aren’t really all that bad when you consider that a written contract can be absolute death for the rep.”

As a part of this discussion, all the attorneys emphasized the importance of the state commission protection laws that are posted in the members-only section of MANA’s web site ([manaonline.org](http://manaonline.org)).

Finally, the attorneys emphasized how important it is for reps to have the assistance of attorneys who are familiar with the rep business and with the problems that reps regularly encounter. 



Pictured above are both participants in and attendees of this year's **MANA Legal Symposium**. **BACK ROW (L TO R):** Bryan Shirley, **MANA**; Alison Cody, **MAFSI**; Thomas Kammerait, **VON BRIESEN & ROPER**; Douglas Andrews, **SCHOONOVER, ANDREWS & ROSENTHAL, LLC**; Len Gambino, **SCHOENBERG, FINKEL, NEWMAN & ROSENBERG, LLC**; Henry Bergson, **NEMRA**; Daniel Beederman, **SCHOENBERG, FINKEL, NEWMAN & ROSENBERG, LLC**; Mitch Reilly, **MAFSI**; John H. Anderson, **THE LAW OFFICES OF JOHN H. ANDERSON**; Gregg Marshall, **GHTA**; Matt Benson, **DUNBAR, HARDER & BENSON, LLP**; Mark Smith, **RAMIREZ & ASSOCIATES**; Paul Greenberg, **ARONBERG GOLDGEHN DAVIS & GARMISA**; Clarinda Comstock, **DUNBAR, HARDER & BENSON, LLP**. **FRONT ROW (L TO R):** Abraham Brustein, **DIMONTE & LIZAK, LLC**; Jay Ownby, **MANA**; Stephen Valentine, Jr., **VALENTINE & ASSOCIATES**; Barbara Kramer, **KRAMER & KRAMER, LLP**; Florentino Ramirez, **RAMIREZ & ASSOCIATES**.

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