
Focusing On The Rep's Major Legal Concerns

Our panel of attorneys familiar with rep law responded to a second query, which follows.

What is the most important legal concern that manufacturers' representatives must be aware of today?



Clay Taylor

“Know your state law. Again, so many reps think they are powerless, with no rights. This is not true. Over 30 states have enacted sales rep legislation, all of which was born out of legislative recognition that there is a gross disparity in bargaining power between reps and manufacturers, and most states have taken some action to level the playing field. You can locate applicable rep laws on the Internet. Databases like “Findlaw” are sure to have them, and if you’re a MANA member, you may access them from the MANA Member Area at www.manaonline.org.

“Next, organize! This is not a

‘concern,’ but readers of this article should be aware that reps in many states, like Minnesota, have successfully organized and lobbied for the passage of strong legislation limiting a manufacturer’s ability to simply cut a sales rep out of a territory. The Minnesota statutes forbid a manufacturer from firing a rep with a phone call... without some substantial problem with that rep’s performance...and then only after 90-180 days’ prior notice. This movement is spreading slowly. Wisconsin recently adopted similar legislation. Because the Minnesota statute covers Minnesota ‘residents,’ our clients in neighboring states who have some business here have been incorporating in Minnesota — thereby arguably becoming ‘residents’ — to take advantage of this law.

“Then recognize and embrace the fact that you know little about the legal field and profession. Find

an attorney who is committed to giving you ‘business advice,’ meaning they are dedicated to giving you the information necessary for you to make a good business decision regarding how you deal with a problem. No attorney should recommend that you enter the civil litigation arena lightly — avoid the guy who tells you to ‘sue them now, sue them today!’ While I truly believe this is a small number of attorneys, any client should interview a couple of lawyers. Expect to pay for the consultation, but it is worth it. To find a knowledgeable attorney, contact other reps and trade associations. Watch out for the guy who is a ‘buddy’ of your neighbor, and has no experience in the sales and distribution business. Again, you don’t want to pay for this guy to go to school. If you have a business attorney or estate planner or a neighbor who just happens to be a lawyer but does

“Over 30 states have enacted sales rep legislation....”

not practice in the area, ask him or her to do a simple Westlaw search for sales representative cases in your state (remember, you should pay for this service), but this will immediately give you a list of attorneys who have handled substantial sales representative cases.”

Tom Kammerait

“Regarding the most important legal concern that reps must be aware of today, I think it relates to their own employees. There has been a great deal of activity with respect to non-compete provisions and managing confidential information in prior years. The courts still generally favor employees in this regard, but great care should be taken in putting together employment agreements to protect the reps, principals, and confidential information. Without this planning, I’ve seen numerous situations where severe loss of income and/or dissolution of an agency can occur.”

Some of the other important areas cited by Kammerait that he and his firm work on with reps include:

- “Year-End Tax Planning — It’s always a good idea for the rep to sit down with his attorney and accountant and determine what planning steps to take before year-end. Not only can individual and corporate taxes be minimized, but retirement plan contributions can be maximized.

- “Agency Transition/Succession Planning — Because of the demographics of most reps (many senior reps, and not nearly as many junior reps), we are typically involved in five to 10 succession plans for agencies at any one time. What this involves is careful planning with the use of pre-tax dollars to transition the agency from

one generation of ownership to the next.

- “Estate Planning — Closely aligned with succession planning, it is so important that reps have plans in place for both their agency and personal assets. Again, Uncle Sam can take a substantial bite out of the assets if a proper plan is not put in place. In addition, agency ownership and personal assets can be passed on to intended beneficiaries.”

Barbara Kramer

“The most pressing concern is non-payment of commissions due to principals’ financial problems. We are increasingly seeing situations where reps have not been paid commissions for several months. The only way to avoid this situation is to keep apprised of your principals’ financial situation. If payments cease for more than a month or are increasingly late, deal with the problem immediately and do not continue working for a principal when payments have ceased. It is difficult to recover unpaid commissions from an inadequately financed principal, particularly since there are typically other creditors, many secured, ahead of the sales representative.”

Paul Saunders

“Change is constant, and unless a rep is constantly reviewing his contracts and his relationships and is changing with the times, a resort to legal action will do little to solve a sudden problem. Reps need to be conscious of the high cost of litigation, and the last thing you want is a lawsuit. So, be careful how long you carry a manufacturer who is not paying your commissions on a timely basis.”

Our panel of attorneys:



Clay Taylor



Tom Kammerait



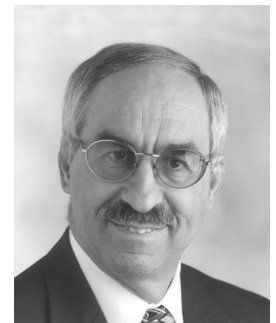
Barbara Kramer



Paul Saunders



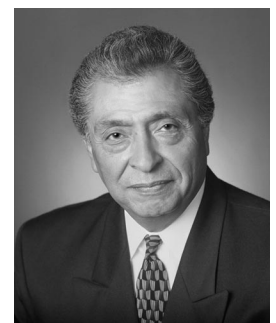
Chad Biggins



Gerald Newman



Scott Sanders



Florentino Ramirez

Chad Biggins

“The most important legal concern in the post 9-11 economy, in my mind, is how do you protect your commission when your principal goes bankrupt? Unfortunately, there are no easy answers, and generally, reps just have to stand in line with other creditors. “However, there are a few things that you can do both prior to and after the principal files its bankruptcy petition. In fact, this is a topic I would like to explore in a future issue of *Agency Sales Magazine*.”

Gerald Newman

“The most important legal concern that manufacturers representatives must be aware of today is being fairly compensated for his or her efforts. With the rapid internationalization and globalization of our economy, guidelines need to be developed to insure that the rep who did the work and rendered the services is properly compensated. This problem is greater in some industries than in others, and is as much a business issue as a legal issue.

“Often, products are specified in one geographical territory, the purchase is made in another ter-

ritory and the goods are delivered to yet a third territory. Which rep is entitled to the commission? Is the commission split, and if so, how and in what percentages? “Many industries do not have standards or procedures for sharing commissions. This issue is overwhelming in the electronic components industry and is exacerbated as more and more production is moved offshore.

Scott Sanders

“Modification of commission terms via conduct, oral statements, and even the cashing of commission checks in a sum less than that called for in the contract are the biggest concerns facing reps today. In fact, the only two cases we have ever lost on behalf of reps were due to the courts ruling that a modification had occurred based on the rep accepting a lesser sum than contractually called for without proper protest.

“This law on modification is rather extensive and complicated, and even varies largely from state to state. Therefore, someone familiar with the particular law of the jurisdiction at issue should always be consulted before bringing suit.

Florentino Ramirez

“The most common concern, besides collections, is manufacturers converting accounts to company accounts and eliminating them from commission compensation, and/or making other unilateral ‘amendments’ to the rep agreement. Another common concern is dubious verbal agreements.

“A solution is a proper written agreement and contractual terms. For example, in the case of company accounts, clauses provide for protection of customer lists as proprietary to the party generating it. In the case of unilateral amendments, inclusion and enforcement of clauses that require written amendments signed by both parties, and above all remembering that to acquiesce in a verbal amendment might mean a loss of the right to later assert the clause requiring a written mutual amendment.”

Entering a successful manufacturer-representative relationship takes caution, due diligence and preparation. As our panel of legal professionals relates, the lack of these qualities can seriously jeopardize the profitable future of not just one, but two companies — yours and the principal’s.

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