Don't Trade a Brand New Cadillac for a Used Yugo

BY RANDALL J. GILLARY

I am in the midst of a sales representation agreement negotiation with a client of mine who represents principals to the automotive industry in Michigan. I have been in several similar negotiations over the past few years and thought that the issues may be of interest to MANA members, especially those who are sales representatives.

First of all, I should include somewhat of a disclaimer. My entire law practice is focused on representing sales representatives in commission disputes and related matters. Most of my clients represent principals to the automotive industry in North America and more and more of the principals are based in foreign countries such as China, Korea, India, Turkey and Germany. Additionally, most of my clients have been very successful, meaning that sales have often far exceeded original expectations. This can create problems especially when the commissions paid to the sales representative also exceed original expectations.

Rewriting Agreements

It is also important to keep in mind that I am often hired only when there is a problem. Most principal-sales representative relationships go very smoothly, and if you are one of those sales representatives in good relationships with your principals, cherish those relationships. Eventually, however, the law of averages will likely catch up with you. This article

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has been written for those sales representatives who have exceeded expectations and whose principals are trying to re-write their sales representation agreement.

The scenario I will be writing about is as follows:

- There is a written sales representation agreement which contains a good commission rate and a good post-termination commission payment provision. In the cases I have been involved in, the sales representation agreement was drafted by the sales representative's attorney.
- Sales and commissions have exceeded original expectations.
- The principal wants to reduce the commissions paid to the sales representative.
- The principal has terminated the existing sales representative agreement but wants to maintain the relationship.
- The principal wants the sales representative to sign a new sales representative agreement drafted by

the principal's attorney, which lowers commissions and generally takes dollars out of the existing agreement.

In my discussions with my clients, I often analogize these situations to one spouse asking the other spouse to renegotiate a pre-nuptial agreement after 10 years of marriage. Tough to do. Keep in mind that one of the primary functions of a contract is to allocate risk. Trying to reallocate the risks after successful performance is almost always very difficult to do.

***Step One** — Calculate the termination value of the existing agreement.*

The first thing you should do if you are in this situation is to calculate the amount of money that you are owed under the existing sales representative agreement. This should be fairly easy to do and most sales representatives already know the amount of money that they expect to earn under their agreement over the course of the next few years. That money is yours and you should not negotiate it away.

***Step Two** — Calculate the termination value of the proposed new agreement presuming that it is terminated the day after you sign it.*

This should also be relatively easy to do. You should not be fooled into thinking that your principal will not terminate the new contract after you sign it. In some cases the primary motivation of the principal is to make it easier and cheaper to terminate you. By definition, anytime your principal is trying to make it easier and cheaper to terminate you, the principal is considering ending the relationship. ***Never agree to make it easier and cheaper to terminate you!*** If you allow this to happen then you will have been out-strategized.

***Step Three** — Compare the Two Numbers.*

This is where I come up with the trading the new Cadillac for the used Yugo analogy. It is almost never a good idea to trade a good contract for a bad contract.

***Step Four** — If you decide to go forward, make sure that the existing sales representation agreement applies to the business obtained under the existing agreement and that the new agreement will only apply to new business obtained after the effective date of the new agreement.*

If you decide to go forward with the process of negotiating a new sales representation agreement, the new agreement should stand on its own. This is the key point of the article. I have no problem if the principal wants to establish new rules for new business. The principal has the right to do that after the prior agreement has been terminated. By the same token, the sales representative is not required to enter into the new agreement. He or she can just walk away and allow the termination to stand.

It is generally not a good idea to allow the new rules to apply to the business obtained under the original agreement. If this is a problem for your principal then it is a good indication of their true motivations.

Fighting Wars

I often tell my clients that I am in the war business. Basically I fight my clients' battles for them with the battle taking place in the courtroom.

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Prussian general Carl von Clausewitz (1780–1831) wrote an excellent book on military strategy entitled *Clausewitz: On War*. One of the quotes attributable to General Clausewitz is: "Prepare for what your enemy can do — not for what you think your enemy will do." This is not to say that when you are negotiating with your principal to replace your existing agreement with a new one or when you are negotiating with your principal for your first agreement that you should expect to be in a battle with your principal. Most sales representation relationships do not end in litigation. It is very good advice, however, to expect for your principal to take every advantage of the provisions of the contract that benefit the principal. The law allows this. Do not allow yourself to fall into a false sense of security thinking that your principal will either not terminate you or that the principal will not take advantage of every provision in the contract that benefits them. Your principal may not but you have to presume that your principal will.

Conclusion

Whenever your principal wants to terminate your existing sales representation agreement and to replace it with a new agreement, you should treat the business obtained under the existing agreement as payable under the existing agreement and the business obtained under the proposed new agreement as payable under the new agreement. If your principal is not willing to do this then you will likely be better off allowing the relationship to end pocketing the commissions owed under the old agreement, and to begin looking for a new principal to represent.

Randy J. Gillary is an attorney and has been a member of MANA since 1991. He concentrates his practice in representing manufacturers' representatives in sales commission disputes. Gillary has been litigating sales commission disputes for more than 33 years. He is also the author of the definitive book for manufacturers' representatives entitled *Protecting Your Commissions — A Sales Representatives' Guide*. The book is available on Amazon.com or through his website at www.gillarylaw.com or by calling his office at (238) 528-0440.