Discovery maneuvering is often aimed at wearing down reps in commission actions

Ordinarily, this column explores legal avenues available to protect the interests of independent sales reps, the willingness of courts to travel down such avenues, or both. Sometimes, however, developing an appropriate legal theory and filing a lawsuit (or arbitration demand) can prove the easy part.

As experienced litigants know, it is in the discovery process — the obtaining of written or electronic information and witness testimony — where cases are usually won or lost.

So rather than focus on the commission recovery theories, this edition of "Legally Speaking" examines a very recent and not atypical judicial look at certain litigation tactics aimed at defending against a commission recovery case through aggressive discovery efforts. Fortunately, by refusing to cave to the principal's aggressive tactics, the rep largely prevailed.

Relevant factual background

Controlled Kinematics Inc., or CKI, represents manufacturers of precision motion control solutions. Its principal, Novanta Corporation, supplies photonics and motion control components to OEMs in the advanced industrial technology markets.
CKI and MicroE Systems Inc. signed a rep contract in 2002. Novanta acquired MicroE in 2004, and entered into a new written contract with CKI in 2014.

The 2014 agreement added a new term, specifying that, following termination, CKI would get commissioned on purchase orders it presented to Novanta prior to the effective date of termination, and Novanta accepted within the 12-month period immediately following the effective date of termination.

Another principal represented by CKI was Applimotion, which Novanta acquired in 2015. CKI and Applimotion had no written contract. On the combined business, CKI was now earning commissions from Novanta totaling $1 million annually, painting a huge target on its back.

Come summer 2015, Novanta sought to lower CKI's commission rate. When the negotiations dragged on without a deal, Novanta dug in and informed CKI it would no longer recognize the

unwritten contractual relationship on the Applimotion business, and it withheld commissions due.

Novanta's resentment continued to grow. Claiming its inherited sales rep was "doing essentially nothing" to earn its sizeable commissions, in June 2016, it terminated CKI "without cause." Yet, Novanta also asserted that CKI was courting its competitors during 2016 and set up a directly competing business.

Relying on the 12-month payout period in the written 2014 rep agreement, CKI sought commissions on MicroE products for the last quarter of 2016. Novanta refused to pay, invoking a claim familiar to many reps whose principals decide to change sales strategies: that it, not CKI, drove the sales. Principals in financial trouble, experiencing a change in management, or preparing to change to a direct salesforce, are sometimes tempted to look at their longtime, hugely successful rep partners and abruptly decide they are no longer earning their commissions.

The ensuing court fight

CKI had little alternative but to take Novanta to court. An action to recover unpaid commissions was filed in the Boston federal court. To no surprise, Novanta decided it may as well counterclaim, and devised dubious contract theories against CKI, including that it wasn't working hard enough and that it improperly represented a competitor.

In pursuit of its unlikely claims, Novanta served broad and overbearing discovery requests upon CKI centered around two topics: 1) the activities of its employees, and 2) its work and preparation to work for a competitor. Naturally, CKI objected to such requests. Novanta then filed a motion to compel CKI to respond.

Probing the extent of the rep's sales efforts

With respect to its first pursuit, Novanta served an expansive request for all documents showing "what CKI and its principals and employees were doing on a daily basis in 2015 and 2016," and argued this information was directly relevant to its defense that CKI did not earn the post-termination commissions at issue. Invoking the MicroE contract terms calling for CKI to "diligently and actively promote, sell, support, install, and maintain" MicroE products, Novanta urged the court to compel its production.

CKI argued the requests went well beyond the limited scope of discovery, and the judge largely agreed. She noted that the request "is nearly limitless because any company document and all of the phone and computer records of CKI principals and employees could be interpreted as 'showing what CKI and its principals and employees were doing on a daily basis.'"

A plain reading of the request even called for CKI to produce records showing what its personnel were doing outside of work, which went "well beyond" the scope of the litigation. Novanta either intentionally exceeded the reasonable limits of discovery or didn't much worry about standards of reasonableness when the effect was to burden its former sales rep with cumbersome discovery demands. Seems they agreed with Clint Eastwood in one of his early Westerns, "Man With No Name," when he muttered: "I tried being reasonable. I didn't like it."

Arguably, these tactics were partially rewarded when Novanta obtained a highly questionable discovery ruling, the possible result of a court attempting to give both parties something. CKI was ordered to produce documents supporting its sales efforts in 2015 and 2016, even though the contractual obligation to pay commissions did not appear directly tied to such efforts. Additionally, such documents were highly unlikely to contain relevant information enabling a fair measurement of the quality and quantity of sales efforts, an inherently subjective determination.

Seeking discovery on work for the competition

CKI admitted during the litigation that it spoke with a Novanta competitor, Allied Motion, prior to its termination, but denied actually representing Allied until months after its termination. This was consistent with the contract. However, to test this claim, Novanta served discovery requests related to: 1) communications CKI had with any customer or prospective customer of Novanta, and 2) all communications with Allied Motion concerning sales representation. The time range began with the notice of termination, but contained no end date.

CKI objected to producing information about communications it had with customers after termination about its new principal, Allied Motion, as "intended to be harassing and to interfere in CKI's contractual relations." Novanta responded that its request was relevant to

assessing whether CKI complied with its contractual obligation to "diligently and actively promote, sell, support, install and maintain" the MicroE products, and the restriction on representing competitors.

The court again agreed with CKI that the request was overbroad, ruling that disputing how CKI spent its time while earning commissions does not enable Novanta "to seek discovery on everything CKI was doing during that time." Further, inquiring about CKI's communications with customers or potential customers about Allied Motion "is not probative of whether it 'diligently' or 'actively' promoted or sold" MicroE products. The court thus streamlined the request, including by adding an appropriate end date.

Similar objections were made by CKI to seeking its communications with Allied Motion about representation and the court issued a similar ruling, deeming the Novanta request overbroad due to a lack of time constraints. Notably, the court again tried to split the discovery baby to a certain extent by compelling production of documents reflecting CKI's work — limited to during 2016 — on the grounds that work performed during this period "may be relevant to determining whether CKI upheld its duties under the contract."

After expensive and time-consuming briefing on the discovery disputes, CKI's incomplete wins were less than it deserved. Alas, this comprises a fairly common outcome. The reality is, as Clint Eastwood reveals in his last Western, the Oscar-winning Unforgiven, "Deserve's got nothing to do with it."

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