

## President's Message

BY RUSS DAVIS



Russ Davis

At the last NICE sales conference, aboard the MS Oosterdam, Jim Crowl, of The Daily News in Moscow, Idaho shared an idea of a one day sale he was hoping to do on July 7, 2007. After listening to Steve Wagenlander, Corporate Director of Circulation at the Evening Post Publishing Company, give his conference presentation and sharing the success of his one day sale I thought it was time to try one. I always come away with a few good ideas from each NICE conference and was excited to give this idea a try.

Buckminster Fuller once said, "There is no such thing as a failed experiment, only experiments with unexpected outcomes." With this in mind I set out to experiment with our newspapers first one day sale. I liked Jim's idea of using the lucky number SEVEN and have a sale on the seventh day of the seventh month in the seventh year. So in keeping with the lucky number SEVEN I decided to make it a SEVEN hour sale starting at SEVEN a.m. And to add another SEVEN I decided to offer the newspaper for just SEVEN dollars per month, for as long as they wanted to pay. With our normal monthly rate being \$11.25 this was a savings of \$3.25 per month or \$39 a year. With the new subscriber choosing the number of months they wanted to subscribe, at the SEVEN dollar rate, I really didn't know what to expect. It was interesting to discover that 95% of the new subscribers who called in on our 777 sale paid for one year or more.

The next step, after deciding on doing a SEVEN hour sale was developing a plan of action. Part of my plan was using some the steps Steve Wagenlander outlined in his conference presentation. He noted that he used single sheet inserts into his single copy papers several days before the sale and the day before and the day of. With our single copy sales being so low, I wanted to reach a larger audience with word of the SEVEN hour sale. One thing that helped is that we already had a full distribution day scheduled for June 29th. Our full distribution day is where

we deliver a newspaper to every household in our market. So we decided to insert a single sheet, with the SEVEN hour sale, inside all the full distribution day papers along with the single copy newspapers the week prior to the SEVEN hour sale.

Since it was a SEVEN hour sale on the lucky day of July 7, 2007, we decided to use the lucky numbers

**Seven Hour Sale**

It's your **LUCKY** Day

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**SEVEN HOUR SALE**  
**One Day Only**  
**July 7th, 2007**

**7:00 a.m. to 2:00 p.m.**

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for just **\$7.00** per month (save \$4.50 per month)  
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\* \$7.00 offer is only valid for new subscribers (who have not subscribed in past 45 days) in our home delivery area. Payment is expected for the number of months you order during this seven hour sale on July 7th, 2007. Easy Pay is a one year commitment at just \$7.00 per month on your credit card. Subscription will continue at regular Easy Pay low rate after one year.

777 from a slot machine. Having found some art work to go along with the 777 theme the promotion piece was developed (see sample).

Along with developing single sheet inserts we also had a matching direct mail piece sent out to over 500 former subscribers, who had stopped their subscription due to non-payment or price. This direct mail piece hit the home mailboxes three days before the SEVEN hour sale. To recap, 20,000 single sheets inserts were placed into newspapers one week prior to the sale and 500 direct mail pieces were mailed out.

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# Legally Speaking

L. Michael Zinser • NICE General Counsel

*This month's column reports on the reversal of independent contractor status by the Mississippi Court of Appeals in a workers' comp case and we discuss the importance of institutionalizing independent contractor status.*



L. Michael Zinser

## **1. INDEPENDENT CONTRACTOR STATUS REVERSED**

The Court of Appeals for the State of Mississippi reversed the finding of the Circuit Court and ruled

that Tina Davis was an employee of The Clarion-Ledger, not an independent contractor. Tina Davis entered into an agreement with The Clarion-Ledger in 1999 to sell newspapers that she purchased and placed them in coin-operated newsracks and in businesses in a specified sales territory. Davis collected and kept the money from the racks and in-store sales with her compensation being the difference between the price she paid for the newspapers and the price the consumers paid.

This situation continued until January 2001 when Davis indicated that she wished to terminate the agreement because the compensation was insufficient. Davis relayed this message to a Clarion-Ledger

District Manager who requested that she continue servicing the sales territory until a replacement could be found. The DM proposed and Davis agreed that she would receive \$40 a day and \$5 a day gasoline allowance. She would continue to service the newsracks in the same manner as before; however, she would no longer purchase the papers and would no longer collect the money for them. The newsrack locks were then replaced by The Clarion-Ledger locks.

Two weeks after this arrangement went into effect, Davis injured her ankle after servicing a newsrack. She then filed a workers' comp claim. The Mississippi Workers' Compensation Commission, finding that Davis was an independent contractor, denied her claim for workers' compensation benefits. Davis appealed to the county Circuit Court that affirmed the denial of benefits. The matter then moved to the Mississippi Court of Appeals.

The Court of Appeals stated, "It is the right to control, rather than the exercise of that right, which is decisive." It continued by listing evidence from the record it found to be

indicative of The Clarion-Ledger's right to control, which included: Davis no longer purchased newspapers; newspapers were provided by The Clarion Ledger which Davis now used to fill newsracks and transport to businesses for sale; Davis' locks were removed from the newsracks and were replaced by The Clarion-Ledger's locks; Davis no longer collected money from the newsracks, rather this task was taken up by DM Tharp. So that she could service the racks, Davis was provided with quarters by The Clarion-Ledger as a means to access the newsracks while preventing access to the money in the coin boxes. And although she furnished her own vehicle and never actually received payment, arrangements were made to furnish Davis with a gasoline allowance. These factors, the court found, "tend to illustrate The Clarion-Ledger's right to control the details of Davis' work."

In addition, the Court noted that Davis was to be paid a salary of \$40 a day regardless of the number of papers sold – a factor, which the court found, clearly favored a find-

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One of the draw backs or challenges in our one day sale process was the SEVENTH of July was a Saturday and just after the 4th of July holiday. But the whole idea that 07/07/07 would not happen for another hundred years was to exciting not to go forward with the SEVEN hour sale. The final result was 81 new sales during the SEVEN hour event. We had 20 or more calls several days in advance of the sale asking to sign up early but we held to our SEVEN hour sale guidelines (as outlined

by Steve Wagenlander). We don't know if those folks called back during the SEVEN hour sale. After the costs of printing and mailing SEVEN hour sale flyers and the additional cost an extra employee to answer the phone during the SEVEN hour sale our cost per order for the 81 new subscriptions was \$18.00.

Maybe next August I'll have an EIGHT hour sale on the EIGHT day of the EIGHTH month of the EIGHTH year. All for just EIGHT dollars a month!

Dave Jacobsen, unable to attend the conference aboard the Oosterdam, was presented the 2007 President's award May 11, 2007 by Dale Irvine, NICE Secretary/Treasurer. John Brewer, publisher of the Peninsula Daily News also attended the presentation.



## Legally Speaking

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ing of employment. And finally, the court noted that either Davis or The Clarion- Ledger could terminate the new agreement at any time. For these reasons, the court found that Davis was an employee of The Clarion-Ledger.

Zinser Comment: I am often asked about a flat fee per day for contractor compensation. There are cases holding it is not evidence of employee status. However, I usually recommend that contract compensation fluctuate, as this is stronger than a flat rate. As I have often opined, "gas allowances" are a bad factor. Remember, no one factor is determinative. In St. Joseph News-Press, the existence of a gas allowance did not prevent an independent contractor ruling. However, viewed in isolation, a gas allowance is a piece of evidence of employee status. A buy-sell relationship continues to be viewed by courts and agencies as a strong independent contractor factor. This case illustrates how these factors catch the attention of a court.

## 2. INSTITUTIONALIZE INDEPENDENT CONTRACTOR STATUS

Make independent contractor a franchise issue for the newspaper. This is critical to the newspaper for many reasons.

The following laws will dramatically impact your newspaper, depending upon whether your newspaper carriers are employees or independent contractors:

- National Labor Relations Act
- State Unemployment Laws
- Workers Compensation
- Fair Labor Standards Act
- Tort Laws
- Antitrust Laws
- State and Federal Tax Laws
- Immigration Reform Act
- Title VII of the Civil Rights Act of 1964
- The Age Discrimination in Employment Act
- 1991 Civil Rights Act
- Americans with Disabilities Act
- Family and Medical Leave Act of 1993

As you can see, the stakes are high. The Newspaper Association of America recognizes this and has formed a task force charged with developing the best practices for

newspapers to consider "institutionalizing" independent contractor status and making it a way of life. I am honored to report that NAA has asked me to be the legal advisor to the task force on this important, critical mission. As we progress, I will share more information.

## Conference Dates for Vancouver Set

The 2008 conference dates are May 6-8, 2008. The conference will be held at the Vancouver, Washington Hilton hotel, adjacent to the Vancouver Convention Center. Our hosts next year are our friends at the Columbian.

# 2007

## *An Interesting Year*

2007 has been an interesting year for our industry. We are seeing reductions in resources while revenues and circulation volumes are declining.

**W**ith that challenge we looked at the priorities of our circulation department. We determined that retaining our current customer base is our number one priority.

The next job at hand was to come up with a way to address this priority.

The approach that we decided upon was to take the hassle out of being a subscriber. We focused our attention on two things, service and EZ-Pay.

Delivery service was our first line of attack. Our customer base demands porch delivery. This type of delivery is challenging with an all adult carrier force. Don Robinson and I put together a program that we thought would help reduce our delivery complaints called "The Bottom One."

This program has each District

Manager take the carrier in his or hers district that has the worst CPM and either retrain or replace the carrier.

We also introduced a CPM contest that rewards our carrier force for delivering at or below a 1.5 CPM. This has paid great dividends. We reduced our CPM by 9.7% daily and 2.3% Sunday. The repeat complaints are down 70% YOY and carrier turnover is actually down 40%. We have found that the good carriers are staying on route longer and referring their friends to us. We believe it is because the carriers have seen a difference in the way the District Manager works with their carriers.

We are offering the EZ-Pay option to our customer base every time they call our office no matter the reason for the call. We sell EZ-Pay on complaint, vacation, or if

the customer is calling to say, "Hi we enjoy your delivery service."

We also include a bill stuffer and several different promotions to endorse this payment option. We have increased our EZ-Pay base by 7% over the past 3 months.

With these two changes we reduced our non-payment stops by 36% and total stops are down 32%. Our churn is down 19% daily and 24% Sunday. We want our customers to have the best experience possible with our paper and we are committed to making this happen.

It is great to be back in NICE after being gone for two years. I look forward to meeting you at the next conference.

**TIMOTHY R. COLES**  
Circulation Director  
Statesman Journal

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