

Reps Should Not Always Turn the Other Cheek

BY GERALD M. NEWMAN AND ADAM GLAZIER

Every experienced rep has stories like this to tell, most often from a relationship with a manufacturer who is not a MANA member.

Two and a half years invested in developing an account while receiving zero compensation, a rep meets with the first stirrings of success. The customer finally agrees to receive samples, and the rep happily reports this development to his partner, the manufacturer. The response is swift: termination. The samples, meanwhile, are on their way directly, and the deal with the customer closes soon after.

After enduring an uncertain relationship for years with a principal who pays late, insists on receiving call reports not called for in the contract, and constantly demands: "What did I get this week for your 3.5 percent?" the rep decides to find another line. Rather than pause to consider why a quality rep firm would walk away, the principal complains to the rep's customers that the rep was never trustworthy, and to express concern about the rep's conflicts of interest. Then, for good

measure, the principal has a different division of the company reach out to the rep's customers to offer its products at reduced prices.

A rep contract that provides for commissions to be paid for the "life of the product or life of the program" is terminated, and no further commissions are paid. When the rep inquires about the post-termination sales, the supplier dismisses her by claiming that no other commissionable sales were made, and "No, we won't send you any more commission reports so you can see for yourself."

Loyalty and Dedication

In each instance, the rep is left to go home, perhaps contemplate what missteps were made over an adult beverage, and to conclude the rep business is unfit for man or beast. What kind of business relationships are these? Why isn't loyalty and dedication recognized and honored?



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Why would manufacturers treat reps so unfairly?

The short answer is found in author and blogger Dina Zipin’s recent explanation for why celebrities glide down red carpets, clutch their

Oscars, and vacation in St. Bart’s: “Because they can.” With bad apple principals, of course, the more accurate answer is: Because they think they can.

The manufacturer who termi-

nates a contract and then hones in on the ex-rep’s carefully cultivated customer believes the rep will slink away quietly. After mistreating the rep for years, the principal who defames him following his resignation,



Manual for the Creation of a Rep-Principal Agreement

A well-written agreement is essential in the establishment of a relationship between a manufacturers' rep and a manufacturer.

The key phrase above is "well-written." The legal profession tells us both parties are better off with no written agreement than they are with a poorly written one. Make sure your written agreement does the job for both of you.

MANA offers members the *Manual for the Creation of a Rep-Principal Agreement*. The manual contains background and rationale information on each of the clauses that belong in an agreement. It also includes sample agreements in MS Word format. The user can copy and paste into new files for editing. Find it in the member area of the website, look for "Contract Guidelines."

MANA recommends that after you create your agreement you consult with a legal professional. The wording you use may have an entirely different interpretation from what you intended when attorneys read it. Contact MANA for a list of attorneys who are knowledgeable about the manufacturers' rep business.

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and then seeks to undercut him, has little fear of a response. And the supplier who not only breaches the lucrative "life-of-the-product" rep agreement, but laughs at its reporting provisions, is unlikely to think twice about any possible consequences.

Enforcing Rights

These kinds of abuses by entities with much deeper pockets are precisely why victimized reps must consider enforcing their rights under the law. Many courts will apply the "procuring cause doctrine" to enable reps who successfully solicit business before termination to continue receiving commissions on that business after termination, unless the parties' contract specifically cuts off post-termination compensations.

False statements by vindictive (or other) principals that do harm to the rep's reputation or standing in the community can leave the principal exposed for defamation, while at-

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tempts to interrupt and supplant the rep's known — or potential — contractual relationships can open the door to claims against the principal for tortious interference with the rep's business relationships.

Most states have a sales rep protection statute that authorizes recovery of not only unpaid commissions, but both attorney's fees and exemplary damages as well when a commission payment arrives late or not at all. These enhanced statutory penalties are specifically designed to level the playing field for the terminated and unpaid rep in what courts recognize is otherwise a decidedly uneven relationship.

The Importance of Taking Action

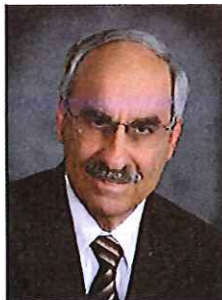
Oftentimes, insightful principals confronted with the rare rep firm unafraid to push back by asserting its rights will head off any need to consider litigation by attempting to negotiate an early and amicable resolution. It may be necessary to send a strongly worded letter reminding the principal of the remedies available, or to have an attorney send such a letter, in order to entice the principal into a good faith negotiation. The threat of potentially facing liability for three times the amount of late paid or unpaid commissions can prove a highly effective driver to get principals to the table.

Of course, for reps damaged to any considerable degree by principals who refuse to pay commissions earned, lash out unreasonably or dishonestly, or engage in opportunistic terminations, the option of taking the dispute to court (or arbitration — depending how the

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contract reads) must be explored. In instances where commissions are withheld, potential remedies available to the rep include a full accounting of relevant sales from the principal in order to determine the commissions due, and recovery of the unpaid commissions, procuring cause damages for future business, unjust enrichment, exemplary damages under the state sales rep statute, plus attorney's fees and costs.

Reps are often concerned that if word gets out they are litigating against a principal, even one who doesn't pay commissions due, it will tarnish their name in the industry. Equal thought should be given to the possibility that by sticking up for itself, the rep firm's position in the industry will be strengthened by demanding to be treated fairly, and showing the industry that abusive behavior will not be tolerated.



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