

Tips to a Better Rep Agreement

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A sales representative typically will review a sales representative agreement twice — at the start of its relationship with a new principal, and then at the end.

If the rep takes the time to read, understand, question, and yes, even negotiate the terms of a rep agreement at the start, there should be no surprises, and hopefully no problems, at the end. It's the difference between fire prevention and extinguishing a raging fire. But, too often, reps belatedly learn that their multi-year contracts can be terminated upon 30-days' notice, or that they won't receive post-termination commissions, or that their principal has the right to unilaterally change the rep agreement, including by reducing commission rates.

Bad rep agreements often are authored by a principal's attorney who doesn't have a clue what a rep does, or a rep's contribution to the sales process, or how a rep should be fairly compensated. However, the blame cannot be affixed solely on principals and their attorneys. The primary reason bad rep agreements exist is because reps accept them. Reps are so anxious to sign an agreement with a new principal that they don't consider or just ignore the adverse terms in the rep agreement until after they are terminated and discover they will not get paid for huge orders they spent months or even years procuring, or after their principals designate a key customer as a "house account."

It is at that point I get the call asking: "Can anything be done?" Regrettably, despite my many years successfully litigating commission collection claims and recovering millions of dollars in commissions, many times, I must advise the rep who signed a contract enabling the principal to take such action that the rep has no legal recourse.

I hate delivering such news when I know the result could have been different had the rep taken the time at the start to understand the contents of the rep agreement. I greatly prefer calls from reps asking me to review and counsel them about a proposed contract before it is signed.

Sometimes principals are receptive to making changes to their contract form, and sometimes they refuse to do so, even when their contract contains typos, misinformation, outdated content, or inherent inconsistencies. However, in all instances, it is worth the effort to question and seek to revise bad contract terms. Even without referring a proposed contract to its attorney, the rep should still attempt to improve its terms. Reps have nothing to lose and everything to gain by doing so.

On average, I review, revise and negotiate three to four rep agreements every week. Some are fair, some are atrocious. Based on this experience, I offer 10 tips to consider when engaging a possible new principal and reviewing a proposed rep agreement:

1. First, make your deal — The material terms of the rep agreement should not come as a surprise. They should reflect what you already discussed and agreed to with the prospective principal. Are you going to be an exclusive or non-exclusive rep? How is your territory comprised? Is the term of your contract going to be for a set period of time or will it automatically renew and continue until terminated? What is the commission rate? All these issues should be addressed and agreed upon before you receive the rep agreement.

2. Read the contract carefully at least twice. Make sure that you understand it. Question inconsistencies — Every word, every phrase, and even punctuation in a contract has meaning and legal significance. Make sure the proposed rep agreement does not contain inherent contradictions. For instance, a contract that purports to have a one-year term, but which can be terminated without cause on 30-days' notice is only a 30-day contract. Make sure it reflects your agreed upon terms.

3. Make sure the contract correctly identifies what you are and what you will do — You are an independent sales representative, not a broker, not an agent, not a distributor. Most independent sales representatives do not sell products. They solicit and promote the sale of products sold by their principals. The contract should not obligate you to sell or increase the sales of products in a territory. Sometimes you can't despite your best efforts. Such a provision may provide a principal with an excuse to terminate the contract "for cause," possibly providing the principal with an excuse not only to terminate, but to withhold commissions or post-termination commissions.

4. The commission provision must be clear and not subject to any unnecessary conditions — Getting paid is what it is all about. As such, make sure that you will get paid for your successful efforts. If you are an exclusive rep, meaning that you have an exclusive territory or account responsibilities, you should get a commission for all sales in the territory. Commissions should not be conditioned upon your "satisfactory" performance of services. Avoid rep agreements naming you as an exclusive rep or with an exclusive territory that also tie commissions only to sales you procured or solicited, or which result from your efforts. Such language is diametrically opposed to a legitimate exclusive territory.

5. The term of the contract should reflect the sales cycle for the territory and/or the products — In some instances, your efforts may not result in orders for months or even years, such as sales of products connected to a construction project, sales of “design-in” products to OEMs, or sale of capital equipment. In such cases, make sure the term of the contract gives you enough time to develop sales and to recover commissions. Make sure the rep agreement provides for the payment of post-termination commissions that also reflects the sales cycle. The longer it takes for an order to process and ship, the longer the post-termination period. A contract that only provides for shipments made through the effective date of termination will unfairly deprive you of commissions for sales already in the pipeline. At a minimum, you should insist upon commissions for all orders received through the effective date of termination, regardless of when shipped or paid.

6. A principal should not have the unilateral right to change commissions, territory and term — While there may be times it is appropriate to consider making changes to a sales rep agreement, such changes should be negotiated and agreed to in advance in writing. An agreement that enables the principal to unilaterally amend its material terms is hardly a negotiated agreement. Under no circumstances should changes be retroactive, such as allowing a principal to reduce commissions for orders already accepted.

7. Never, never agree to a post-termination restriction on competition — You should not be asked, and you should not agree, to give up your profession and your ability to make a living post-termination. Also, don’t agree to a “non-compete” provision hoping that a court will not enforce it. Courts in some jurisdictions may find well-drafted non-compete provisions enforceable. It simply is not worth the risk.

8. Do not give away or restrict your use of your own work product — A seemingly innocuous confidentiality provision in a rep agreement can sometimes be used as an alternative to a non-compete provision. To avoid that, a principal’s “confidential information” should only include information you receive from the principal itself. It should not include your own work product and resources. These are your intellectual property. They are the tools of your trade. They are why you were selected by the principal in the first place. Except under extraordinary purposes, the identity of customers or customer lists and information about customers that did not maintain a pre-existing relationship with the principal, should not be included in the definition of a principal’s “confidential information.”

9. Always include an indemnification provision — A principal should indemnify, defend and hold harmless its sales rep from any and all claims arising from or relating to the principal’s products, including claims involving products liability, intellectual infringement, warranty issues, and violations of laws relating to the principal’s products (including California’s “Proposition 65”). The rep also should be named as an additional insured under a principal’s product liability policy (which typically does not add any cost or burden to the principal). Make sure the indemnification provision survives the termination of the agreement just in case you get sued after your relationship with the principal is over.

10. Don’t be afraid to negotiate or to walk away from a bad contract — You negotiate every day of your professional career. You should never hesitate to negotiate for yourself with respect to the terms of your contract. Remember, the principal already selected you to serve as

its rep. It wants you because of your knowledge, experience and proven ability for getting results in your territory. However, if you cannot make a deal that is satisfactory, don't force the issue and agree to a bad contract in the hope that everything will work out in the end. Many times, it doesn't. You are better off walking away from a bad deal.

One more tip — after you sign an acceptable rep agreement, don't put it away in a drawer never to see the light of day until a problem arises or until the end of your relationship with your principal. I recommend that you review all of your rep agreements on an annual basis. Also, it is helpful to prepare a grid that summarizes the key provisions of all of your contracts such as term, termination, post-termination, house accounts, and territory. That way, you can plan ahead and avoid surprises

No contract is perfect. There always will be issues and problems in any dynamic business relationship. However, if you take the time to review, understand and negotiate a contract, and to assure that it clearly memorializes the term agreed upon with the principal, you likely will have the legal foundation for an excellent and mutually rewarding business relationship. After all, principals and reps should view themselves as a team, working together to promote the sale of the principal's products. A good rep agreement is part of achieving that shared goal.

MANA welcomes your comments on this article. Write to us at mana@manaonline.org.



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