

Contracts

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RECOMMENDED PRINCIPAL/REPRESENTATIVE AGREEMENT

Name of Officer
Name of Principal
Address
Address

Dear Name of Officer:

This letter confirms that Name of Principal (hereinafter "The Company"), and any of the Company's subsidiaries or related companies, engages Name of Manufacturers' Representative Agency Company (hereinafter "The Representative") commencing Date under the following terms and conditions:

1. The Representative shall keep the Company informed as to the general conditions which pertain to or affect the sale of its products.
2. The Representative will serve as an independent contractor and be responsible for payment of all applicable social security, withholding and other employment taxes. The Representative will bear all expenses incurred in its sales endeavors except those which the Company agrees to pay for in writing.
3. The Representative will diligently promote the sale of the Company's products and act as the Company's exclusive sales representative for all accounts (recite territory) and will make no representations, warranties or commitments binding the Company without the Company's prior written consent. Additionally, there shall be no house accounts or non-commissionable accounts in the territory unless accounts have been thoroughly reviewed and mutually agreed upon by both parties.
4. The Company agrees to promptly pay the Representative, as compensation for his/her services a commission of (specify) on the gross invoice amount of sales shipped into the Representative's exclusive territory. Payments (including all payments due for sales representatives and road staff hired and supervised by the Representative) shall be sent immediately to the Representative on or before the () th day of the month following the month in which the goods are shipped (or payment is received directly by the Company). The commission rate specified in this paragraph cannot be changed unless mutually agreed upon in writing.
5. The Representative shall receive commission on all shipments into its exclusive territory. Commissions shall also be paid on all orders originating from customers within the Representative's exclusive territory, regardless whether said orders are sent by the Representative or received directly by the Company from customers over the telephone, through the mail, by FAX, or through other means without the Representative's assistance. The Representative will also receive a split commission in accordance with the Specifier Identification System (SIS) approved by FCSI, MAFSI and NAFEM. There will be no deductions or chargebacks from the Representative's commission for any reason without the express written consent of both parties and the Representative shall not be responsible for the payment or collection of delinquent accounts.
6. The Company shall provide the Representative without charge the necessary supplies, promotional materials, reprints of advertisements, and such other items as the Company may deem advisable for promotion of its business and will make available to the Representative those pamphlets, advertising, promotional and sales materials free of charge and in reasonable quantities.

7. The Company shall maintain an accurate set of books and records regarding commissions due and shall furnish the Representative with copies of all invoices within () days. Commission statements containing accurate purchase order numbers, shipping dates, customer's names and address, invoice numbers and invoice dollars amounts.

8. The Company agrees to employ the Representative for a minimum period of (specify) from the effective date hereof through (specify). This Agreement cannot be shortened without the express written consent of both parties. In the event notice of termination is not sent by either party via certified mail, return receipt requested at least (3) months prior to the effective termination date, this Agreement shall be automatically renewed, under the same terms and conditions, for an additional (specify) period.
9. At the termination of this Agreement, a final accounting shall be made between the parties, The Company shall maintain an accurate set of books and records regarding commissions due the Representative following the termination of this Agreement and the Representative shall be paid full commission on all accepted orders in-house (optional: re-orders) at the date of termination which are shipped after the termination date. In the event the Company terminates this Agreement after it has been in effect for at least One (1) year, the Company agrees to pay the Representative a termination fee in an amount equal to One (1) month's average commissions, based on the twelve (12) calendar months preceding the month of the effective termination date, multiplied by the number of years this Agreement was in effect on the date of such termination; and said termination fee shall be paid within two (2) weeks after the termination of this Agreement.
10. During the term of this Agreement and for a period of One (1) year thereafter, neither party will hire or otherwise utilize the services of any employee or sales associate of the other. Both parties agree that the loss of such employee or sales representative would result in irreparable harm and grants to the other the right to seek damages and an injunction in a court of equity or other competent jurisdiction to enforce its rights hereunder. Arbitration Clause: Any case or controversy arising among or between the parties hereto, this Agreement or the subject matter herein, shall be settled by arbitration in the State of (specify) under the then prevailing rules of the American Arbitration Association. The decision of the arbitrators shall be final and binding and the prevailing party shall be entitled to recover all reasonable attorney fees and costs.
11. The Company shall provide the Representative with the names of all persons and companies within its exclusive territory requesting information on the Company's products, together with general correspondence, quotes, supply, price and timely delivery information.
12. The Company agrees to indemnify and hold the Representative harmless against any and all losses, legal fees, court costs and reasonable expenses arising from or in connection with claims for the infringement of any patent rights, property damage or personal injury arising from the products manufactured by the Company or sold by the Company pursuant to this Agreement.
13. This Agreement forms the entire understanding between the parties. It cancels and supersedes all prior agreements and understandings. There shall be no change or modification of any of the terms in this Agreement unless it is reduced to writing and signed by both parties.
14. This Agreement shall be binding upon each of the parties hereto, their heirs, successors, assigns and successors in interest.
15. If any term or provision of this Agreement shall to any extent be invalid or unenforceable, the remainder of the Agreement shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.
16. Any failure by either party to enforce this Agreement at any time or to exercise any option provided for herein will not constitute a waiver of any provisions of this Agreement.

17. All notices called for under this Agreement must be in writing and will be deemed given when mailed, certified mail, return receipt requested, to a party at its address written above or at such other address as a party may hereafter designate in writing to the other party.

THE CONTRACT'S THE THING!

There are still some in this industry who go back in time to when the only contract you needed between manufacturer and representative was a handshake. In today's business world, with the changes taking place as rapidly as they are, when the manager of today is gone off to another company tomorrow, those companies that have not bound their businesses to the clear definitions of a written contract between them may find themselves deep in controversy and litigation that will take months or years to unravel. We are faced with these realities in our modern business world:

Manufacturing firms are merging:

The company we started out doing business with five years ago can be an entirely different one today. And the difference could very well not be in our favor.

People change faster than companies:

Name the company you represent that hasn't had a change in sales or marketing management (from district on up to headquarters) in the last five years.

We all have short memories:

What we started out promising to do and being promised would be done for us become hazy and complex with each passing year. We have a tendency to forget (without reference to something in writing) what our original intent was when we first talked about our mutual responsibilities.

Our needs change:

Our outlook changes. The business gets more and more complicated. We're both not the same as we used to be. And, as a result, our relationship fluctuates over the years.

Unlike many years ago, most representative firms today have become business entities: Representative firms operate on a long-term basis and provide their principals with continuity of management. These contracts insure that continuity.

We constantly have government looking over our shoulders:

Demanding that we put everything into contract language to protect ourselves from future problems in any kind of litigation. Every so-called "Sales Representatives Protection Act" legislation has as its recurrent theme: "Put it in writing,"

What to say in the contract? What to cover?

The contract on the previous pages was not developed on a one-sided or biased basis. It provides recommendations and suggestions for contract language that will positively reinforce the best type of agreement.

How to start?

After the interview and the agreement by both sides that there is a healthy "mix" between the two of you, the manufacturer and the representative should sit down with this contract format and review each area in detail, making notes as to changes, additions, deletions. Following this preliminary approach, each party should then review the contract to see if there are any items not included that they require as part of their agreement.

Then call in counsel to make the necessary arrangements for further strengthening the agreement, get it into proper language and get it typed and signed into effect. This detailed,

painstaking process is more traumatic than a handshake. But it's a more businesslike approach that can add lasting value to your relationship.

GUIDELINES* FOR NEGOTIATING AGREEMENTS BETWEEN SALES REPRESENTATIVES AND MANUFACTURERS

1. Appointment and Acceptance:

Manufacturer appoints Representative as its exclusive selling representative to sell products (enumerated in Provision No. 3 hereof) in the territory (defined in Provision No. 2 hereof); and Representative accepts the appointment and agrees to sell and promote the sale of the Manufacturer's products.

2. Territory:

Representative's territory shall consist of the following:

The territory can be designated as specific states, counties, cities, or in any other way which clearly delineates the area. If the territory is not a specific area, and is limited only to specific customers, the customers should be named. If there are any customers or "house accounts" to be excluded from the territory, they should be clearly listed by name and location.

3. Products:

The products of the Manufacturer to be sold by the Representative are:

The agreement should cover all products and services of the manufacturer unless the representative is to handle only specific products or services. If the representative is not handling all of the products of services the agreement should list the product lines, products or services the representative is handling. It is preferable not to list products by model or catalog numbers as these may change from time to time. The agreement should also indicate if new products or services developed or added by the manufacturer are to be included.

4. Amount of Compensation:

Representative's compensation for services performed hereunder shall be _____% of the "net invoice price" of the Manufacturer's product shipped into Representative's territory. However, when engineering, execution of the order, or shipment involves different territories, the Manufacturer will split the full commission among the Representatives whose territories are involved. The Manufacturer will make this determination using the SIS determined by FCSI, MAFSI and NAFEM and advise the interested Representatives at the time the order is submitted to the Manufacturer. The sum of the split commission shall add up to a full commission and no Representative whose territory is involved shall receive less than _____% of the full commission.

The blanks should be completed with the amount of commission agreed upon. There are many different arrangements that can be worked out between a representative and a manufacturer. If a representative is expected to develop a new market, he should consider requesting a higher commission rate than ordinarily paid by the manufacturer, or for some monetary subsidy during the period of time necessary to develop the market. If the representative is asked to handle a product line for a new manufacturer and the representatives' activities could result in a significant contribution to the success of the company, the representative could request an opportunity for an equity position in the manufacturers company. In either or both of these situations, the representative could also consider a more favorable severance clause than that ordinarily negotiated with other manufacturers.

The representative should consider negotiating for any one or a combination of the following forms of compensation:

- a) A commission based on the "net invoice price" of the manufacturer's products shipped into the representative's territory and a split of commissions when engineering, execution of the order, or shipment involves different territories (i.e., 50% to the representative in whose territory the product is engineered or specifications are prepared; 25% to the representative

into whose territory the product is shipped; and 25% to representative in whose territory the order is executed),

- b)** A monthly retainer fee or draw against commissions actually earned-with reconciliation of any amount due or overpaid to the representative within (30) thirty days after the end of each calendar quarter, or after the end of any period agreed upon. (Any amount due upon reconciliation to be paid by the 10th of the month following reconciliation and any overpayment to be deducted from the next commission check due the representative.)
- c)** A retainer fee to be paid in addition to commissions on sales.

- d) An accelerated commission rate to be paid on sales which exceed certain volume levels. A quota could be established each year, based on the previous year's sales, and an increased commission rate paid on sales in excess of that quota.
- e) The establishment of a Representative's Fund in which the manufacturer would deposit a percentage of the commissions earned by the representative each month (in addition to commissions earned and paid the representative). And if the manufacturer terminates the representative without cause, the fund would be paid to the representative. However, if the representative terminates the contract, or if it is terminated by the manufacturer for cause, the manufacturer would retain the Representative's Fund.
- f) The opportunity to use a portion of the monies earned by the representative to purchase stock of the manufacturer. If the representative is effective in establishing customer relationships and developing market acceptance for the manufacturer's product line, the manufacturer's stock could appreciate considerably. The representative may want the opportunity to participate in the growth of the manufacturer and the appreciation of the manufacturer's stock by acquiring a stock position. The procedure for purchasing the stock and the price to be paid for the stock should be carefully negotiated.

5. Computation and Payment of Commission:

- a) Commissions are due and payable on or before the ____ day of the month following the month in which the customer is invoiced; and if not paid when due, the amount not paid will accrue interest at ____% per annum from the date due until paid.
- b) Manufacturer will send Representative copies of all invoices electronically or by other means at the time Manufacturer invoices customer, and each invoice shall indicate the amount of commission due Representative.
- c) At the time of payment of commissions to Representative, Manufacturer will send Representative a commission statement showing:
 - 1. the computation of all commissions earned during the (90) ninety day period prior to its issuance (listing all invoices covered by the statement), and
 - 2. commissions paid during that period (listing the invoices on which commissions are being paid), and
 - 3. commissions due and owing Representative.
- d) "Net invoice price" shall mean the total price at which an order is invoiced to the customer, including any increase or decrease in the total amount of the order (even though such increase or decrease takes place after the effective date of termination), but excluding shipping and mailing costs; taxes; insurance; and any allowances or discounts granted to the customer by the Manufacturer.
- e) "Order" shall mean any commitment to purchase Manufacturer's products which calls for shipment in to Representative's territory or which is subject to split commission in accordance with Provision No. 4 hereof.

The blanks should be completed with the day of the month on which commissions are to be paid, and the amount of the interest to be charged on commissions due and not paid. The representative might consider:

- a) Requesting that payment of commissions be made on or before the day of the month following the month in which:
 - 1. the order is dated, or
 - 2. the order is received by the manufacturer, or
 - 3. the order is accepted by the manufacturer, or
 - 4. the order is invoiced, or
 - 5. shipment is made.
- b) Negotiating for the payment of commissions on lease agreements and the manner in which commissions will be computed (i.e., to have commissions on lease agreements payable in full at the time of the initial lease payment to the manufacturer).

- c)** The possibility of the payment of commissions on distributor sales to the representative covering the territory in which the distributor makes the sale to its customer. It may also be possible to work out some split commission arrangement between the representative who covers the territory in which the distributor is located and the representative covering the territory in which the distributor's customer is located.
- d)** Providing for the payment of _____% interest per annum on commissions not paid when due accruing from the date, or providing for the execution and delivery of a promissory note by the manufacturer (with an appropriate rate of interest) when the manufacturer is delinquent in the payment of commissions due.
- e)** Obligating the manufacturer to pay attorney fees and collection costs when it is necessary for the representative to sue the manufacturer to recover monies due and owing him.

6. Acceptance of Orders:

All orders are subject to acceptance or rejection by an authorized officer of Manufacturer at its home office and to the approval of the Manufacturer's credit department. Manufacturer shall be responsible for all credit risks and collections.

If Manufacturer notifies customer of its acceptance or rejection of an order, a copy of any written notification shall be transmitted to the Representative. At least once every month, Manufacturer shall supply Representative with copies of all orders received directly by the Manufacturer, copies of all shipping notices, and copies of all correspondence and quotations made to the customers in the territory.

7. Terms of Sale:

All sales shall be at prices and upon terms established by the Manufacturer and it shall have the right, after detailed discussion with their representative, from time to time, to establish, change, alter or amend prices and other terms and conditions of sale. Representative shall not accept orders in the Manufacturer's name, make price quotations or delivery promises without the Manufacturer's prior approval.

8. Representative's Relationship and Conduct of Business:

- a) Representative shall maintain sales office in the territory and shall use its best efforts and devote such time as may be reasonably necessary to sell and promote the sale of Manufacturer's products within the territory.
- b) Representative will conduct all of its business in its own name and in such manner as it may see fit. Representative will pay all expenses whatever of its office and activities and be responsible for the acts and expenses of its employees.
- c) Nothing in this agreement shall be construed to constitute Representative as the employee of the Manufacturer, nor shall either party have any authority to bind the other in any respect, it being intended that each shall remain an independent contractor responsible only for its own actions.
- d) Representative shall not, without Manufacturer's prior written approval, enlarge, or limit orders, make representations or guarantees concerning Manufacturer's product or accept the return of, or make any allowance for such products.
- e) Representative shall furnish to Manufacturer's credit department any information which it may have from time to time relative to the credit standing of any of its customers.
- f) Representative shall abide by Manufacturer's policies and communicate same to Manufacturer's customers.
- g) Manufacturer shall be solely responsible for the design, development, supply, production and performance of its products and the protection of its trade names. Manufacturer agrees to indemnify and hold representative harmless from and against and to pay all losses, costs, damages or expenses whatsoever, including reasonable attorney's fees, which Representative may sustain or incur on account of infringement or alleged infringement of patents, trademarks, or trade names, or breach of warranty or claimed breach of warranty in any way resulting from the sale of Manufacturer's products. Manufacturer will indemnify Representative from and hold it harmless from and against all liabilities, losses, damages, costs or expenses, including reasonable attorney's fees, which it may at any time suffer, incur, or be required to pay by reason of injury or death to any person or damage to property or both caused or allegedly caused by any products sold by Manufacturer.
- h) Manufacturer shall furnish Representative, at no expense to Representative, samples, catalogs, literature and any other material necessary for the proper promotion and sale of its products in the territory. Any literature which is not used or samples or other equipment belonging to the Manufacturer shall be returned to the Manufacturer at its request.

Whenever Representative, at Manufacturer's request, takes possession of Manufacturer's products for the purpose of delivering such products to customers for any other purpose, the risk

of loss or damage to or destruction of such products shall be borne by the Manufacturer, and Manufacturer shall indemnify and hold representative harmless against any claims, debts, liabilities or causes of action resulting from any such loss, damage or destruction.

The Representative could consider negotiating with the Manufacturer for:

- a) Payment of transportation and all other expenses relating to the representative's personnel attending a sales meeting or training seminar at the specific request of the manufacturer.
- b) For a "most favored nations clause" (i.e., 'Any rights, payments or other benefits provided in any other agreement between the manufacturer and a sales representative [in effect during the term of the agreement] which are not provided in this agreement or which are more favorable than those provided in this agreement, shall be deemed to be incorporated into this agreement as though they were set forth herein verbatim'). In this connection, the representative should ask the manufacturer for the opportunity to review other agreements with representatives so that the representative will be aware of the provisions and arrangements which are different from those suggested by the manufacturer for the agreement being negotiated.

9. Term of Agreement and Termination:

This agreement shall be effective on the day of ____ 19____, and shall continue for ____year(s) until the ____day of 19____. It shall be automatically renewed from year to year thereafter unless terminated by either party upon ____days notice to the other by registered mail or certified mail prior to the end of the initial term of this agreement, or any renewal term.

The date on which this agreement is to become effective, the term and the expiration date should be filled in. The term of the agreement may be for a specific period of time, or for a period of time which will automatically continue if the agreement is not terminated by written notice from one party to the other. The number of days required for written notice of termination should be negotiated. The representative might also consider negotiating for a contract that will not permit cancellation for one (1) year (or more) unless there is a mutual agreement to terminate, there is bankruptcy involving one of the parties, or the business of one of the parties is discontinued.

The termination provision could also include any one or more of the following:

- a) By either party upon ninety (90) days written notice to the other in the event of unreasonable or repeated failure to perform as agreed.
- b) By mutual agreement.
- c) By either party in the event that the other shall file or has filed against a petition of bankruptcy (which is not dismissed within thirty (30) days after it is filed), or makes an assignment for the benefit of creditors.

10. Rights Upon Termination:

Upon termination of this agreement for any reason, Representative shall be entitled to:

- a) Commissions on all orders calling for shipment into Representative's territory which are dated or communicated to Manufacturer prior to the effective date of termination, regardless of when such orders are shipped; and
- b) Its share of split commissions on orders dated or communicated to Manufacturer prior to the effective date of termination, regardless of when such orders are shipped.
- c) Commissions referred to in this Provision No. 10 shall be paid on or before the day of the month in which the Manufacturer receives payment for the orders.

In addition, representative may be entitled to, and should consider the addition of, the following: "In the event of termination, manufacturer shall make its customer orders and shipping records available to the representative, or the representative's duly authorized agent, for inspection at the manufacturer's place of business"

In addition to the commissions referred to in this Provision No. 10, there are a number of ways to reward representatives for services or tenure, some of which are as follows:

- a)** The representative shall be paid full commissions when due on all orders dated during the ninety (90) day period immediately following the effective date of termination. In addition, the representative will be paid one-half commission when due on all orders dated during the +0-day period commencing on the 91st day and concluding on the 150th day following the effective date of termination. (The number of days can be changed to fit the circumstances.)

- b) By establishing a program of "severance payments" For example: One month's severance pay for each 2 full years as the representative of the manufacturer, with a maximum number of months of severance pay which can be earned (i.e., 12 months). Severance payments shall be paid monthly commencing with the 10th day of the month after the effective date of termination. Each payment shall be 1/12th of the total commissions payable to the representative in the 12 full calendar months preceding the effective date of such termination. The number of monthly "severance payments" might be: (The following are examples of severance arrangements which may be negotiated. If representative has been involved in substantial market developments, he should consider an arrangement which provides for more substantial severance payments.)

No. of Consecutive Years as a Representative for the Manufacturer No. of Monthly Severance Payments

More than 2 years/less than 4 years	1
More than 4 years/less than 6 years	2
More than 6 years/less than 8 years	3
More than 8 years/less than 10 years	4
More than 10 years/less than 12 years	5
More than 12 years/less than 14 years	6
More than 14 years/less than 16 years	7
More than 16 years/less than 18 years	8
More than 18 years/less than 20 years	9
More than 20 years/less than 22 years	10
More than 22 years/less than 24 years	11
More than 24 years/less than 26 years	12

- c) By payment of a portion of future commissions for a period of time after termination, depending upon the number of years of service (i.e., if the representative has served the manufacturer 10 years, one-half of commissions that would have been earned by the representative if the contract had continued in force during the three-year period following the date of termination).
- d) In the event of the termination of the representative for any reason, the manufacturer agrees to be fair and reasonable in compensating the representative for the representative's efforts in developing customers in the territory which place orders or can reasonably be expected to place orders after the effective date of termination.
- e) Provide for greater severance payments in the event of termination when a manufacturer intends to service the territory through a direct factory salesman or a former employee of the manufacturer who is or intends to become a sales representative.

11. General:

This agreement contains the entire understanding of the parties, shall supersede any other oral or written agreements, and shall be binding upon, or inure to the benefit of, the parties' successors assigns. It may not be modified in any way without the written consent of both parties. Representative shall not have the right to assign this agreement in whole or in part without Manufacturer's written consent.

The representative might also consider the establishment of a manufacturer-sales representatives council (made up of company delegates and a delegate from each for selected sales representative firm(s) of the manufacturer) to discuss and exchange ideas of mutual benefit to the manufacturer and the representative. Sales representative, and manufacturers can benefit by the exchange of ideas, and the sales representative may be very helpful to the manufacturer in product and market development and planning. Manufacturer should pay transportation and other expenses relating to the representative's attendance at meetings of the council.

- a) This agreement shall be construed according to the laws of the State of _____.
- b) The parties agree that any disputes or questions arising hereunder including the construction or application of this agreement shall be settled by arbitration in accordance with the rules of the American Arbitration Association then in force, and that the arbitration hearings shall be held in the city in which the principal office of the party requesting arbitration (with the American Arbitration Association) is located. If the parties cannot agree upon an arbitrator within ten (10) days after the demand by either of them, either or both parties may request the American Arbitration Association to name a panel of five (5) arbitrators. The Manufacturer shall strike the names of two (2) on this list, the Representative shall then strike two (2) names, and the remaining name shall be the arbitrator. The decision of the arbitrator shall be final and binding upon the parties both as to law and to fact, and shall not be appealable to any court in any jurisdiction. The expenses of the arbitrator shall be shared equally by the parties, unless the arbitrator determines that the expenses shall be otherwise assessed.

*The format and considerations do not cover all possible situations and alternatives, and is presented only as a guide to point out some of the matters to be considered in negotiations. This should not be construed as recommendations, as every relationship between representative and manufacturer differs and cannot be covered by a standard agreement. Each agreement should be individually negotiated and prepared, and an attorney should be consulted concerning negotiation problems and the formalization of an agreement.

GUIDELINES FOR AN AGREEMENT TO WAREHOUSE CONSIGNED STOCK

This Agreement, made this _____ day of _____, 19 _____, by and between _____, a corporation incorporated under the laws of the State of _____, having its principal office at _____, hereinafter referred to as "Manufacturer" and/or "you, your,"

and

_____, a corporation incorporated under the laws of the State of _____, having its principal office at _____, hereinafter referred to as "Representative" and/or "we, us," as follows:

This Agreement is for the warehousing and shipment of products* on consignment basis by _____ (Manufacturer). It is not a sales representation agreement, and it is separate and exclusive from any such agreement.

(* Products shall be deemed to include any and all products received by us on your behalf.)

Warehouse refers to our facilities located at _____ (insert complete address) _____. Manufacturer will ship to us, from time to time, _____ products on "consignment." You will properly mark and pack all consigned products for shipment and pay the cost to deliver those products to us.

Upon delivery, we are to visually inspect each shipment and note any damage on the carrier's receipt. We are not responsible for any damage in transit if we promptly inform _____ (Manufacturer) of the damage and promptly forward a signed inspection report describing the damage, or evidence of waiver if the carrier waives inspection.

After inspection, the consigned stock is to be stored _____ (specify location, indoors or outdoors) at our above referenced location in an area clearly marked to identify the consigned products as belonging to _____ (Manufacturer). If state law requires that you file a statement of consignment, our signature is required on that statement. These procedures are required to protect your property against claims of any of our creditors by informing such creditors that the consigned stock is not owned by us. We must keep these products free from any lien, security interest or encumbrance.

When a buyer is located and if you decide to sell from stock consigned to us, you will notify us to ship specific products to the buyer. We then must remove the products from storage and arrange for delivery to the buyer. You shall pay the cost of shipment. Title to all consigned products shall remain with _____ (Manufacturer) until the products have been placed on carriers for shipment to the buyer.

** Note: These are FOB shipping point terms. They should be changed as necessary, i.e., FOB Destination: title would not transfer until delivered to customer.*

We are to confirm each shipment daily by written, telephone or electronic communication. After the end of each month, you will total the purchase price of all sales to buyers from the products consigned to us and pay us a warehousing fee at our then published rate, which currently is _____.

**Note: This should be completed with the fee agreed upon. There are many different arrangements that can be negotiated, such as flat fee per cubic foot per month, a percentage of sales from consigned inventory, etc.*

You may inspect your consigned products during our regular business hours. Upon your request, we are to complete an actual physical inventory of your consigned products and to report the results on forms you will supply. You may witness the inventory and review our records relating to your consigned products. Adjustments will be made using the current published distribution price. If we are required to take more than two inventories annually, you will pay the cost of all additional inventories. We shall store and handle your consigned products with due care and diligence, but you shall be responsible for damage or loss of consigned products arising from acts of God, acts of Government, inadequate packaging or other cause beyond our control. Your insurance company, if any, will waive the right of subrogation in regard to one consigned stock.

The risk of loss or damage to or destruction of such products shall be borne by you and you shall indemnify and hold Representative harmless against any claims, debts, liabilities or causes of action resulting from any such loss, damage or destruction.

You will file all returns and pay all taxes resulting from this storage arrangement provided we promptly communicate to _____ (Manufacturer) all governmental notices. You shall be solely responsible for the design, development, supply, production and performance of your products and the protection of your trade names. You agree to indemnify and hold us harmless from and against and to pay all losses, costs, damages or expenses whatsoever, including reasonable attorney's fees, which we may sustain or incur on account of infringement or alleged infringement of patents, trademarks or trade names, or breach of warranty or claimed breach of warranty in any way resulting from the sale of your products. You will indemnify us from and hold us harmless from and against all liabilities, losses, damages, costs or expenses, including reasonable attorney's fees, which we may at any time suffer, ensue or be required to pay by reason of injury or death to any person or damage to property or both caused or allegedly caused by any products sold by _____ (Manufacturer).

This warehouse arrangement may be terminated by either of us upon thirty (30) days advance written notice. Upon termination, you may come on to our property to remove all your products consigned to us. Prior to removal, however, any and all financial obligations and/or indebtedness to us must be paid in full. Upon termination, removal will be at your expense. If you do not supervise or inventory the final removal or if you direct us to ship the inventory to another location, we shall conduct a final inventory which shall be binding. We shall have no further responsibility for the inventory once it leaves our premises. No waiver of any provision in this arrangement shall operate to waive future occurrences. Any modification of this storage arrangement must be in writing and signed by both of us. However, from time to time, we will announce procedures to implement the above storage arrangement, which do not require your signature. We may amend such procedures with ten (10) days advance notice.

This Agreement contains the entire understanding of the parties, shall supersede any oral or written agreements, and shall be binding upon, or inure to the benefit of the parties' successors assigns. It may not be modified in any way without the written consent of both parties. We shall not have the right to assign this Agreement in whole or in part without your written consent.

(a) This Agreement shall be construed and enforced according to the laws of the State of ___ - _____ (Warehouse location) regardless of where it is entered into or performed.

(b) The parties agree that any disputes or questions arising hereunder, including the construction or application of this Agreement, shall be settled by arbitration in accordance with the rules of the American Arbitration Association then in force, and that the arbitration hearings shall be held in the city in which the principal office of the party requesting arbitration (with the American Arbitration Association) is located. If the parties cannot agree upon an arbitrator within ten (10) days after the demand by either of them, either or both parties may request the American Arbitration Association to name a panel of five (5) arbitrators. The Manufacturer shall strike the names of two (2) on this list, the Representative shall then strike two (2) names, and the remaining name shall be the arbitrator. The decision of the arbitrator shall be final and binding upon the parties both as to law and to fact, and shall not be appealable to any court in any jurisdiction. The expenses of the arbitrator shall be shared equally by the parties, unless the arbitrator determines that the expenses shall be otherwise assessed.

IN WITNESS THEREOF, the parties have executed this agreement this _____ day of _____, 19 ____, written in multiple counterparts, each of which shall be considered an original.

Manufacturer: _____
By: _____
Title: _____

Representative:

By:

Title:

Plan English or "Pain" English

By Gerald G. Salmen

"Say what you mean and mean what you say." We've all heard that phrase. When I was in law school, a required course was Legal Writing. I quickly learned that in my school there was a concerted effort to train prospective attorneys to write in "plain English." The goal was to purge from legal documents convoluted phrases, such as "party of the first part" and "party of the second part," and replace them with clear, concise and accurate words, such as (imagine!) the actual names of the parties.

My professor had no use for the legalese of "herewith" and "notwithstanding anything to the contrary hereinabove" and similar tortured phrases. I found this startling because almost all the language in the guidebooks that students - and lawyers - consult occasionally contained these and many other official sounding words in abundance. My professor told our class to forget salting our legal writing with legalisms and to write plainly.

He did caution that some phrases had acquired a special and widely understood meaning over time. We would learn how and when to use them in our law school training. But we would be more effective for our future clients if we took the time and exercised courage to write in "plain English" rather than legalese or "pain" English.

Plain English for Reps and Principals

Reps and principals should use plain English in their Communications and documents. In reviewing proposed contracts, I often find unclear writing. When I ask my client to explain certain language in the agreement, my client usually says, "You know, I wondered about that, too." Or as we discuss the words, we find them susceptible to various meanings. Or I'm told that some other lawyer drafted the language so it must mean something.

What it means is that the contract still needs work. The parties must clarify their understandings and translate those concepts into plain English. Sometimes this is hard work because it is human nature to assume that the other person comprehends and agrees with our own understanding. Think about how many times in everyday conversation someone states a position, follows it up with "You know what I mean?" and quickly moves on to the next point without really determining if there was understanding.

Here's another example. If I ask you to think of a tree, you will do so. But you may be picturing an oak tree, while I am picturing a pine tree. We are both right, however, the specifics of our concepts do not match up.

Similarly, the words in a rep-principal contract may be "plain" such as in our tree example, but the specific meaning attached to the word may be very different for each party. Consider the word "orders" as in the phrase "commissions will be paid on all orders." The rep probably thinks it means every kind of order, including blanket orders, regardless when releases occur. The principal usually thinks it means only specific requested releases. Big difference.

Suppose we add a word: "Commissions will be paid on all solicited orders." Does that help? No way. The rep will argue that he/she solicited the blanket order, and the principal will contend that it means she had to solicit the specific releases.

Plain English Beyond Contracts

"Pain" English problems can occur in communications between reps and principals other than in their contracts. Let's say that to meet a tough customer's demands, the rep and the principal agree over the telephone to reduce the commission for the "initial order." They document their

agreement in a letter that says that the commission to be paid per the written contract is "reduced for the initial order only."

What is the "initial order" Is it only the first commissionable production order that may be a small quantity or is it the entire production under the purchase order? Again, big difference.

Plain English = No Assumptions, Common Sense and Work

A productive way to get to plain English is to not assume things about words and documents. Do not assume that because a lawyer prepared the document that he must have accurately and clearly translated your agreements into words. Question language you do not understand or that seems vague to you. See if you are both thinking of the same kind of tree.

Do not assume that you can write plain English automatically. Consider having someone unfamiliar with your position read what you have written and seek (and listen to) an honest evaluation of your language in the critical areas of the document.

Do not assume that your lawyer has a basic form contract or other document that simply requires filling in the blanks. Every business relationship has its unique aspects. You must be willing to take the time to get it right in the writing.

If you, as the party of the first part, follow the advice hereinabove proffered, with all parties of the second part hereinafter contracted, communicated or otherwise conjoined, you will avoid, diminish or rectify convoluted word compositions. In other words, make efforts to use plain English and common sense to avoid "pain" English.

About the Author:

Gerald (Jerry) G. Salmen, formerly a partner in the Cincinnati law firm of Wood & Lamping recently formed his own practice, The Law Offices of Gerald G. Salmen. A graduate of the University of Cincinnati College of Law, Jerry has practiced law for over 20 years- He has represented both manufacturers and agents in contractual matters and in the resolution of disputes. He is counseling attorney for MANA as well as for the Manufacturers' Agents of Cincinnati and has written articles and spoken to many groups, including MANA's educational symposiums, regarding the principal-agent relationship. Jerry has extensive experience in product liability concerns of those involved in product distribution.

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BETTER REPPING SURVEY REPORTS—CONTRACTS

For Representatives and Manufacturers - Designed to Improve Teamwork and Profits

by Jack Berman

Survey Results - "Contracts"

General Observations

There was more controversy expressed in this survey than I had expected. It gave both Manufacturers and Representatives an opportunity to express their strong feelings, as well as to present their reasons for action and emotions. Particularly look at the Representatives' viewpoints on waiting to receive commissions until the customer pays, and the Manufacturers explanations on the fairness of 30 day termination clauses. We are all striving for better relationships resulting in more profitable business.

Here are the results:

65% of the Manufacturers believe Contracts should be identical for all of their Representatives, while 62% of the Representatives believe they don't have to be the same.

Reasons for Identical Contracts - Most Principals and some Representatives agree:

- Representatives must be treated equally. "Deals" with some Representatives and not others is unfair.
- Lack of uniformity creates too many interrelationship problems between representatives.
- Administration is too complicated

Reasons for Differences in Contracts - Most Representatives and some Principals agree:

- Differences in market conditions.
- Differences in territories.
- Extra effort to build up a territory.
- Specifics applying to national accounts.

Quotes from MANUFACTURERS who believe in Identical Contracts:

"A Manufacturer makes a multitude of decisions daily in dealing with Representatives. If there are different contracts, each must be checked every time a change is made. Special situations of a temporary nature should be addressed with an addendum to the contract. These are flexible and easier to review, but there should be few of them."

"In a large organization it would be difficult to inform key people of deviations."

"Contracts cover the basics of the agreement, not the spirit of the relationship. Basics should be the same for all Representatives."

"I wouldn't want to keep track of the varying situations. With the number of good representatives available in any territory, someone will agree to our standard terms. If not, I should review my terms overall."

Quotes from REPRESENTATIVES who believe in Identical Contracts:

"How can you have a Representative Council when Representatives are not treated equally?"

"Split commissions could create problems if contract differences existed."

"I would hate to represent a company for a long time and find out another representative had a better deal. I realize that each territory has its problems and I think each representative has the right to the best deal he can get, but I feel that all representatives should be treated the same."

Quotes from Manufacturers who believe all contracts DON'T have to be identical:

"Specific issues on distributor and end-user locations are possible exceptions."

"Different market areas may require different responsibilities."

"Four factors are considered: 1. Longevity; 2. Needs; 3. Objectives; 4. Account size."

"Representatives, markets, and motivations vary."

Quotes from Representatives who feel that Contracts DON'T have to have identical:

"Contract terms should be negotiated for a "win-win" agreement. Territories and customers vary, and the contract should accommodate these differences."

"Most Representatives in my industry do not negotiate Contracts. This is a mistake. Representatives and Principals would all be better off if the Principals were open to listening about some provisions we feel are not fair."

"If some Representatives do not negotiate clauses they consider unfair, the Representatives who do, cannot be successful."

"Consideration should be given to a large territory with increased costs such as travel, time, and communications."

"Representatives, like employees, have different value. Manufacturers do not pay all employees the same wages. Contracts should be based on the value the Representative brings. Is a 10 or 20 person organization with strong inside sales support the same as a 1 or 2 person organization? Representatives are different, so contracts should be different."

"There are many variables today in types of customers, differences in territories, contract manufacturing, off shore opportunities. These must be considered"

"A territory with a large backlog is different than a virgin territory. Similarly, a Representative may want to have different contract terms based on sales volume. Pioneering is costly, so extended termination might motivate the Representative to make more investment."

**80% of Principals pay Commissions on Invoice; 20% pay when customer pays.
89% of Representatives feel it is unfair to them to wait until the customer pays.
11% feel It is unfair to be paid late.**

Quotes from the Manufacturers who pay based on Invoice:

"We pay after invoicing. We used to pay after the customer paid, but it was difficult, and the Representatives didn't like it."

"The credit decision is made by the manufacturer, not the Representative."

"The Representative is an independent business man and needs cash flow to operate effectively. If he waits until the customer pays, it could be 90 days after the invoice."

"It is our job to collect. We ask the Representative to assist only when Purchasing is involved. We decide on credit, so the Representative should be paid when we ship to the customer, or when the distributor ships to the customer."

Quotes from the 20% of Manufacturers who pay after customers pay:

"It costs time and money to collect from a slow-pay customer. Waiting until the customer pays gives the Representative incentive to help the Manufacturer collect."

"We all share the risk when, we pay after we are paid. It seems we are better off."

"I would need to hear strong reasons why the Representative should be paid before we are."

"It is standard practice. If we change independently it would impact Our costs."

"Representatives hate being delayed and shorted on commission. I hate poor-paying customers. They hurt our ability to grow and support our Representatives. We need his help."

"The manufacturer is not a bank."

Quotes from Representatives:

"Commissions should be paid on acceptance of order. The manufacturer is responsible for what happens after that."

"We cannot wait until the customer pays. We have already spent money and time to get the order. If deliveries are running 2-3 months, it is already too long a wait for the Representative. Add 30-45 days for the customer to pay and another month for our payment, we could be waiting 4-6 months to be paid."

"Our problem is a Principal who holds commissions during his cash flow problem."

**74% of Manufacturers have a termination notice of 30 days; 13% give three months; the others vary, some considering length of service.
80% of Representatives feel 30 day notice is unfair**

Quotes from Manufacturers:

"The contract works both ways. I've seen Representatives resign lines with no warning. If relationships are not good, neither will be surprised with a 30 day warning."

"Once the relationship is severed, everyone looks after their own interests. It is best to admit that up front. We pay for all backlog but when it's over- its over."

"No Representative or Manufacturer should be surprised by a termination if it is the result of poor performance. The termination should be the last step in a longer chain of communications to resolve the issues."

"Lame duck tenure should be short."

"Thirty days is a powerful motivator. However if a Manufacturer terminates a Representative who is truly not aware of why, then the Manufacturer has not performed due diligence and is at fault. But once the decision is made, and made correctly, action must be swift."

Representatives' Quotes on Termination Notice:

"Unfair are terminations without any warning or a chance to correct a problem. If a termination is to go direct, the period should be from 6 months to a year."

"The 30 day termination notice is a two-edged sword. It limits your stability, but allows you to take on better opportunities."

"30 days is fair. A longer termination notice goes two ways. If a Representative wants to pick up a competing line, he would be hamstrung with a long termination period."

How Manufacturers pay commissions on termination:

57% pay on all orders on hand when shipped.

21% pay on shipments for 90 days

7% pay for six months

7% pay for one month

3% pay for two months

3% pay a lump sum for all orders

91% of Representatives feel that payment for any fixed period is unfair - that payment should be for all orders on hand.

Quotes from Manufacturers:

"Fair is Fair. Pay on all orders received while the Representative was representing you"

"30 days is fair. Hopefully there were orders on the books when they were signed. At some point, you must pay the new Representative."

"The Representative booked them and, should be paid. It should not be a lump sum. That would be like a bonus at termination."

"The Representative should be compensated for orders received for current shipment through the 30 day notice period, plus shipments of orders in the house and due for shipment in 90 days. Substantial follow up is often required prior to shipment and the terminated Representative cannot be expected to do this. We feel the successor Representative earns the commission in view of follow up work and the demo start-up of our equipment."

"With us, 90% of customer requirements are shipped within 90 days. A lump sum is a cleaner method"

91% of Representatives negotiate when they feel some Contract Provisions are unfair. However, 84% of Manufacturers state they seldom have ever had a request to make changes; and 16% state they have never had a request. 62% of Manufacturers state they have made changes; 38% have not.

Contract provisions Representatives feel are most unfair: (in order of times mentioned)

- **House Accounts Low Commission Rates**
- **Non-exclusive Territory Payment after customer pays**
- **Non-payment on full backlog at termination**
- **Descending commission rate on increasing volume**
- **Non-compete clause on termination**
- **Sole right of Manufacturer to change contract and commission rates**

- **New company with 30 day termination**
- **Plus many others**

Change requests from Representatives that Manufacturers feel are most unfair:

61% did not report any unfair requests

39% reported the following:

- **Longer termination periods**
- **Reduction in Quotas**
- **Increased commission rates**
- **Payment on booking instead of shipment or payment from customer**
- **Unfair share of split commissions**
- **Asking for more territory**

Quotes from Manufacturers:

"Most common concern is with requests for lower quotas. Mutually setting quotas reduces this issue significantly."

"I don't consider anything unfair - I admire when Representatives ask, because I know they'll be just as tenacious in getting top dollar for our products!"

"Sometimes they ask for increased commission rates. If they want to increase commission, they should increase sales."

"It is unfair to ask for change unless the Representative offers something in exchange."

"A good hardworking Representative should not fear termination."

"Longer termination handcuffs us and eliminates one of the benefits of using a Representative sales force instead of direct."

"Representatives not disclosing all lines is unfair. I can live with certain situations if I am aware of them."

Representative Comments on Unfair clauses:

"A truly unfair contract indicates a firm that is basically unfair, and no amount of negotiation will change their attitude. So why bother. Go with the good guys and let the bad guys suffer as your competitors."

"We walked from two companies that want a hybrid setup - house accounts to 1 or 2 direct people. We would get distributors and small accounts. This doesn't fit us."

"After 21 years, our number one line changed their contract with very unfair clauses. We were told the contract was nonnegotiable, and to sign it or they would find a Representative who would. They take total control of our line acquisitions. All lines are considered competing because they are competing for our time. They can refuse our taking on any new line and demand that we drop any current line. Also we had to agree to binding arbitration giving up all rights to sue them in court. This line accounts for 86% of our income and they know it!"

"I have a contract on my desk. It will require pioneering, but has promise. It has a 30 day clause on payment on open orders. I will not take it on unless they agree to payment on backlog."

"Non-compete clause for one year if terminated is unethical. They shouldn't be able stop a person from making a living."

"The Representative doesn't have an account until he takes the order, and no commission when an order comes in direct."

"National accounts not included."

"I can't remember the time when a principal wanted us and nobody else. When we procure a line we always discuss unfair contract provisions but cannot push so hard that we might lose the line. However, we cannot tolerate house accounts; not getting our complete territory, or inclusion of areas we do not normally cover."

"Our largest principal wanted us to promote a new product at a reduced commission rate. We declined and they finally agreed to standard commission."

"I turned down a line twice when they insisted on exclusive rights to make any customer a house account. A lesser Representative took the line and lost several big accounts plus major revenues. He resigned."

General Comments by Manufacturers:

"We have made allowances for additional financial support for new representatives. This was a temporary addendum with a specified expiration date. We also have written an enhanced contract for established representatives who meet certain criteria."

"It was written in response to representative requests, but the factory decides who qualifies and how to enhance the standard contract."

"Contracts are good things! They should be the guide in disputes. Involve representatives in creating a good contract. Representative Councils can help put together a contract that is effective for both representatives and manufacturers."

"We are just about to end our 5th year. Our sales will be in excess of \$40 million. We are also very profitable. We think our great success is due to our great sales force and our Representative partnerships. Every decision has an element of building increased share of mind - and it is vital to our success. It sure seems to be working!"

"Our representatives are the foundation of our selling effort. We provide strong engineering and inside sales support to help close business. Reporting is minimal, so more time can be spent in the field. We believe contracts are not of great importance. Sign it and put it in the drawer. If representatives could sell as well as they interview - a handshake would suffice."

"Jack, this is an interesting topic and I am looking forward to the results. If you want a copy of our contract, let me know."

"Contracts should be shorter and clearer, without the "legalese", and should be agreed to by both parties. Manufacturers should be willing to negotiate contract terms because the more comfortable the representative is with the contract, the greater will be the push for the manufacturer's line."

"We only make changes due to extreme circumstance. We typically do a lot to help our representatives as a normal course of business. I try to help them understand us a little better and try to work with them in some other way rather changing the contract."

"We have good Representatives who are fair and honest business people."

"You have to be open-minded because the way companies do business is rapidly changing. This is affecting the way representatives have to sell, and if there are points in their contract that are hindering them, they should be able to approach you without fearing your wrath or the loss of the line."

"I am willing to listen, but try to discourage changes. If a Representative is unhappy, they should consider dropping us, as an unhappy representative does neither party any good."

"Our representative contract was developed in close cooperation with the Representative Council. So many questions never arise. I feel the contract we have is very fair, as my representatives agree, so I don't negotiate."

"Frankly Speaking"

By Jerry Frank

Jerry S. Frank (B.S., M.B.A.) is President of IMA Inc., Management Consultants since 1958. He is co-author of "THRIVING WITH REPS", the authoritative bible of marketing through Representatives. (Published by MRERF in 1992) His clients include multi-billion dollar world wide firms, start-up companies, and numerous representatives. He can be reached at IMA 16244 Dorilee Lane, Encino, CA 91436 - Phone(818)783-4461 Fax(818)386-1945.

I was fascinated as I read through the returns from Manufacturers and Representatives expressing their feelings about some of the common provisions of Contracts. The majority of Manufacturers and Representatives seem to agree, but there cases where they are at loggerheads.

Both would like contracts that are fair for all Representatives. They may not always be exactly identical, but in some cases may contain some slight differences beneficial to both the Representative and the Principal.

Payment is one area where I believe Manufacturers who pay commissions after they collect from the customer might reexamine their system. The Manufacturer's credit department makes the decision on granting open account terms.

When they go with customers who are slow pay, it places a severe cash flow burden on the Representative. It is also de-motivating if the Representative salespeople have to wait for their compensation.

On the other hand, Representatives should recognize that extended termination notices handcuff Manufacturers. If the Manufacturer pays commission on the backlog, it clears the boards and answers one of the Representative's most serious complaints. There are exceptions, of course, such as the Manufacturer who tells us that a lot of work in installing equipment and training customers is needed by the new Representative. Also, if the manufacturer is asking the Representative to make substantial investment by adding people, longer protection could be called for.

I like the idea of those Principals who use Rep Councils to help refine Contracts so they are of the maximum benefit to both.

I have no quick answers on the subject of house accounts. It might be difficult for a manufacturer to obtain a top notch Rep with house accounts or the right to establish house accounts. The accounts are usually the customers where the Rep is spending most of his time. He will still be calling on them for his other lines, and he needs the income from them to pay for the high cost of calling on smaller accounts. It is often de-motivating and remains a large problem.

Many trade associations have sample Contracts which have been developed by industry committees of Manufacturers and Representatives. Usually these have a lot of options which prove helpful to a manufacturer. It was interesting to read between the lines. Many Representatives will accept contracts without trying to negotiate provisions they feel are unfair. They fear starting off on the wrong foot, and risk losing a line they really want. The manufacturer does not hear their feelings. In fact, he might even agree with them. He surely would not want anything standing in the way of enthusiastic support by the new Rep. The Rep, on the other hand,

never gets to hear the reasons for clauses he doesn't like. If he did listen to the Manufacturer, he might understand why they are necessary.

By talking frankly, and listening to each other with open minds, much can be accomplished. No relationship can blossom properly by holding back from each other. The most successful Manufacturer/Representative relationship results from a completely open and honest exchange of opinions on all key issues.

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THREE STAGES IN THE LIFE OF A MANUFACTURERS' REPRESENTATIVE AGREEMENT

by Randall J. Gillary, Attorney

Editor's Note: MANA member Randall Gillary is an attorney who represents a number of agents who sell to the automotive industry. In his practice, he sees many situations where agents are either poorly protected in terms of a contractual agreement, or they have no contract with their principals at all. In this article, he explores a process by which agents can move step-by-step to having an agreement which not only outlines the rights and responsibilities of both parties, but which protects the agent when faced with a termination issue. We do want to point out that many attorneys use the MANA contractual guidelines as they create agreements for their clients. As Mr. Gillary points out, by identifying the three stages of an agent-manufacturer relationship, you can create an agreement that clearly spells out the relationship.

There are three key states in the life of an agreement between a manufacturers' sales agent, or representative, and his principal.

I refer to these as the Negotiation Stage, the Administration Stage, and the Termination Stage. All three of these stages are important to the manufacturers' sales agent.

Negotiation Stage

The Negotiation Stage is where the manufacturers' sales agency and its principal first begin to discuss the possibility of entering into a relationship. It is important for you to remember that when having these initial discussions with a prospective principal where you are attempting to convince the principal to hire your agency, you must also negotiate a good agreement for yourself. I have seen on too many occasions where manufacturers' sales agents have given their principals an economic incentive to terminate them when the agents have become successful. This is of particular concern in the automotive industry. A salesperson may procure a purchase order for a part which may be in production on an automotive assembly line for 4 to 7 years. If your contract contains a provision that the principal may terminate you in 30 days and pay you commissions for 30, 60, 90 days or even one year, then in most cases you will be selling yourself short. Most automotive sales representatives are working on obtaining business which will not even be in production for 2 to 3 years. If you obtain a \$10 million order and the parts are not going to be in production for 2 years, in some cases it is possible for your principal to terminate you and pay all of the post-termination commissions under your agreement before production begins on your big order. This is obviously not a very advantageous position for a salesperson to be in. You should be sure that all termination payouts begin from the start of production with regard to any orders you obtain. The length of the payout depends upon the particular industry. In the automotive industry you should always strive for the life of the part.

As indicated above, it is important for the manufacturers' sales agent to remember that in addition to being an effective advocate for your principal, you must also be an effective advocate for yourself. This means that you should consider having a discussion regarding termination during the negotiation process with your principal. Obviously, this is not always an easy subject for a principal and an agent to address. In part, this is due to the fact that in order to be an effective salesperson you must accentuate the positive at all times. Discussing termination deals with the more negative aspects of the relationship, i.e., the end of the relationship. This can be uncomfortable but it generally should be addressed. There are exceptions, however, which are discussed below.

During the Negotiation Stage, it is important to remember that it is not always necessary for you to have a formal written contract drafted by a lawyer. I would say that a formal written contract which contains a good post-termination commission payout is the most ideal situation for the

manufacturers' sales agent to be in. Most principals will not agree to this, however. I would be the first to admit that lawyers have a tendency to screw up deals almost as often as they help to consummate them. It is not always advisable during your initial discussions with a prospective principal for your agency to openly get the lawyers involved. In some cases, I will advise my clients to merely have a letter agreement which may be signed by both parties. In other cases, a letter written by the sales representative confirming the terms and conditions of the representation is sufficient.

It is important for you as a manufacturers' sales agent to have a close relationship with an attorney who understands the manufacturers' representative business. Unfortunately, many lawyers who receive a license to practice law feel that they can handle any legal problem which happens to come their way. This is just not the case. It is important for your attorney to understand your business, the manufacturers' representative business. I would definitely recommend that you make it a point to know an attorney who spends a significant amount of his practice in representing manufacturers' sales agents.

During the negotiation stage with your principal, it is important for you to have close communication with your lawyer. In almost all states there are statutory provisions which mandate written contracts between agents and their principals.

Administration Stage

The second stage in the life of a manufacturers' representative agreement is the administration stage. This occurs after the contract has been executed and you begin representing your principal.

There are several matters which should be kept in mind by the manufacturers' sales agent during this stage. First of all, it is important for you to be aware of the status of your relationship with your principal. Is the principal satisfied with your performance? Do you believe that he is planning on terminating you, appropriating your accounts, and going direct?

There are few things more devastating to the manufacturers' sales agent than to work for several years in building up sales for your principal only to have the principal terminate the relationship. This is one reason why it is important to have a liberal post-termination commission payout because this may discourage the principal from terminating you when you become successful.

If you have a good relationship with your principal then you should be able to notice any changes which may be foretelling a significant alteration of your relationship. Typically, I am quite suspicious of the following:

1. Detailed reports so your principal knows exactly who your contacts are.
2. The hiring of a sales manager who is there to "help you." I am especially concerned when the sales manager begins going on sales calls with the agent and I am even more concerned when the sales manager begins making sales calls without the agent.
3. When the principal begins hiring direct salespeople in other territories even though they may be assuring you that it will never happen in your territory.
4. A merger with another manufacturer who has an existing in-house sales force. In many cases, it is the commission money to be saved by terminating the salespeople which makes such a merger profitable.
5. Unilateral commission reductions.
6. Appropriation of accounts by the principal.

If you find that it is necessary for you to either agree to a temporary commission reduction or to the appropriation of an account, it is important that you document that agreement in writing. You should confirm that the commission reduction is temporary until sales improve or that the appropriation of the account is a modification to your agreement but only as to that account.

It is most important at all times during the negotiation and administration stages of your relationship to control the record. You must send confirming letters regarding major meetings dealing with your relationship as well as confirming letters relating to any modifications of your agreement. Whoever controls the record has the advantage in the event the matter ever reaches the litigation stage.

Controlling the record does not only relate to modifications of your agreement. It is also important for you to document your successes. If you secure a large order, don't just put the order in an envelope and mail it to your principal. Send a cover letter which may be something like the sample on the opposite page, bottom left.

Hopefully you get the idea that you should remember you are not only a salesperson to your customer but you must also be a salesperson to your principal. You should always be selling.

Termination Stage

Hopefully you have been able to see the writing on the wall and the termination is not something which hits you like a ton of bricks. Once you start having suspicions that your principal wants to terminate you, you should seek legal advice immediately. The correspondence and communication which occurs toward the end of a relationship is extremely important. There should not be any letter which goes back and forth between you and your principal during this time which is not carefully reviewed by your attorney.

In some cases, you may feel that your principal is trying to force you to quit. You may wonder if you should quit rather than wait to be terminated. In general, my opinion is that you have a stronger commission claim if you are terminated rather than if you quit. I would generally suggest that you resist the urge to quit even though your principal may be trying to make life very difficult for you.

If you are notified that your relationship is terminated there are three key rules which you should keep in mind at all time:

1. Don't agree to anything without talking to your lawyer.
2. Don't cash any checks which contain restrictive endorsements on the checks. If the check says, "In full and final payment or settlement of all claims", this is a restrictive endorsement and you should not cash the check. If the check contains any language that purports to limit your rights in the event you cash the check, take it directly to your lawyer.
3. See your lawyer ASAP.

Many states, if not all, now have Commission Acts which provide for penalties including attorney fees in the event the principal does not pay commissions which are owed to the agent in the event of a termination. Accordingly, you should never attempt to negotiate any kind of a buyout or settlement without having the matter reviewed by a lawyer.

Final Thoughts

The most important thing for you to realize as a manufacturers' sales agent is that you must be a salesperson at all times and you must not ever sell yourself short. I have seen salespeople who have been able to obtain purchase orders for millions of dollars but cannot have a heart to heart discussion with their principal about termination. Additionally, it is important at all stages of the relationship with your principal to control the record. Be sure that you document the following in writing throughout the course of your relationship:

1. Key provisions of your agreement.
2. Significant meetings and discussions with your principal.
3. Your successes.

Finally, if you get terminated, hopefully you have already been in contact with your lawyer. If you have not, see your lawyer immediately and don't sign anything and don't agree to anything without legal advice.

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HOW MUCH CAN YOU INFLUENCE THE USE OF SALES REPS?

The case of Wal-Mart or other dominant buyers telling its vendors that it would not do business through independent sales representatives has received a lot of attention from time to time. Manufacturers' representatives have maintained that the practice is illegal, but little has been printed in the national media how it is illegal, or why legal action is not more prevalent.

This article outlines the legal issues, as they apply to the contractual relationship between vendor and its sales representatives, and the potential legal consequences of a customer's trying to influence that relationship. While we may not always assert our legal rights, it is wise to understand what your legal rights (and risks) are.

If a third party (such as a customer or dominant buyer) influences the manufacturer's decision to terminate the independent sales representative, that third party may have unlawfully interfered with a business relationship. An agreement or combination to induce a party not to deal with a sales representative is an actionable wrong. Under state court decisions, a person who induces another not to enter into or continue a business relationship may be liable for harm caused and the damages incurred. The law recognizes the right to take legal action for both interference with contractual relationships and for interference with prospective economic advantage. The third party may also be subject to punitive damages. If that person "intentionally and maliciously" interfered with the representative's relationship with a manufacturer, a court may also award punitive damages. Involvement of a third person may create antitrust problems, too.

Some actions by buyers in dealing with no-representative policy in dealing with manufacturers can be legally dangerous. While there is no legal prohibition against direct selling, there are legal prohibitions against interference with the right of contract, unlawful price discrimination and concerted refusals to deal in order to stifle competition.

The manufacturer does have the right to select whom it will or won't do business with. Even if the manufacturer has a contractual right to terminate, though, and there are no statutory impediments to a termination, that does not end the inquiry. One must next determine whether or not the termination violates antitrust laws.

The use of monopolistic buying power to induce a manufacturer not to deal with a particular sales representative is within the prohibitions of the Sherman Act. When a purchaser exercises its coercive economic pressure to bring about a concerted refusal to deal which results in harm to the sales representative's business, all the parties involved in such concerted action may be held legally responsible.

Liability for wrongful termination under the antitrust laws can be substantial. A terminated sales representative harmed by concerted action to remove it from access to a particular market or by conduct interfering with contractual relationships can recover three times its actual money damages, plus attorneys' fees and costs of litigation. Although the sales representative is acting as an agent of the manufacturer and the manufacturer can basically deal with the agent as it would an employee, there are limitations to this principle. The representative cannot be used to perform tasks that the manufacturer itself would not be allowed to perform under law.

For instance, a part of a sales representative's commission cannot be passed on to the buyer. Such payments are prohibited by law because they represent a means by which a manufacturer could grant to a buyer a concealed discriminatory price. The law permits the payment of compensation by a manufacturer to its agent for services rendered. It does not permit payments by the sales representative, directly or indirectly, to the buyer. Such an act is unlawful price discrimination.

Although the constraints on the use of sales representatives may be somewhat less than those on distributors, a manufacturer still must use care. As the representative is asked to take on more of the functions of a distributor, the distinction between the two diminishes, and the treatment of the relationship by a court tends to become more strict. If the representative has made an investment in inventory, physical facilities, goodwill, or uses the manufacturer's logo on its business cards, the ability to terminate the representative may be restricted.

The best solution to termination by either party is a commercial one. Under a commercial contract, the two parties either can agree to termination conditions or salvage the relationship without legal action or arbitration. In a successful manufacturer-sales representative relationship, the parties should be able to resolve these matters reasonably, free of outside influence. As third parties, customers must always be careful about the ways in which they might be construed as outside influences.

A CAREFULLY PREPARED CONTRACT CAN NOT ONLY SAVE TIME BUT ALSO COSTLY LITIGATION

A carefully prepared contract between a representative and manufacturer not only informs both of each other's involvement in the relationship, but can also reduce potential disputes with regard to compensation, product/liability indemnification, evaluation and other issues. Here are several examples which may go a long way in helping you avoid the "trouble spots" when it comes to developing these contracts.

Compensation

Contracts need to outline, in specific detail, the baseline compensation, as well as the "above and beyond" compensation provided for extra services. That can be spelled out in language as such:

Principal agrees to compensate representative on all gross sales shipped net of trade promotions and allowances by principal in the territory as indicated (catalogs, product samples, price lists, promotional material, etc.). Such compensation shall be computed on the price of the merchandise or products sold before discounts and allowances are figured regardless of the actual items shipped by the principal or received by the customer. Compensation shall be paid promptly within 15 days after the end of the each month by electronic funds transfer (EFT) with simultaneous electronic confirmation send directly to the representative. A delinquency charge of 1.5 percent per month (but not in excess of the lawful maximum) may be added on any amount past due.

Principal also agrees to compensate representative for incentives and special services as indicated.... These services may include:

- local marketing programs/special events
- category management services
- special end user work or coverage
- introduction of new products
- invoicing sales of consigned stock
- trade shows
- test marketing
- demonstrations and start-ups
- extra services or extra reports
- free goods or special allowances
- assisting product recall

Keep in mind that some contracts call for compensation on a project-per-account fee, an hourly basis or on a per item basis for selected value-added services.

Diverting

Representatives need to prepare themselves for diverting. This occurs when a product is sold by your principal to a customer in a market who, in turn, then transfers the product to a different customer and/or marketing area.

Both parties agree to abide by the principal/representative policy of diverting product as described. if representative orders any product proven to be knowingly distributed into another territory, all commission will be forfeited and representative will be responsible for breach of contract. If principal diverts product into representative's territory, principal will be responsible for all commissions to representative and will be deemed to be in breach of contract for all associated fees.

Product Liability Indemnification

This establishes the liability of principal for any damage claims relating to product while under representation from the sales representative.

Principal agrees to defend, hold harmless and indemnify representative from any and all loss or damage, costs and expenses, including legal fees, incurred by representative from any claim or action made or filed against representative claiming loss or injury of any nature whatsoever, resulting from any defect in any merchandise, or the purchase or use of any product manufactured, produced, or distributed by principal. Principal shall furnish representative with a certificate of insurance listing representative as an additional insured within 30 days of execution of this agreement.

Evaluation of Performance

This statement establishes the schedule for any formal evaluation processes. The criteria are used to evaluate both representatives and principals. An example of criteria is: sales vs. quota.

The performance of each party of terms of this agreement shall be evaluated every 12 months or sooner as to assure all responsibilities and objectives are being upheld. Within 10 days of every evaluation, each party should notify the other in writing of their concerns.

NON-COMPETITION PROVISION NOT ENFORCEABLE AGAINST SALES REPRESENTATIVES

By Brad Parcels, with legal assistance from Steven Mitchell Sack and Gerald Newman

Manufacturer/representative agreements usually provide that the sales representative is an "independent contractor." Although "independent," some manufacturer/representative agreements contain non-competition provisions that prohibit the representative, after termination, from representing other principals in the same line of business as the former principal or from selling to the former principal's customers for a set period of time after termination, such as six months or one year.

Are such non-competition provisions enforceable? The Florida court in the case of *Amedas, Inc., vs. Brown* concluded that because a terminated sales representative was an independent contractor, the non-competition provision was not enforceable against the representative. In *Amedas*, the principal, *Amedas, Inc.*, and the representative, *Brown*, entered into a sales representative agreement that provided that *Brown* was an independent contractor. The agreement also contained a non-competition clause that, among other things, stated:

"Representative further agrees that for a period of one year after the termination of this agreement, whether with or without cause, he, will not for himself or on behalf of anyone engage, in a similar line of business, directly or indirectly, or solicit business from any customer of *Amedas*..."

After his termination and within the one-year period, *Brown* solicited a customer of *Amedas*. The principal sued the representative, seeking to enforce the non-competition agreement.

The court held that because the representative was an independent contractor and not an employee, the non-competition covenant was a restraint of trade in violation of public policy and, therefore, unenforceable. The critical issue was whether the sales representative was acting as an employee or an independent contractor, as previous rulings had established that non-competition provisions were enforceable against employees. The court stated that the main consideration in determining whether a person is working as an independent contractor or as an employee is the right to control the method of doing the work. If a person is subject to the control or direction of another as to the result only, then that person is an independent contractor.

In this case, the sales representative set his own schedule, contacted prospects of his own choosing, could not bind the principal to any contracts or orders, was financially accountable for inventory and product literature to the principal, was paid commissions and not a salary, and did not have Social Security or federal taxes withheld from commissions received. Accordingly, the representative was found to be an independent contractor, and the non-competition covenant was unenforceable.

Properly drafted non-competition covenants may be enforceable, but such covenants are not favored because they are considered restraints of trade. They are given close scrutiny by the courts and must be reasonable in time and geographical scope. Even so, non-competition clauses may be unenforceable if the sales representative can be terminated at will and without cause, or as the court in *Amedas* held, if the sales representative is an independent contractor.

There is no universal rule regarding the validity of covenants not to compete, and the law in each state must be examined to determine the enforceability of a non-competition covenant against a sales representative. Nevertheless, as the court's ruling in *Amedas* makes clear, the fact that the representative voluntarily signed an agreement containing a non-competition provision does not mean ' that it is valid and enforceable against the representative.'

(Please note.- Representative agencies with independent contractor contracts of their own also fall into this ruling.)

INDIANA TAKES THE LEAD IN PROTECTING AGAINST OPPORTUNISTIC TERMINATIONS

By Brad Parcels, with legal assistance from Steven Mitchell Sack and Gerald Newman

When a representative agreement terminates and the parties sort out what went wrong, the representative frequently ends up charging the principal with opportunistic behavior. This means that, in the representative's eyes, the principal has unfairly taken advantage of the representative's work in developing the territory. Just when the large orders begin coming in, the principal may reduce the commission rate, designate the major customers as house accounts, or terminate the agreement completely. As the representative sees it, the principal took these steps to deprive the representative of the post-termination commissions that were earned through the representative's pre-termination sales efforts.

The principal, of course, is likely to view the situation differently. In order to meet a competitive bid, the principal may cut the commission rate, or principal may feel that the representative has not serviced the customers adequately, or is being overpaid because of the magnitude of the orders. Because of their fundamental disagreement over who did what and why, the parties may well end up in a lawsuit.

Although the major of states have passed laws to protect sales representatives' commission claims after termination of a contract, only a few states have statutes that specifically define parties' rights in the event of an opportunistic termination. Recently, a federal court judge explained how the Indiana statute applies when a sales representative alleges that the principal terminated the representative in order to deprive the representative of commissions.

The case was a suit by an Indiana sales representative against a Wisconsin principal. The representative proved that it had procured two multi-year contracts from the principal's (and his) customer, and the principal had terminated the representative because the principal did not want to pay commission on the sales that would flow from those contracts. The representative sued for just under \$4 million. The representative agreement specified that it was to be governed by Indiana law.

Although the exact wording of the Indiana statute is rather technical, it provides that when a principal has terminated a representative in order to deprive the representative of future sales commissions, the representative is still entitled to recover commission on any written orders that the principal had accepted prior to the termination. This would still be the case even if the parties' contract stated otherwise.

The principal moved for summary judgment, contenting that the statute was only intended to apply when the parties had made an agreement under an arrangement known as a "unilateral contract," which rarely arises in the sales representative/principal situation. The court disagreed and held that the sales representative was entitled to protection under the statute. It explained the legislative purpose with the following language:

'Furthermore, the obvious purpose of the statute is to prohibit a manufacturer from avoiding the payment of commissions under circumstances where a sales representative has fully performed and obtained an order which would otherwise entitle it to the payment of a commission. The statute is designed to prevent opportunistic behavior by the principal which would allow it to obtain the services of the agent without payment. Certainly, the relationship in this case might permit such behavior and is covered by the language and intent of the statute.'

Following this ruling and based on the court's guidance, the parties were able to settle their difference at an agreeable figure. This may be the first case that describes opportunism by name

and holds that a sales representative protection law is intended to prevent opportunistic behavior by principals. It is also the first case decided under Indiana sales representative law.

We highlight this case because it explains the "obvious purpose" behind the Indiana statute. We consider the Indiana sales representative protection law to be one of the better laws designed to protect sales representatives, and we believe that legislators of other states would be well advised to review this case and the Indiana statute in order to consider whether a similar law should be passed in their own state.