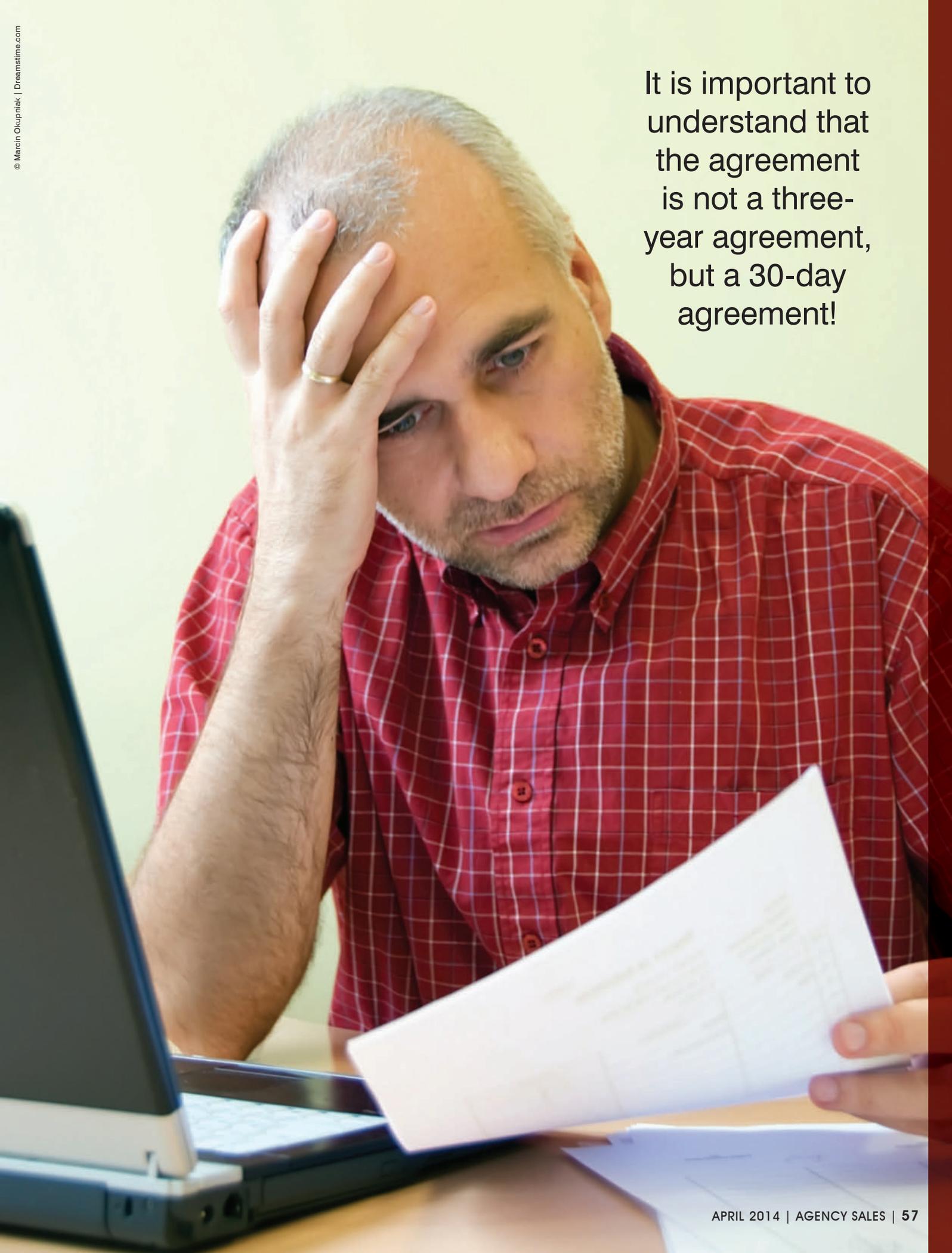


Don't Be Fooled Again

BY RANDY GILLARY

One of the services that we provide for our manufacturers' representative clients is to review proposed sales representative agreements. Manufacturers' representatives can sometime be fooled by language in the paragraph dealing with the term of the agreement which gives with one hand and takes away with the other. The manufacturers' representative often focuses on the term of the agreement which often specifies a term of years and pays little attention to the provision that takes it away. For example the term of the agreement may be for three years. Later — and often in the same paragraph — there will be language that states that principal can terminate the agreement on 30-days' notice. It is important to understand that the agreement is not a three-year agreement, but a 30-day agreement!

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Sometimes manufacturers' representatives can be too trusting. They may think that, "My principal will be fair with me" or that "My principal is my friend and he or she would not terminate me for no reason." Unfortunately, that is fool's gold. You have to assume that your principal will take advantage of any provision of the sales representation agreement.

You may have a very good relationship with your principal at the time that you sign the sales representation agreement — but things change. The person who you originally made the agreement with may be your friend who would not terminate you to avoid paying commissions but your friend may retire or his son or daughter may take over or the company may be sold to a hedge fund. I have seen it happen many times.

The lesson here is to read your proposed agreement very carefully and then show it to a lawyer who is experienced in sales-commission matters. If the proposed agreement has a term of three years but can be terminated on 30-days' notice, you should decide whether or not you want to work under an agreement that can be terminated on 30-days' notice. If your selling cycle is one year or two years or three years, it would not generally be a good idea to have a 30-day contract.

Communications Prior to Termination

One of the key services that we provide for the manufacturers' representatives we represent in our office is to help them to manage communications during the time that the principal appears to be laying the foundation to terminate our client. Often this happens when the manufacturers' representative is making more money than the principal wants to pay. The communications that are exchanged during the "pre-termination period" are very important in laying a proper foundation for possible future litigation. I try to work with my clients to lay the groundwork for the key themes that I will want to present to a judge, jury or arbitrator in the event that we have to fight for commissions. Typically the theme is that the principal just does not want to pay. I thought that an e-mail that I sent to one of my clients may be helpful to MANA members. Incidentally, we ultimately did get into a legal dispute with the principal which is currently the subject of an upcoming arbitration.

The background is that the principal was criticizing my client for allegedly not performing his obligations under the Sales Representative Agreement. The principal was being very critical of my client's performance and was trying to convince

my client to agree to a termination of the Agreement. My client did not want to do that because there was another two years to run on the Agreement and he was earning more than \$20,000 per month in commissions. Incidentally, my client fully and completely complied with all of his obligations under the Sales Representative Agreement.

The e-mail is as follows:
“Good morning Steve,

You are right on re your comment. There is a lot of negative emotion associated when someone decides that they do not want to pay you and especially when they are trying to rewrite history to try to make it your fault. You almost want to say, “Stop — just say that you don’t want to pay us.” They won’t say that and for sure their lawyer won’t allow them to say that. That is why we have to play these games. All of the things that you wanted to say in your initial draft of the response and the comments from your salespeople are on point but you are correct in that they are too negative to put in writing. Not because they are not true, but because they tend to make you not look so good two years later when we may have to be in court fighting about this. As British statesman Benjamin Disraeli said back in the

1800s: “Never complain. Never explain.” You always want to focus on the positive in these types of written communications with the idea that a judge or jury will be reading the communication at some point in time in the future.

Anything that you put in writing to your principal, unless it has to do with specific technical issues, should be focused on the mission. Some key points about this are as follows:

1. The mission is to do the best job that you can representing the principal.

2. The ideal way for you to do the best job that you can in representing the principal is to focus on what is best for the customer. Your job is to solve the problem that your customer has. Hopefully the way to do that is to sell them your principal’s product. Your customer is not doing business with your principal so that your principal can increase

sales and make a lot of profit. Some principals have a hard time understanding this.

3. Anything that you put in writing should be focused on what is good for the mission of increasing sales of your principals’ products to your customers. Normally this is done by gearing your efforts to solving the customer’s problems. Everything should be geared to doing what is best for the customer. If you and your principal are successful in doing that, you should both make money. I am pretty sure that this is how you have always run your business. It is just important that you keep focused on this even when you are upset about your principal not wanting to pay you.

4. Always avoid any negative emotion of any kind. Anything that you put in writing should be very positive and focused on the mission of doing what is best for the customer. 



Randy Gillary is an attorney and has been a member of MANA since 1991. He concentrates his practice in representing manufacturers’ representatives in sales commission disputes. Gillary has been litigating sales commission disputes for more than 33 years. He is also the author of the definitive book for manufacturers’ representatives entitled *Protecting Your Commissions — A Sales Representatives’ Guide*. The book is available on Amazon.com or through his website at www.gillarylaw.com or by calling his office at (238) 528-0440.

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