

Don't Negotiate Your Contract Backwards

BY RANDALL J. GILLARY

One of the reasons I write articles for *Agency Sales* magazine is that it saves me time. Since all that I do is represent sales representatives in sales commission disputes and related matters, I keep seeing the same problems but with different faces. It is like *déjà vu* all over again on a regular basis.

There have been countless times over the years that I have handed or e-mailed copies to my clients of the *Agency Sales* articles that I have written on a topic related to the client's problem. I generally ask them to read the article(s) before we talk further. Frankly, I am doing my clients a favor because it is much cheaper for them for me to e-mail one of my articles to them than to engage in a lengthy explanation of the basis for my recommendations. In fact, I generally send a copy of my book *Protecting Your Commissions — A Sales Representative's Guide*, to new clients and ask them to read it before our first meeting. It is a good primer for them and provides insight into the types of problems that sales representatives will experience during their career. My book also provides insight into the way I think. I self-published my book so I do not have to account to publishers for free copies that I give away.

One of my least favorite things to do is to explain the reasons for the advice that I give. It is like the Van Morrison song, *Why Must I Always Explain?* The articles that I write for *Agency Sales* magazine enable me to spend less time explaining because the explanation is generally in one of the articles that I have written.

The Problem

In this article I will provide my thoughts regarding the proper way to negotiate a sales representation agreement. It seems that many of my clients approach this issue the wrong way. Rather than sit down across a table with their principal to have a face-to-face conversation, one of them will pull out their standard sales representation agreement and hand it to the other. The net result of this is that the parties are ceding the foundation of their relationship to the lawyers. To me that is backwards. The clients should drive the bus — not the lawyers.



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Process Is Important

Process is important in pretty much everything. I think that the first step in forming a new relationship with a new principal is to first have an open and honest discussion about the respective goals and objectives of both parties. There is not much point in wasting anyone's time negotiating a business agreement if both parties do not have complementary goals and objectives.

Successful salespeople must first be good listeners. This should be the starting point for the sales representative. I recommend that the sales representative ask the principal what the principal's goals and objectives

are and how the sales representative can help accomplish those goals and objectives. Maybe the goal of the principal is to expand into a new market or to do business with a new customer that the sales representative has current business with for another (non-competing) principal. Whatever the goal, it is pretty likely that the conversation would not be taking place unless the principal thought that the sales representative could help to accomplish the goal.

After the principal has had a full opportunity to explain its goals and objectives, it becomes the sales representative's turn to talk. The sales representative should discuss what he or

she would like in return. Generally the sales representative's primary goal is to be fairly compensated for his or her work in accomplishing the goals and objectives of the principal.

At this point, the sales representative should address what I believe are a few key points. I will not address commission rates or the request for a retainer or draw because those are primarily economic issues and vary greatly depending on the industry and many other factors. The key topics that I recommend my clients address are as follows:

- **Exclusive representation of the principal to the key customers** — I am a firm believer that sales repre-

sentatives should have exclusive customers identified in the agreement and that he or she should be paid for all sales to those customers. It is a no-win situation for the sales representative to compete for business with the principal or other sales representatives at a customer. Also, the sales representative should avoid language that requires the sales representative to "procure" the order. Such language just increases the probability of disputes and litigation. There are many more reasons almost too numerous to mention in this article as to why the sales representative should not have to prove procurement as a condition of compensation. Feel free to contact me and I will discuss the rest of them with you if you would like to know what they are.

- **Minimum term and automatic renewal/evergreen provisions** — There should be a minimum term which should be roughly equivalent to the amount of time it is expected that the sales representative will have to spend to be able to successfully obtain new business. Additionally, the agreement should automatically renew for successive terms unless terminated by written notice. This is a matter of practicality as much as anything else. The reality is that once the sales representation agreement is signed it typically gets stuck in a drawer somewhere and no one looks at it again until one party wants to

end the relationship. No one wants to have to remember to renew their agreement at a specific time.

- **Post-termination commissions** — This is a subject that should be addressed at the very early stages and should be part of the discussion by the sales representative regarding his or her goals and objectives. Since I live and practice law in Michigan, the automotive industry is our dominant industry. Blanket purchase orders typically are in place for the life of the part which can run in the three- to five-year range and in many cases longer than that. Life-of-part commissions is the standard in the industry but will be overridden by a provision in the sales representation agreement limiting or excluding post-termination commissions. The same principle applies to other industries. The main objective is to get paid for what you have done. This may require that the sales representative be paid for a period of years after termination for procuring a new customer who may do business with the principal for many years.

- **Asset sale protection** — Over the years many automotive suppliers have been purchased and sold, in some cases multiple times over. There should be sufficient protection for the sales representative to ensure that he or she is compensated in the event of an asset sale. Most asset purchasers select the assets and li-

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abilities that will be the subject of the sale. You can pretty much guarantee that your life-of-part agreement will be one of the liabilities which will be excluded. What is the point of having a life-of-part agreement if the principal can sell its assets and you then get paid nothing? You will need a good lawyer experienced in sales representation law to draft this for you. One other topic to consider along these lines is bankruptcy protection. This can be done by having the sales representation agreement include a provision for the sales representative to obtain a security interest in the purchase orders obtained and in the proceeds from those purchase orders. This could put you in the position of being a secured creditor in the event your principal files for bankruptcy. Unsecured creditors generally receive little or nothing in bankruptcy court. Asset sale protection is a topic that can only be addressed prior to the start of the relationship. No principal will allow you to add asset protection after the sales representative has already accomplished his or her tasks.

Confirm the Key Provisions in Writing

Once you have had the discussion with your principal about the party's respective goals and objective

and you have agreed in principle on the key terms, you should confirm the key provisions in an e-mail or other writing. Effectively, you have by now negotiated the key terms and provisions of your sales representation agreement and the heavy lifting has been done. This is a very important step in the process because at this point the parties have an agreement in principle. The objective of both parties should be to now implement the agreement that has been made in principle. Now it would be appropriate to get the lawyers involved.

The Lawyers' Job Is to Draft the Agreement Made Between the Parties

It should be relatively easy for the lawyers to draft a sales representation agreement that meets the goals and objectives and specific terms agreed upon by the parties. The lawyers should not be allowed to change the deal already made by the parties.



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This Process Only Works if the Sales Representative Is Well Prepared

The sales representative has to be fully prepared to have a detailed discussion about each of the above topics in order for this process to work. You will have to understand each of the topics and be able to go toe-to-toe with the principal in selling yourself and your terms and conditions that you want in the agreement. If you are not comfortable in selling these principles to your principal during the discussion phase, then you should learn them before you engage in the process.

Conclusion

The first job of a sales representative is to sell himself or herself to the principal. Good salespeople should relish the opportunity to have a face-to-face discussion and negotiation in the early stages of a relationship to convince the principal that you are the person who can solve their problem. It is much better to find out sooner rather than later whether the principal is willing to fairly compensate you for what you are able to accomplish.

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