

GUIDELINES, STRATEGIES AND TIPS TO PROTECT YOUR REP AGENCY

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I. INTRODUCTION

II. POINTS TO CONSIDER BEFORE TAKING ON A NEW LINE

- A. Investigate the principal and line you are considering representing to reduce the chances of exploitation.
1. Agreements via the telephone should be avoided.
 2. Find out who you are talking to, what his position is, and the extent of his authority to bind the company.
 3. Never rely on promises that terms will be worked out at a later date.
 4. Ask for names of key customers and speak to them for references.
 5. Learn who previously represented the company; speak to the former sales rep if possible to learn why he/she no longer represents the principal.
 6. Investigate the principal's financial history.
 - a. What is its financial status and credit rating?
 - b. Does it ship damaged goods with a high rate of return?
- B. Negotiate the deal with the goal of obtaining a fair written contract containing the following:
1. Territory
 - a. specify the precise territory you will represent
 - b. try to obtain a status as the exclusive rep in that territory
 - c. obtain consent to sell all of the principal's products
 - d. specify you will receive commissions for all sales in your territory
 - e. specify there will be no house accounts
 - f. define split commission policies in advance
 2. Commissions
 - a. understand how your commissions will be earned
 - b. negotiate to receive commissions after shipment rather than when the customer pays for the product
 - c. consider negotiating guaranteed shipping arrangements
 - d. be aware of all potential deductions which can reduce commission earnings
 - e. discuss final commissions after a collection agency or law firm is retained to collect delinquent arrears
 - f. negotiate full commissions for re-orders
 - g. establish an arithmetic formula for off-price goods
 - h. discuss split commission policies

- i. request additional payment for extra services including warehousing, detailed forecasting, and collections
3. Job Security
 - a. specify the start date
 - b. try to get as much line security as possible by requesting a contract with a definite term (e.g., one year) that automatically renews itself under the same terms and conditions if neither party cancels or upon the happening of stated goals (e.g., meeting defined sales quotas, etc.)
 - c. avoid agreements which generally define "for cause" terminations
 - d. understand common law examples of cause that justify contract terminations with a loss of benefits
 - e. if you cannot obtain a contract with a specified term, negotiate for as much notice as possible before termination
 - f. during this notice period, specify that you can continue representing the line and will be paid for all sales, even if shipped after the effective termination date of the contract
 - g. specify how notices of termination must be communicated
 4. Termination of Representation
 - a. clarify when commissions stop but avoid arrangements where they cease immediately upon termination
 - b. negotiate to receive commissions for a certain period of time after termination
 - c. negotiate extra severance pay, especially if you are representing a start-up company; the general formula is to be paid one month of average commissions for every year worked
 - d. a fall-back request is to receive severance based upon the increase of sales volume in the territory
 - e. specify when a final accounting will be made
 - f. discuss the handling of commissions for pending orders procured but not yet consummated
 5. Proper Accounting
 - a. always request copies of accepted orders and invoices within a certain period of time after shipment
 - b. avoid arrangements where the company forces you to protest commission statements within a certain period of time after receipt and if no notice regarding errors is received, the statement will be considered correct
 - c. demand the right for you, your accountant, or attorney to inspect the company's books and records at least one time annually upon reasonable notice at your own cost; and if errors are discovered exceeding 5% of what you were told was owed, the company agrees to pay for the cost of the inspection
 6. Points to Avoid
 - a. never accept an arrangement where you are paid commissions on a quarterly, semi-annual, or annual basis

- b. avoid agreeing that you will work exclusively and on a full-time basis for the principal
 - c. avoid arrangements where you must personally solicit the product and cannot hire a sales associate, partner, road salesperson or employee to assist in your selling endeavors
 - d. that you must attend national sales meetings at your own expense
 - e. resist arrangements where you must call on all accounts in the territory a certain number of times annually, service these accounts, and maintain accurate selling records and lead sheets
 - f. be aware of situations requiring you to actively assist in any collection efforts
 - g. never sign contracts containing restrictive covenants prohibiting you from working for a competitor, calling on certain customers, or revealing confidential information or trade secrets after termination
 - h. that you must maintain expensive general and auto liability coverage exceeding \$X per occurrence
 - i. avoid signing contracts with clauses stating that any litigation must take place in the state where the principal is located
 - j. avoid signing contracts with clauses stating that the law of the state where the principal is located is the prevailing law
 - k. avoid signing contracts with clauses in bold typeface prohibiting your rep agency from suing the principal for anticipated profits, consequential or punitive damages, or that you waive a trial by jury
 - m. avoid arrangements where you will not be paid any commission unless the customer pays the bill in full
 - n. avoid arrangements where you will be paid several months after the customer pays the bill
7. Other Negotiating Points to Request
- a. ask the company to provide proof of product liability insurance naming your rep agency as a beneficiary on its policy which indemnifies and holds the rep firm harmless from any liability or lawsuits, including the payment of legal fees, caused by the injury to a customer of the product negligently designed and/or manufactured by the principal or regarding patent, trademark or copyright matters affecting the principal or its products
 - b. be sure the contract states there can be no modifications of any terms previously agreed upon unless reduced to writing and signed by both parties
 - c. be sure the contract states it is binding on all successors, assigns, and successors-in-interest so if the principal is sold, the new company will be required to honor the contract and continue to engage your rep agency

- C. Confirm the deal in writing
 - 1. Avoid oral "handshake" agreements at all times
 - a. if the company refuses to issue a written agreement, write a letter to confirm the deal
 - b. tips to increase the chances the letter will serve as a de facto contract

III. STEPS TO TAKE WHILE WORKING

- A. There are a number of steps to take while representing a principal to reduce the chances of being exploited
 - 1. Carefully review monthly commission statements for accuracy and notify the company immediately in writing when there are errors.
 - 2. Save all correspondence, records, and documents to confirm all deals and actions.
 - 3. Save all commission statements, copies of checks, letters, memos and other financial documents received from the company while working.
 - 3. Review the agreement periodically to confirm both parties are complying with all of its terms.
 - 4. Document all promises that are made.
 - 5. If the principal decides to reduce your commission rate or draw, or change your territory, and the contract specifically prohibits any changes except in writing and agreed to by both parties, consider promptly sending a letter to document your protest.
 - 6. Recognize however that your rep agency may be legally fired as a result, especially if you have a short term or no term contract and there is a short notice period before an effective termination, so weigh your options carefully.
 - 7. Anticipate future lawsuits and plan ahead.
 - 8. Confer with legal counsel as soon as practicable and don't wait until after the relationship with the principal is terminated.
 - 9. Understand your legal obligations while working.
 - a. duty not to exceed authority
 - b. duty not to work for a competitor
 - c. duty not to make secret profits
 - d. duty not to use trade secrets or confidential information
 - e. duty not to engage in product disparagement
 - f. duty not to engage in trade defamation
 - g. duty not to engage in unfair competition
 - h. duty to avoid claims of misrepresenting a product or service
 - i. duty to avoid product liability exposure
 - j. duty to avoid anti-trust impact of selling, including price-fixing, and refusals to deal with reps and customers

IV. STEPS TO TAKE AFTER WORKING

- A. How to resign properly
 - 1. Plan ahead and sign a written agreement with your new principal.
 - 2. Review your old contract or letter agreement.
 - 3. Should you offer notice although not required?
 - 4. Resign by letter to document any protest or claim.
 - 5. Review the compensation arrangement.
 - 6. Keep quiet and avoid badmouthing.
 - 7. Return company property immediately.

- B. Steps to take when you are fired.
 - 1. Examine what the contract says.
 - 2. Reconstruct oral promises.
 - 3. Do your personnel records support the firing decision?
 - 4. If you are a sales employee, was the firing a result of discrimination?
 - 5. Did you rely on a promise before the hiring only to be fired immediately thereafter?
 - 6. Did you receive proper notice?
 - 7. Know the law in your state with respect to the prompt payment of earned commissions.
 - a. more than 35 states have enacted specific legislation called sales rep protection statutes
 - b. these laws provide for double and triple damages plus reasonable attorney fees and costs if commissions are not promptly paid after termination
 - c. be aware of contract terms which attempt to defeat the effects of rep protection laws
 - d. send a detailed demand letter for unpaid commissions
 - e. consider litigation to collect what is due no matter how small the claim
 - 7. Consider other arguments supporting additional post-termination commissions.
 - 8. Insist on receiving a final statement of commissions and other benefits to determine if you are owed any money.
 - 9. Consider collecting your money in Small Claims Court, arbitration, or litigation if you receive no response or are unsuccessful in negotiating what is due.
 - 10. Tips to increase the chances of winning a claim in Small Claims Court.
 - 11. The pros and cons of arbitration.
 - 12. Speak to an experienced lawyer to receive a proper evaluation of the chances of success with your claim.
 - 13. Ask your lawyer to send a demand letter before litigation becomes necessary.
 - 14. Never sign a release unless you know exactly what you are owed before settling a claim with a principal.
 - 15. Never cash "final" termination checks that contain language such as "in full and final payment" without first speaking to a lawyer. In some states the cashing of the check precludes you from recovering anything further despite protest language on the check.