Thank You, Sir, May I Have Another?: AVOIDING GETTING ABUSED IN CONTRACT NEGOTIATIONS

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Principal-Rep Contracts: A True Partnership

✦ The World that Should Be:
  – Two Equals Sit Down
  – Negotiations Governed by Respect and Understanding of Other’s Position
  – Resulting Contract Is Product of Reasoned Compromise

✦ The World that Is:
  – Perhaps the Principal Will Listen Briefly
Worst Case Scenario
The Art of the Possible

- Only the Naïve View Contracting as Distinct from Politics
  - Sometimes, Industriousness and Hard Work Will Pay By Opening New Channels
  - Sometimes, Knowing the Asst. Sales Mgr.’s Brother-In-Law Gets a Foot in the Door
- Either Way, Negotiations Can Turn Political; Reach for the Best Possible Deal
Why Bother Negotiating in Advance?

- Courts will enforce written agreements between commercial entities (even if one-sided) if:
  - Not fraudulent
  - Not ambiguous
  - Not against public policy
- Duress is generally not a defense
- Nor is “unfairness”
WHY SHOULD THE PRINCIPAL NEGOTIATE?

✦ Despite their initial response, many can and do change the “form” contract.
✦ Some believe in consensus; they want you vested in the relationship.
✦ They want you for a reason.
✦ Consider whether a principal who refuses to negotiate is a co. you want to partner with.
Discussion of Sample Mfr. Provisions

★ Rule No. 1: Read the Agreement.
★ Rule No. 2: Read the Agreement.
★ Rule No. 3: Consider now whether you can live with or improve what is an opening offer.
★ Rule No. 4: Negotiate like the sales professional you are while you still can.
8(a) **Commissions**

As the sole compensation owed to the Rep, Company shall pay a commission as set out on the scheduled attached as Exhibit B on the Net Sales Price of all Product sales solicited by Rep that Company ships during the term of this Agreement. Commissions will be earned when the Company receives payment from the customer, and Company may deduct any commissions paid on Products that are spoiled or returned from the next scheduled commission payment.

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From the HIRA specimen contract:

3. **COMMISSIONS.** The Principal shall pay the Representative a commission (“Commission”) in the amount of __ percent (___%) of the Net Invoice Price (as defined below) of all Orders [shipped into the Territory] [shipped to the Accounts], regardless of whether the Representative was the procuring cause of such Order. Commissions are earned upon issuance of an invoice by the Principal and are payable by the 20th of the month for the preceding month’s invoiced business during the term of this Agreement.
House Accounts

B. Basis of Commission. The Commission shall apply to all orders solicited by Representative from the Territory that have been accepted by Company and for which shipment has occurred. No commissions shall be paid on: … (iii) sales to the following specified accounts (“Protected Accounts”): none. Company reserves the right to add additional Protected Accounts from time-to-time by sending written notice to Representative.
House Accts. (Preferred version)

In the event that business conditions dictate the need to change the commission structure on a certain account, then for valid consideration accepted by and paid to Rep, Principal may reduce or eliminate the commission on an account.
RESPONSIBILITIES AND DUTIES OF REP:

VII. To contact by mail, phone, email or personally visit virtually every account in the territory (CA) within 120 days after this agreement is signed, and personally visit virtually every account within 180 days and solicit them to carry all of Company’s products, and provide a summarized report to Co.’s Director of Sales & Mktg. on the progress made every 30 days.
5. **Term and Cancellation.**

(a) This Agreement shall be effective as of the date first written above and shall continue in full force and effect thereafter for a period of one year, whereupon this Agreement shall automatically be renewed for successive one year periods, unless earlier terminated in accordance with the terms of this Agreement.

(b) The Company and the Sales Representative shall have the right to terminate this Agreement without cause upon thirty (30) calendar days’ written notice.

(c) Either party shall have the right to terminate this Agreement upon ten (10) calendar days prior written notice in the event that the other party breaches its obligations under this Agreement, including without limitation the breach by Sales Representative of any of its obligations under Section 3 hereof, which breach has not been cured within thirty (30) calendar days after receipt by such other party of notice of such breach from the non-breaching party.
6. Termination

This agreement shall commence on the date it is executed and shall continue until terminated by either party giving the other not less than 30 days prior written notice.

Upon termination, commissions shall be paid on purchase orders placed and shipments made up to the effective date of termination.
Termination: A Better Approach

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

i) Commissions on all orders dated or communicated (whether orally or in writing) to Manufacturer prior to the effective date of termination, for all accounts procured through the efforts of Representative and for which Representative has been acknowledged by Manufacturer to be assigned or responsible for such customers and accounts, or which were targeted and contacted by Representative on behalf of and for the benefit of Manufacturer;

ii) Commissions on all orders placed or communicated to Manufacturer after the effective date of termination and up to one full year after, which orders were the result of Representative's efforts in targeting, contacting, and using Representative's best efforts and expertise on behalf of and for the benefit of Manufacturer;

iii) Commissions on all orders, for up to three full years after the effective date of termination, which constitute "repeat" sales or orders for accounts and/or governmental programs which were the result of Representative's efforts and expertise, and which were exclusively developed and serviced by Representative on behalf of and for the benefit of Manufacturer;

iv) Commissions on design-ins which were procured before the effective date of termination and continuing through the life of the part, in accordance with paragraph 7 of this Agreement.
Non-Compete Agreements

23. Restriction on Competition

During the term of this Agreement and for 24 months thereafter, Rep shall not accept or represent another line, or provide assistance or aid to one who represents another line that competes with the Products sold by Principal, without the written approval of Principal.
## Does Arbitration Deliver?

<table>
<thead>
<tr>
<th>Costs Less Than Court System</th>
<th>Speed of Arbitration</th>
<th>Experienced, Even Savvy Arbitrator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discovery Is More Streamlined</td>
<td>Confidential Proceedings</td>
<td>Finality</td>
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Arbitration Clauses (cont’d)

“convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was 'arguably construing' the contract—which this one was—a court may not correct his mistakes [under the Federal Arbitration Act]. The potential for those mistakes is the price of agreeing to arbitration.”

--U.S. Supreme Court
(unanimously) in Oxford Health Plans v. Sutter, 6/10/13

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Arbitration

From the Minnesota Termination of Sales Reps Act:
(a) The sole remedy for a manufacturer, wholesaler, assembler, or importer who alleges a violation of any provision of this section is to submit the matter to arbitration. A sales representative may also submit a matter to arbitration, or in the alternative, at the sales representative's option prior to the arbitration hearing, the sales representative may bring the sales representative's claims in a court of law, and in that event the claims of all parties must be resolved in that forum.
Article 16 – Dispute Resolution

In the event a dispute arises out of this Agreement…it shall be finally settled in accordance with the Rules of Arbitration of the International Chamber of Commerce, by three arbitrators to be appointed in accordance with such Rules.

The arbitration shall be in Conn. in accordance with the procedural rules of Conn. (Rep. in FL)

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The exclusive forum for the resolution of any dispute or controversy arising out of this Agreement or the enforcement of any right hereunder shall be the state or federal courts located in _______. Each party stipulates to the jurisdiction of such courts.
OTHER IMPORTANT CONSIDERATIONS

- Choice of Law
- Recovery of Attorney’s Fees
- If Paid Like an Indpt. Contractor, Maintain Independence
- Addition of non-solicitation provision
- Split commissions are never split with the principal
Or just sign it and take it.
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