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## Business Self-Defense 101:

Hiring Sales Representatives and Consultants – How to Avoid Being Held Hostage to Unearned Commissions and Unreasonable Demands



*Jerusalem College of Engineering*

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Program Held on Wednesday, January 28, 2009, 8:15 am

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## Objectives of Program

- **(a) Provide practical insights into current practices regarding Sales Representative and Consulting Agreements**
- **(b) Offer tips and tools that can be immediately put into practice when you return to your offices after our program today.**

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## Summary of Program

- **(1) Introduction of Program**
- **(2) About Shelowitz & Associates**
- **(3) Sales Representative Agreements**
- **(4) Legal Treatment**
- **(5) Top 10 Key Issues**
- **(6) Questions and Answers**
- **(7) Conclusion**

# About Shelowitz & Associates



big law firm quality.  
no big firm fees.



## About Shelowitz & Associates

- **Founded by M. Shelowitz (March 2007)**
- **Current headcount of 10**
- **6 Lawyers**
- **2 Admin**
- **2 Legal assistants**

# About Shelowitz & Associates

## Mitchell Shelowitz- Experience

- ✓ Proskauer Rose, NYC (1991-1996)
- ✓ Nixon Peabody, LI (1996-1997)
- ✓ Goldfarb, Levy, Israel (1997-1999)
- ✓ Sr. Counsel, Gilat Satellite Networks, Israel (1999-2000)
- ✓ General Counsel, Ceragon Networks, Israel (2000-2004)
- ✓ Nixon Peabody, NYC (2004-2006)
- ✓ Greenberg Traurig, NYC (2006-2007)
- ✓ Shelowitz & Associates (2007-Present)

## Experience with Sales Rep. Agreements

### Drafted and Negotiated Hundreds

- ✓ US (East Coast and West Coast)
- ✓ Canada
- ✓ Europe
- ✓ Asia
- ✓ Former Soviet Republics
- ✓ Africa
- ✓ Middle East



## What is a Sales Rep. Agreement?

**A sales representative agreement is:**

**An agreement with a person or entity  
who is not an employee for the  
performance of certain defined services  
in exchange for certain consideration,  
usually payment of money**

## Why is this Important?

- ❖ **Current surge in disputes, claims, and lawsuits by Sales Representatives Claiming Payments that are unearned -**
- ❖ **More companies are turning to independents as headcounts are reduced**
- ❖ **Principals usually prevail where the parties signed a clear written agreement**
- ❖ **Principals usually lose where emails, handshakes, or poorly drafted agreements are exchanged or signed**

## Main Goal of Agreement - Sales

- ❖ The main goal of sales representative agreements are the achievement of sales, marketing, or other related objectives.
- ❖ Main compensation is commission based upon achieving objectives
- ❖ Sales reps are required to take any and all action necessary to reach the agreed objectives
- ❖ If and only if objectives are met, they are entitled to payment

## Reasons for Hiring Representatives

- ✓ **Proprietary Access to Customers**
- ✓ **Limited in-house resources**
- ✓ **Track Record**
- ✓ **Validation of Products or Services**
- ✓ **Expand Geographic Reach of Business**

# Scope of Work for Sales Representatives

- ✓ **Door Openers**
- ✓ **Sales Representation**
- ✓ **Marketing and Promotion**
- ✓ **Advertising**
- ✓ **Lead Generation**
- ✓ **Finder for Investments**
- ✓ **Advisors or Advisory Board Members**
- ✓ **Joint Ventures**

# Industries Utilizing Representatives

- ✓ **Telecommunications**
- ✓ **Software and Technology**
- ✓ **Food and Restaurant**
- ✓ **Franchising**
- ✓ **Consumer Goods**
- ✓ **Apparel**
- ✓ **Investments**
- ✓ **Banking**
- ✓ **Manufacturing**

## Courts Have a Different View

- ❖ *AHA Sales vs. Creative Bath Products*, Nov. 12, 2008, Appellant Division, 2<sup>nd</sup> Department, NY
- ❖ Court created private right to sue in consultants based upon NY Labor Law
- ❖ Court found that consulting company could recover for extra work done further to selling
- ❖ Court believes a fiduciary duty was created and because company waited 4 months to terminate consultant until sale closed, company breached duty

# Legal Requirements of Agreements

- **1. Employee vs. Consultant**
  - Does principal control other person's performance; tools; equipment; work site?
  
- **2. New York Labor Law**
  - Section 191(b) - requires written agreement for payment of commissions to sales contractors
  
  - Section 191(c) - requires payment of all earned commissions within 5 days of termination of agreement



## Top 10 Key Issues in Sales Rep. Agreements

- No Perfect World
- Terms are subject to negotiation so can't always achieve ideal agreement terms - there are trade offs, though in certain cases
- *Commercial realities* and market *norms* always temper what is best, ideal, or required in these deals
- The most critical consideration is that control of the business must be retained by the company and NOT the consultant

# Top 10 Key Issues in Sales Rep. Agreements

## ➤ 1. Written Agreement

➤ Most disputes arise due to a failure to complete a full written agreement, rather than emails, memos, informal meetings, which are always subject to dispute and differing recollections.

### ➤ Why No Contracts?

➤ Often parties don't want to introduce "formality" at the beginning of the relationship and are so excited about the possibility of buying and selling that they decide against an agreement

➤ Cost of Lawyer - actually is far less than damages, interruption from dispute, or litigation for lack of an agreement.

## Top 10 Key Issues in Sales Rep. Agreements

- **2. Defined Scope of Work**
- **The scope of the consultant's work should be clearly defined and limited.**
- **Can limit by:**
  - Customers;
  - Products or brands;
  - industries;
- **Any expansion to scope should be tied either to performance or track record**

# Top 10 Key Issues in Sales Rep. Agreements

- 3. Defined and Limited Territory
  
- Geographic Scope: Clearly define the state, regions, countries in which the consultant may sell or represent the company
  
- Retain right to appoint other reps.
  
- Retain right to sell directly in territory
  
- Compromises can be made (e.g., reduced commission or no commission)

# Top 10 Key Issues in Sales Rep. Agreements

## ➤ 4. Short Term of Agreement

- Agreements should be short term in nature, e.g., 6 months
- The parties can always agree to extend
- If things don't work out, it is always easier, more efficient, and less expensive to not renew a short term
- Termination: Company should always have right to terminate without cause on notice (typically 30-90 days) depending on term
- Termination can also be tied to performance

## Top 10 Key Issues in Sales Rep. Agreements

- 5. Clearly defined amount of Commissions (%)
- There should never be any misunderstanding regarding the amount of commissions that are due
- The agreement must be carefully drafted so that there are never any questions about the percentage commission due
- This is one of the most disputed issues in consulting arrangements

## Top 10 Key Issues in Sales Rep. Agreements

- 6. Basis for Commission (Net Sales/Gross Sales)
- Ensure that taxes, expenses, delivery, and other business costs are not included in the base for the commissions

## Top 10 Key Issues in Sales Rep. Agreements

- **7. When Are Commissions Earned (collection in full)**
  - **A. What Must Consultant Achieve?**
    - There are always arguments regarding whether the consultant originated the sale or whether a relationship pre-existed the consultant's efforts.
    - Careful drafting and agreement at the outset for means of proof are a must
  - **B. Collection by Company in Full**



## Top 10 Key Issues in Sales Rep. Agreements

- **8. When Are Commissions Payable (30 days after receipt in full)**
- **Clearly define the timing for when, after commissions are earned, and company is paid in full, invoice of consultant must be delivered and consultant should be paid.**

## Top 10 Key Issues in Sales Rep. Agreements

- 9. Company Has Sole Right to Accept or Reject Purchase Orders
- Company must always retain sole right to accept or reject purchase orders or sell to any customer for any reason.

## Top 10 Key Issues in Sales Rep. Agreements

- **10. Protect Confidentiality/Ownership of materials created using intellectual property/confidential information**
- Consultant must protect financial, contact, proprietary and other confidential information of principal
- Any and all materials and information prepared in connection with sales by Consultant must be owned by principal and consultant has no rights to own or retain anything so prepared

# Top 10 Key Issues in Sales Rep. Agreements

- 1. **Written Agreement**
- 2. **Defined Scope of Work**
- 3. **Defined and Limited Territory**
- 4. **Short Term of Agreement**
- 5. **Clearly Defined Commissions (%)**
- 6. **Basis for Commission**
- 7. **When Are Commissions Earned**
- 8. **When Are Commissions Payable**
- 9. **Company Has Sole Right to Accept or Reject Purchase Orders**
- 10. **Protect Confidentiality/Ownership of materials created using intellectual property/confidential information**

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## Upcoming SA Events

- Feb. 11<sup>th</sup>: FundingPost VC Showcase
- March 19<sup>th</sup>: SA 2 Year Anniversary Wine Tasting Event
- April 29<sup>th</sup>: SA Breakfast Briefing
- May 27<sup>th</sup>: SA Technology Licensing Event

# Thank You

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