

# A rep's telltale signs of looming termination: What can be done?

Most terminations are telegraphed. Reps must pay attention to the warning signs. Consider Roger Rep's plight.

## A classic termination scenario

Other principals seem to come and go, but not for Roger's most dependable and lucrative line, Batteries Unlimited of Louisiana, Ltd. (BULL). For over 19 years, BULL provided Roger a consistent source of both steady income and valuable relationships.

While Roger's territory continued to see moderate growth, the overall BULL sales were flat last year. He heard the Southeast rep had been terminated. She had repped BULL nearly as long as Roger. Talk of a merger began to pick up. Or was it a takeover? If so, would Roger be kept on? Roger's longtime regional sales manager, Billy, seemed a bit distant on the phone. Was he nervous?

An unexpected email arrived from the recently-revamped national office of BULL. Roger tried to remember the last time a corporate email like this was sent. It seems Billy was out, and a top-to-bottom evaluation of the sales channel was underway. As part of this process, Roger should expect officials from the corporate office to visit his territory sometime next week. They will want him to introduce them to the leads on his key accounts.

The next Tuesday, a follow-up email introduces Roger to the new BULL regional manager, who will be in his office at 8:30 Wednesday to begin the drive-around to make personal visits. The name strikes Roger as familiar. Isn't he the national sales manager's nephew? Or maybe her brother-in-law?

One week later, the new regional manager sends an email requesting "Top 10" lists within 14 days. He wants not only the contact people from Roger's largest customers, but also his largest potential customers. There is no "thank you for the introductory meeting" or other banal courtesy included in the email.

If the drive-around, during which the regional manager barely looked at Roger, didn't sound a loud enough alarm, surely this "request" does. Yet, what's the alternative? Change is clearly in the air, and Roger decides the best way to reach his 20th anniversary with BULL must be to cooperate with the new regime. So he dutifully prepares the lists, mutters a quick prayer that he doesn't live to regret it, and fires off the requested email response on the 14th day.

The next communication from BULL arrives not by email, but by certified U.S. mail. It's the 30-day notice of termination. But don't worry, Roger, because BULL appreciates the longstanding relationship and will pay commissions on orders that ship out for 60 days after the effective date of termination. All he has to do is sign the enclosed paperwork, return all samples and promotional literature, and work with the regional manager to transition accounts on an as-needed basis. His dreams of a 20th year silver BULL watch and wall plaque shattered, Roger finally decides to reach out for help.

## Monday morning quarterbacking

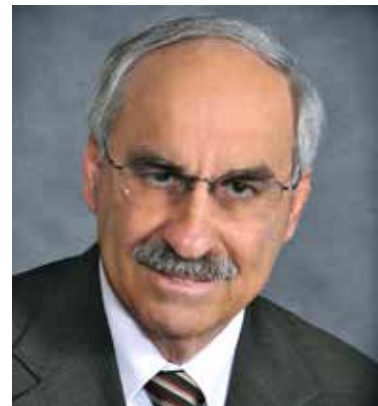
Could any of this have been prevented? Even exercising perfect 20/20 hindsight, Roger appeared unlikely to ward off termination under this all-too-common, end-of-the-line scenario. However, some greater care or perhaps consultations with counsel, may have left Roger better positioned to negotiate with BULL and move on with his post-termination career.

Upon learning of BULL's possible merger or sale, Roger might have dug out his rep contract to review what it says about a change of control. Many rep contracts will automatically carry over the rights and responsibilities of a manufacturer to any successor. A merger with another entity or even the acquisition of BULL by a competitor does not have to spell the end of the relationship. Other rep contracts will enable the rep to immediately cancel, which may also serve a strategic interest. If Roger had kept up with other potential opportunities, this development may have furnished an opportunity to pursue them.

The demand for corporate representatives to tour the territory with Roger and get introduced to the key contacts is probably not specifically addressed in the rep agreement. Generally, choosing to accompany reps in the field is within a manufacturer's discretion. And if handled correctly, they can even be productive. While undesirable and frequently an ominous sign, demanding a list of contacts from a rep's largest customers is also usually within a manufacturer's prerogative. Roger should have asked himself what benign purpose is served by this request, and if he could find none, read the writing on the wall.

Calling for a list of *prospects* in the territory, the clearest red flag waved by BULL, is rarely appropriate. Such a request is unlikely to find

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by Gerald M. Newman  
ERA General Counsel

*Gerald M. Newman, partner in the law firm of Schoenberg, Finkel, Newman & Rosenberg, LLC, serves as general counsel to ERA and is a regular contributor to The Representor. He participates in Expert Access, the program that offers telephone consultations to ERA members.*

*Gerry co-authored this article with his partner, Adam Glazer.*

*You can call Gerry Newman or Adam Glazer at 312-648-2300 or send email to them at [gerald.newman@sfnr.com](mailto:gerald.newman@sfnr.com) or [adam.glazer@sfnr.com](mailto:adam.glazer@sfnr.com).*



Adam Glazer

## LEGALLY SPEAKING: Looming termination

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support either in the rep agreement or in the law. Just as designs for future products or pricing schemes are considered the manufacturer's intellectual property, lists of customer prospects may be viewed as the rep's intellectual property. After all, these prospects, developed by a rep from servicing a territory for years and investing significant resources to build up a knowledgeable base of contacts, are hardly proprietary to the manufacturer. Roger may have been well-advised to resist this demand — perhaps by pushing back at BULL's rationale for seeking it.

As for the offer to pay commissions for 60 days post-termination, this is a matter typically governed by the rep contract. Is BULL actually making a generous offer, or does the contract already require such payments? The contract may contain a 90 or 120-day shipment provision. Or it could require commissions to be paid on orders received, not shipped, for 60 or more days after termination, regardless of when shipment takes place. Beware of offers made to quickly wrap things up upon termination.

Finally, the paperwork to be signed could contain any number of traps and should be very carefully examined. To receive the promised benefits, including some form of severance payment, Roger may find that BULL has slipped in a post-termination, non-compete period. Or perhaps he is subject to getting drafted back into service for BULL on some non-commissioned basis, if the company needs help with transitioning the territory at some point during an unlimited, "as needed" period.

Maybe BULL is seeking some post-termination indemnity agreement from Roger, and on a retroactive basis. BULL may be looking for retroactive compensation adjustments based upon difficulties with a customer. For good reason, severance agreements are usually scoured over by attorneys.

The severance deal offered by BULL is, after all, its opening offer. Roger should know he is in a reasonable position to counter. BULL is the party seeking to obtain a full release of all claims from Roger on his way out, and the manufacturer should be willing to negotiate in order to secure peace, following its unceremonious termination of a longtime rep.

### Taking the BULL by the horns

Perhaps the most important function to be served by reviewing Roger's dusty contract with BULL is to determine what it doesn't say about post-termination commissions. Determining whether Roger has a claim to recover such commissions beyond the 30 or 60 days set out in the contract may enable him to go on the offensive with BULL, or he may at least strengthen his hand in trying to negotiate favorable parting terms after nearly 20 years as its rep.

While many rep contracts specify how commissions are to be paid on orders or shipments during these initial 30 or 60 days after termination, they often do not address orders procured by a rep pre-termination that do not come in until long after the termination is effective. Reps who invest years of time and money to create demand for a product and then face termination may have a right to recover more than 30 or 60 days of commissions under the common law procuring cause doctrine.

Courts in the many jurisdictions that follow this doctrine may read into rep contracts — even contracts that address orders arriving within the first 30-60 days after termination but do not expressly bar or limit post-termination commissions thereafter — a right to recover such commissions. This legal right is based upon the concept that the manufacturer otherwise recovers an unfair windfall by terminating the rep who procured the business, expecting the sales to prove commissionable. If the parties did not agree that commissions would be paid for *only* 30 or 60 days, then a manufacturer enjoying continued sales from the terminated rep's hard work is entitled to no presumption of such a limitation.

### Summary

The contract Roger signed with BULL, back when lithium-ion batteries were all the rage, should be located and consulted at the first sign of trouble, not merely when termination is on the horizon. As the relationship is changing, maintaining a working knowledge of the rights and responsibilities of the manufacturer and the rep will greatly aid both parties. Furthermore, pushing back appropriately in the face of unreasonable demands may even enable the rep to limit or hold the line on drastic deviations from the parties' agreement. And if the termination is taken without due regard for the rep's efforts, then fair compensation may still be attainable on a post-termination basis. ■



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