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# Prosper At Your Own Risk: When Sub-Rep Success Cannot Be Restrained

by GERALD M. NEWMAN and ADAM J. GLAZER

**Y**our doggedness and proficiency on behalf of a national manufacturer have finally paid off. After 13 years of steadily increasing sales up and down your eastern seaboard territory, Rodney, the manufacturer's general sales manager, recognizes your dedication and pays you your due by expanding your sales territory to include "everything East of the Mississippi." For the first time, Rodney even invites you to dinner with the company's COO, to whom you're accorded the introduction, intended as praise, "Felix, meet the sales rep who never missed a sales call, and probably never made a kid's birthday."

A bit shaken by the accuracy of the greeting, you overcome your mixed feelings about the personal cost of your success and seize this opportunity to throw down martinis with Rodney and Felix. Before long, you learn of Felix's plans to develop the business in some of his projected growth spots in your new territory. Places like Chattanooga, Akron and Springfield. Chattanooga? You know it only in song. Something about a train. Akron? Your

wife visited Akron once. Or maybe it was her brother. And Springfield? The one in Illinois or Missouri? Wait, isn't Missouri West of the Mississippi?

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## Developing the Sub-Reps

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The next morning you've bought a new atlas and are on the phone with some of the reps you've played golf with over the years after your rep association's annual meetings (okay, during the meetings), well on your way to lining up a new sub-rep network to continue servicing this important principal. Over the next few months, after shedding three other principals to make sufficient time for this undertaking, you introduce your new, non-coastal



sub-reps to the methods and practices that have kept you in Rodney's good graces and made his product line an industry leader.

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rep has signed an agreement reciting how this sales relationship was forged exclusively by you, and each proves agreeable to an equitable split of commissions earned. The subs further accept the boilerplate, non-compete language that you always tried to delete when inserted into sales rep contracts by manufacturers. This enables you to carefully restrict, on your own word processor, your assemblage of sub-reps from representing any other line for three years — no, make that five years, following termination of the agreement.

And your hard work and thoroughness pay off again. For the next 18 months, “your” network increases Rodney’s sales East of the mighty Mississippi by nearly 20%. Never resting, you continue your fly-arounds and ensure the sub-reps are all performing up to your own high standards. You allow yourself to consider turning this into a true, national account.

***You may have covered your contractual bases with the sub-reps, but the contract you signed with ol’ Rodney did nothing to prevent Sheila from seeking to exploit the rep relationships you handed her.***

Felix must envision more growth locales to the west. What about Wichita?, you wonder. Des Moines? Maybe even Reno. You always wanted to visit Reno on an expense account.

With visions of your own manifest destiny racing around the cerebellum, you call Rodney to discuss presenting some additional expansion concepts to Felix, trying not to sound too presumptuous. Oddly, your call does not go through. Word slowly reaches you that Felix’s further growth plans evidently did not include your man Rodney.

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#### **Whose Sub-Reps Are They, Anyway?**

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The introduction to Sheila, Rodney’s replacement, was icy at best. Not yet two weeks into her new job, Sheila wonders aloud how your small, border state rep firm can efficiently manage the company’s sales half a continent away. “No wonder Felix brought me in,” she tells herself. You always felt your growth record spoke for itself. But suddenly, the only speaking that mattered was being done Sheila to Sheila.

You were not surprised to receive the termination notice six weeks later. It was not unusual for new sales managers to bring in their own key people. Sheila would have had to work fast to

replace your network across the entire Eastern United States, but give the devil her due. She seemed capable. Besides, the company was honoring its contractual post-termination commission obligations.

Harboring hopes of keeping your sub-rep network together, you open negotiations with possible replacement lines. Your network is already in place, experienced, and in need of a new line, and could be leveraged to look quite attractive to other manufacturers. Competitors who had watched your success with envy up till now could step right up to fill the void. And Rodney never insisted you sign a non-compete. Upon broaching the topic of taking on a new manufacturer with one of your trusted subs, WHAM! It turns out the subs weren’t terminated at all.

Instead, Sheila the Sinister had quietly cut you out while signing most of those spineless, disloyal subs to new rep agreements directly with the company, and at reduced commissions. Perhaps you could stomach your own termination, but you would not watch Sheila rob you of the sub-rep network you had so painstakingly planted and harvested, not without a fight.

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#### **The Fight?**

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“Whaddaya mean there was no non-solicitation clause?!” boomed your fierce, fire-breathing rep lawyer, Rex, the next morning. “We coulda sought to restrain and enjoin this Sheila from going after your subs!”

What, no injunction? You really weren’t in the mood to hear Rex’s version of the “Why didn’t you see me sooner” speech, par-

ticularly since he made it sound so painfully obvious. You may have covered your contractual bases with the sub-reps, but the contract you signed with ol' Rodney did nothing to prevent Sheila from seeking to exploit the rep relationships you handed her. Adding insult to injury, Rex made it sound like your failing to come to him with the contract to protect your rights as the sub-rep assembler was the worst blunder since Custer led his calvary unit into Little Big Horn. Maybe General Custer should have had you draft him a nice contract too, Rex.

Sensing your disappointment, Rex counsels that you might have a cause of action against the company for wrongfully or "tortiously" interfering with your contracts with the sub-reps. "Attaboy, Rex," you tell him, pausing to think how much that sounded like you were praising a canine. "Now, what about those turncoat subs?"

Belatedly, you realize that you had interrupted Rex, who was busy qualifying his tortious interference theory with cautionary, lawyer phrases that you didn't care for, including how "proving damages won't be easy," something about an "uphill battle" and howjuries are "fickle." Fickle? C'mon, Rex, ol' boy. Where's the fire?

"As for the sub-reps," he continued without conviction, "the idea of a non-compete was probably appropriate, but the language is not what I would have recommended." Of course not, Rex, you think to yourself, but I didn't charge myself by the hour for modifying a form. "What's wrong with the language?" you demand.

"Well," intones the suddenly fireless counselor, "for starters, the non-compete only restricts these subs from representing other lines. It does nothing to



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limit their ability to continue representing the same line directly for the principal." Could that possibly be right? The pounding in your head grows heavier as you try to decide if the company had all along plotted to steal the network you built and trained, or if Sheila just got lucky. "Moreover," Rex continues, but you are so deflated you can only wonder if any life form other than lawyers ever uttered the word, "Moreover."

In truth, you heard very little after Rex's "moreover" proved to be that any restriction on competition for longer than two years was difficult to enforce, and that your five-year restriction was almost certainly "too long under the circumstances." Soon, you were spending unprecedented time with your children, including your first pizza and petting zoo party. Unfortunately, hosting 20 five-year olds and farm animals proves to be no elixir for your headaches. It also dawns on you that it is difficult to both attend and pay for these birthday parties. And what is that on your shoe?

#### Lesson Learned

Perhaps you would elect to sue

the company for tortious interference, and also pursue the subs, not for the fiery and immediate injunctive relief you had hoped for, but under the more practical theory Rex recommended, a straightforward claim for breaching their contracts by repping the product line without paying you your share of the commission payments. You understood the theory wasn't foolproof, but perhaps the company would be anxious to work something out with you before the reps could get scared off. It seemed that Rex's fire probably wasn't extinguished after all, just kept on a low flame until he was ready to start the grilling.

At the same time, you're not completely comfortable with the idea of suing your former rep buddies. You also recognize that, given time, Sheila is perfectly capable of replacing each of them with new reps who won't owe you a dime on their sales. Preparing to move on, you first authorize Rex to fire a demand letter off to Sheila and to each of your turncoat subs, rattling his saber and suggesting the wisdom of a prompt, fair settlement offer. Perhaps copying Felix on the letter will cause him to re-emerge and forge a confidential deal. If an

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amicable resolution cannot be quickly reached, will you file suit? You leave them wondering about this as your primary focus returns to sales, and to developing new business lines and relationships.

As the fall season takes effect, you've lined up a competing manufacturer with a very attractive product line. It's quite a change after 15 years, but you have not lost your zeal for sales

and are determined to continue in the manner that always brought you success. One change you will make, however. Trying not to picture Rex turning on his meter as soon as you step off the elevator toward his suite, you carry both the proposed sales rep agreement you just received, and, just in case the opportunity again arises, your original sub-rep agreement for review as well. You are

reminded of the old oil filter commercial where the mechanic warns, "You can pay me now or pay me later."

Rex greets you warmly and listens carefully to your directions. "I need you to review this rep agreement. It looks okay to me," you tell him, "but I need you to clean it up." Pausing for effect, you add, "Moreover, Rex, I've brought my sub-rep contract..." □