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# The Legal Value-Add

There's no need for the relationship between independent rep and manufacturer to be strained. But in the view of attorney Barbara Kramer, the time to ensure that you create and maintain a positive relationship is at the beginning. And, having an attorney in the mix doesn't hurt.

“Obviously, no one wants to begin the relationship in a contentious manner,” she maintains. “If I were a rep, here's how I would approach it. From day one, make sure you have experienced legal counsel. I advise that because I know that many reps, especially inexperienced reps, are a little apprehensive because they feel a manufacturer may be offended that a rep has a lawyer. But that's not the case.”

According to Kramer, “It's been my experience that there are several benefits to having an attorney:

- “Manufacturers respect reps who truly understand their own value, and having an attorney is an indication that they are smart businesspeople.
- “The attorney is of great assistance in helping the rep negotiate a fair contract. What manufacturers would want their reps to work under the terms of an unfair contract? There is no better incentive for reps to work long and hard on behalf of the manufacturer than if they are working under the terms of a fair and equitable contract.
- “By involving an attorney in negotiations, reps may find that they can insulate themselves from unfair demands from the manu-

facturer. If the manufacturer has an objection to something, the rep can simply say, ‘I'm doing this because my lawyer advised me to.’”

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## Full-Service Law Firm

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Kramer is a partner with her father, Mitchell, in the law firm of Kramer & Kramer, LLP. The firm, which has offices in Pennsylvania and Michigan, offers a broad range of legal services with a special emphasis on handling legal matters unique to sales representatives and distributors. Visitors to the firm's web site ([www.kramerandkramer.com](http://www.kramerandkramer.com)) will learn that: “In addition to decades of experience working

with sales agents and manufacturers' representatives, we assist clients in the review and negotiation of contracts, the purchase and sale of businesses, and employee issues. We have a broad and diverse litigation practice, handling matters involving contract, business tort, antitrust and trade regulation, employment law, personal injury, franchising, and securities law on behalf of corporations and individuals. We serve as general counsel to trade associations and corporations, counseling our clients in all aspects of their business to help them achieve their business goals and avoid the expense and disruption of legal problems. We offer a blend of business advice and legal counsel

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*Barbara Kramer*

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and maintain up-to-date, in-depth knowledge of the industries in which our clients operate.”

Kramer, who was a participant in the Legal Symposium sponsored last year by MANA, explains that she and her father do a good deal of working together on various cases. “If you call one of us, the benefit is that you get both of us. My father is incredibly experienced in rep law, and while we individually handle some matters, when something goes to trial, we’re both involved.”

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### Far-Reaching Legal Practice

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Kramer & Kramer’s two-location practice in Rydal, Pennsylvania and Ann Arbor, Michigan hardly limits the geographic scope of the firm’s business. “We regularly take cases from all over the country, whether it’s Texas, New Mexico, California, New York, Pennsylvania or Michigan,” explains Kramer. She points to the breadth of their practice as indicative of the fact that “it’s not that common to be able to find a lawyer who has an understanding of what a rep does, and that’s an important consideration when choosing your legal counsel.

“The common law that applies to contracts protecting reps is quite similar from state to state. Because sales rep law can be different from state to state, however, there are many legal firms that are new to the law and the accompanying litigation. We are one of the few firms that have gone to trial numerous times on these laws. As a result, we’ve built up quite a body of experience. For instance, the fact that we have an understanding of the rep world and of the specific industries that reps work in is much more mean-

ingful than being a lawyer located in New York state. From our offices, we can look at the New York rep act and immediately have an understanding of how to litigate a matter better than perhaps 99.9 percent of lawyers in New York. The reason for that is that the legal contract issues reps face are very specialized and may not be as obvious to a commercial contract lawyer as they are to an attorney who specializes in rep law. That’s why it makes more sense for a rep to retain someone who’s familiar with what they do for a living.”

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### Rep Law Expertise

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A check of Kramer & Kramer’s profile on the MANA Online Directory shows the firm was founded in 1924 and serves as legal counsel for PTRA and IMDA. According to Kramer, “We developed our rep law expertise over more than 30 years of working with independent reps and distributors. Our firm has always practiced antitrust law, which is very common to distributors. About 25 years ago we were asked by a group of medical distributors to assist them in forming a trade association, which we did. Through that association, we really worked to change the fundamental contract relationship in medical sales between the distributor and the rep on the one hand, and the manufacturer and the distributor on the other hand. Historically, reps and distributors had no protection against termination by manufacturers and there was no recognition of the value that they provided to the manufacturer. Through that association it became quite standard for reps and distributors to achieve protection in cases of termination. At the same time, we

worked at building strong relations between reps and manufacturers. Our experience with that one association led us to represent other trade associations. As a result of word-of-mouth referrals, we started working with more and more reps. As a law firm, we were able to assist in getting some state rep laws passed, even going so far as to draft the Pennsylvania rep law. This activity is very important in that we continue to encourage reps to pay more attention to contracts and the development of their contracts. Remember that laws are no substitute for good contracts. The law doesn’t protect against termination and protect commissions when the rep has devoted years to develop a sale and then is terminated.”

If Kramer is a firm advocate of the rep obtaining competent legal counsel, she has equally definite thoughts in a number of other areas of importance to reps.

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### Advice

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In a word of advice to reps, Kramer maintains that perhaps their greatest concern should be in the area of contracts. “It all comes back to developing strong contracts and to understanding what the contract means in the relationship between manufacturer and rep. Remember, manufacturers always have their lawyers write their contracts. Those contracts are often put together in a sophisticated and subtle manner that is crafted to make it appear the rep is getting something on the one hand, but in reality something is being taken away with the other hand. Too many reps don’t know what that contract means in terms of their business.”

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### **Importance of Written Contracts**

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In response to the question, “Should a rep ever work with a manufacturer in the absence of a written contract?,” she explains, “As a general rule my answer is no. I’d add, however, that in my career I’ve seen some contracts that have been so incredibly bad and if the manufacturer shows a reluctance to negotiate, the rep would have probably been better off without a contract.

“But having said that, everything the rep does with his manufacturer comes down to a contract. Reps are salespeople and they want to go out and sell. As a result, from the very beginning of the relationship the rep

wants to be enthused about what he’s selling. If he doesn’t have a fair contract, that’s going to affect how he performs in the field.

“Unfortunately, too many reps maintain they’re in a 30- or 60-day termination industry and that’s just the way it is. Well, that’s not true. It’s critical for reps to understand that the only time they have any real bargaining power is before the relationship begins. Once they start selling products, their ability to leverage themselves to gain a better contract is severely limited.”

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### **Cost of Legal Representation**

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In speaking with independent representatives across all industries, a consistent point they all

make is that they face the challenge of meeting their costs of staying in business. Those costs include payroll, insurance, travel and entertainment — not to mention the cost incurred from legal representation.

According to Kramer, she’s well aware of the rep’s concern in this area; however, she maintains reps would do well to view legal representation “not as a cost, but more as an investment in your business.” To bolster that view she says, “I can cite any number of examples where the fee paid to an attorney has been more than worth it. For instance, there have been any number of times when a manufacturer terminated his reps to go direct. When that happens, there are things that the lawyer understands that the rep can and should do to protect assets (e.g., their relationships with customers). I know it may be hard for the rep to justify paying hundreds, if not more than a thousand dollars, for that type of advice, but it’s money well spent.”

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