Good Fences Make Good Neighbors; Document Customer and Vendor Agreements

by Stuart Adams

Robert Frost is credited with coining the phrase, "good fences make good neighbors." I'm sure there's a comparable quote related to doing business, but I'm afraid in the e-commerce era you can't always count on the good old handshake days. It's a little more difficult to shake a hand when you may be continents away from a customer you've never seen. Originally, it appears the handshake was used to make sure the person you were greeting was not carrying a weapon. Later, in negotiations, it came to be recognized as a sign an agreement had been reached.

Today, it could just as easily have the meaning ascribed to it by the TechWeb Techencyclopedia, (http://www.techweb.com/encyclopedia/) which defines handshaking as: "Signals transmitted back and forth over a communications network that establish a valid connection between two stations." Unfortunately, all too many e-commerce companies get so involved either in obtaining the business at any cost or are so focused on doing the work, they sometimes forget to dot all the "i"s and cross all the "t"s in their dealings with customers and vendors.

Believe it or not, as I write this article, a computer company client of mine is involved in litigation which has dragged on for over five years. The out of state client is a defendant in a case locally where the plaintiff (end-user) prides itself on not having read the fairly voluminous contract. The plaintiff stakes most of its case on what it says it considered to be oral representations by the initial salesman. Granted, we have whittled the plaintiff's case away to almost nothing, and actually now have a chance of recovering more in attorney fees and costs against it than it could obtain in a judgment, but my client has spent thousands of dollars, let alone innumerable hours of key personnel time, defending this case hundreds of miles from its home base.

This is a situation where the "don't try this at home" slogan has an entirely different meaning. My client would rather have tried the case in its home state, which has slightly more favorable legal precedents on the issues we are concerned with and where it would have at least been much cheaper and convenient for it to litigate. It went to the trouble of having its corporate counsel put in some very nice language dictating that any litigation must take place in its home state, but not atypically, the local judge allowed the case to proceed here. This is called "long arm" jurisdiction. No matter the outcome, my client lost before it ever contacted me. Its profit margin on the deal evaporated long ago, simply due to loss of time and productivity for several of its key employees. Margins are typically low

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in this industry to start with because of competition, so it doesn't take much to lose money on a deal like this. In retrospect, they would certainly never have done this "deal."

The key is obviously not to get into a dispute with a customer in the first place, since customers can "vote with their feet." Clearly that's not always possible, but you can certainly improve your odds. Keep in mind that you should also look at the reverse of the customer situation, applying it to your relations with your vendors. After excellent employees, having good relations with your customers should probably rank highest on your list of assets, and vendor relations a close third. To that end, let's start with a look at some ways to avoid ending up with a customer dispute.

CUSTOMER DISPUTES; LOOKING FOR LOVE IN ALL THE WRONG PLACES

The first issue to deal with is how the relationship with the customer begins. This, of course, can happen in a multitude of ways. The basics for your business, for instance, might be that you search for and respond to requests for proposal (RFP) issued by a company looking for a vendor to fulfill an existing and defined need. At the other end of the scale, you might have a product, service or combination thereof, and you are looking for customers to "convince" that they need what you have. In between the response to the RFP and the cold call, there are many situations where opportunities may arise to enter into a relationship with a customer to initiate, expand or modify your business arrangement.

If what you are selling at retail from a storefront is a gallon of milk or something else which is relatively obvious in its use and usefulness to the customer, things are pretty simple. The basic elements of fixed price for a specific quantity should be enough, as long as the milk is not sour or radioactive and the customer's check clears. If you are shipping truckloads of milk on a regular basis, such as to a school or grocery chain, things start to get interesting.

The milk scenario (insert microchips, Web sites, software, books, sailboats, or anything else, if you wish) changes dramatically if you are bidding on fulfilling the need of a potential customer which has issued an RFP. You must be sure that what you are offering responds to all elements of what the customer wants, so as not to be eliminated from the bidding process, and must also gauge how thinly you can cut your margin, so as to beat out the competition. In addition to price, other elements of what you offer can result in a competitive advantage over the other potential bidders, such as reduced delivery time, increased support, order tracking, etc. This is where the gamesmanship comes into play counterbalancing risks and rewards.

THE UNINTENTIONAL NON-PROFIT BUSINESS

Many start-ups get into trouble by cutting their margins so low, or even providing goods or services at a loss to "get the business," they later find they have underestimated their ability to sustain the loss. They typically believe that if they can undercut their competition or deliver the goods or services faster, they will get enough repeat or spinoff business to make a profit in the long run. Obviously, some industry leaders have successfully employed this strategy to get where they are today. Perhaps less obviously, the bankruptcy courts have to sort out many more of these overly optimistic ventures, for pennies on the dollar.

Keep in mind that big companies, with multiple, diversified streams of income, can better weather a price war than can a thinly capitalized start-up. The big companies typically also have sales, manufacturing, delivery and administrative infrastructure in place, as well as an already recognizable brand name. These are all things the start-up must acquire over time and at a price. There can be good and bad in this for the start-up.

The small company can typically adapt to changing market or customer needs more quickly and at less cost, a potential competitive advantage we'll explore in a separate chapter. The big company often has the "Billy Graham" dollars to fund research, development and immediate expansion into multiple markets, but can change direction about as quickly as a fully loaded barge going downstream. The small company, on the other hand, might have to rent a truck, at a relatively uneconomical rate, to make the first delivery to the customer. The big company may find that its cash is being sucked into a black hole by having to sustain a large fleet of vehicles with corresponding insurance, maintenance, and labor costs, even when not fully deployed in profit generating activities. An idle fleet is the devil's playground.

The key here is to accurately determine what the customer really wants and needs, and to then compare that with what the start-up really needs. The salesman in the field could, however, may not always be the best person to conduct this analysis, particularly if he or she is working on commission. The calculation at that level may be extraordinarily simple. What do I have to promise this potential customer to get them to sign the purchase order, and what will my commission be on the sale? While the salesman may move on tomorrow, or later today, commission check in tow, you, as entrepreneur, may be left with an unhappy customer, or worse.

Making marginal sales may have its place, but with few exceptions, it's probably not the best way to lay a foundation for a successful business. A better way is to try to understand and fulfill what the customers really need, whether they themselves understand that initially, or not. Too many salesmen are so busy giving the pitch, that they don't spend the time to research the needs nor listen to the desires of the customer. Quite often, there is an opportunity to do something "wonderful" for the customer with the correct answer or innovative idea, increasing your chance of a successful, long term business relationship. Be careful, however, because, as Roger von Oech pointed out in his classic book on creative thinking, A Whack on the Side of the Head, there is often more than one correct answer.

This leads to the second method of getting the new business, which is the proposal. I'm not sure there's anything wrong with responding directly and exactly to an RFP, but also sending in a proposal, substantially different than your response to RFP, which may better meet the client's needs. Certainly a more typical scenario is to send an unsolicited (or at least barely solicited) proposal to a client. At this stage you may (but not necessarily must) be dealing with a client that may have an unrealistic view of what is needed. Remembering that the customer is always right, your job may become that of educator, teaching the prospective client enough to see the "wisdom" of what you have perceived the client really needs.

If your job is fulfillment, you must understand the difference between what the client feels it needs and what it will actually benefit from. Sure, letting the sale force sell anything a client will buy may help your cash flow in the short term, but beware the financial revenge of the unhappy customer. Many marketing professionals say you should see something of a bell curve resulting over time from a successful advertising or PR campaign. After implementation of the marketing effort, you should see an otherwise inexplicable increase in sales. After the effort peaks, or if you later terminate or incorrectly change the promotion, you should then see a corresponding, somewhat gradual and just as inexplicable decrease in sale, thus forming the shape of a bell on your time chart of sales.

Likewise, if you allow your sales to be less than "fulfilling" to your customers, you may see an inverted bell curve. Your peak, the rim of the bell, may be the level of your present sales, while, after your sales bottom out, if you correct your strategy and your sales start to return, they will, hopefully, eventually rise to the starting point on the far rim of the bell curve. The major problem here may be that if you don’t realize the error of your ways in time, the bottom of the bell becomes a black hole and your downward momentum may never allow you to rise to the lip on the far side of the inverted bell.

The deterioration of the inverted bell into a black hole seems to be something to which e-commerce companies have recently been more susceptible than traditional bricks and mortar companies. Many of these have been ill-conceived companies with no real substance to fall back on and may have a business plan written, if at all, around the prospect of a quick IPO, literally based upon the cuteness of the domain name alone. This susceptibility for disaster is perhaps also because of the lack of customer contact and thus, correspondingly greater misunderstanding of customer needs.

BLEEDING EDGE CUSTOMERS

Web designers also seem particularly prone to customer dissatisfaction. Because of the youth and inexperience of many start-up Web designers, it is perhaps not so surprising that what is being offered or provided fails, in the final analysis, to reach any meaningful level of customer approval. Many businesses simply feel they "have to get on the web" but have no real understanding of what this means. Initially they are taken in by the "pitch" of the proposal and are perhaps overstimulated and overly optimistic They can quickly feel the pain of the "burn" rate of web developers, however, while only later realizing the specifications, if any, for the company Web site result in no perceptible return on investment.

This is a typical case of a perhaps very talented technician, inexperienced in the needs of business, attempting a contractual "meeting of the minds" with a business oriented individual who is out of his or her "element." Technology is still such an alien concept to many businesses, that often those negotiating on the side of the end-user business simply abdicate their role as bottom line analyst. Frequently, it seems, they have been talked into acquiring or upgrading "technology." There may be resistance in their "gut" but this seems to be outweighed by their fear of being left behind by their competitors if they don't acquire some "cutting edge" technology.

We all know, of course, there is a thin line between "cutting edge" and "bleeding edge." Many of us learned this in the early days of the deployment of the Windows® operating system as a replacement for a less glamorous interface. In the rush to "modernize," many early adapters scrapped their old DOS programs, only to find they had replaced a black DOS screen with white letters and obscure function commands, for an initially colorful but unstable OS which always had a blue screen with white letters. Soon, many realized that the new OS required more memory, a larger and faster hard drive, more powerful processor, and other enhancements, to come even close to the marketing promise of the new operating system.

While some of our competitors still plugged away at their work using their now antiquated systems, we innovators found we were learning to "crack the box" to figure out why our CD drive no longer worked, sound card made no sound, or we simply got the proverbial "Blue Screen of Death," indicating we were the recipient of our 12th general protection fault of the day, thus commanding us: "Do not pass Go. Do not collect any money. Reboot your machine and lose all work you were silly enough not to save before you tried to print out the document you were working on."

This is where we come back around to the proposal stage of contracts. In some cases a proposal can be quite simple. This is true where the parties have established a course of conduct over a period of time in the same type of transaction. If all the terms have been worked out initially and there is evidence (preferably in the form of documents as well as conduct) it can be easy to use the cookie cutter approach on the next transaction of the same type. Unfortunately, as an attorney, I am often requested to collect an "overdue account" only to find my client has been lulled onto a false sense of certainty as to the terms of the contract.

MINOR DETAILS

This usually occurs when seemingly minor differences occur in what one party thinks is simply another cookie from the same mold. Sometimes there is an add-on, a different delivery situation, another party introduced into the transaction, or something else one of the parties has not accounted for. If everything goes well, there may not be a problem. I usually don't see those deals, except from an historical perspective. What I do see is the loss of product or time because of an intervening common carrier, a refusal to pay full price because another party has become involved, or some other factor raising its ugly head, all to the chagrin of my client. "This one" also turns out, quite often to be "the one where we didn't get the normal signature on the delivery receipt form," or someone outside of the normal chain took the order by phone, instead of getting a purchase order, etc.

Any proposal, which is of course partially a marketing piece, must also include or incorporate by reference, your terms and conditions. An alternate method is to simply make final approval of the "deal" subject to written approval by the appropriate individual at your company after a fuller sales agreement or contract is signed. Even though the handshake deal has lost its luster in e-commerce, most transactions can still be handled on the basis of an oral or implied contract. This is your least desirable alternative, since evidence of the elements of the contract is obtained in the forum of the proverbial liar's duel. This is great for lawyers, but horrible for those charged with looking after the company's bottom line.

Typically, an offer and acceptance can result in an enforceable contract. Your proposal may have just enough information, when accepted, to result in a deal you didn't fully appreciate or desire. If you promise you will do something for a client, you may find your client has the legal right to hold you to that promise unconditionally. The condition you might have wanted to insert, in hindsight, was something the client didn't tell you about, but was not referenced in the proposal. Regardless of additional cost to you, you may have to perform at a loss, rather than losing a customer and paying a lawyer either to chase the "bum" or defend you from a customer suit or counter-claim. All of this can be, and should be, handled in the wording of the proposal.

I'll never forget the computer client who promised to deliver and set up the new computer for his customer in the customer's office, including getting the modem connection working. He found out when he got on site in another city that the customer's office did not have either the proper electrical or phone connections necessary to do the job correctly. The simplest of language could have either gotten him off the hook or allowed him to charge for several hours of additional time he spent, after calling me, to finally satisfy the customer and avoid litigation.

Getting out of a contract is something that may be difficult but not always impossible. Some techniques are described, for instance, in an article entitled "Graceful Exits: Contractually Bound" by Bret A. Fausett, available at the Webtechniques site, http://www.webtechniques.com/archives/2001/06/legal/, or even information on how to get out of noncompetition agreements, for a price, at BreakYourNoncompete.com,™ a Web site (http://www.breakyournoncompete.com) apparently developed by a Virginia attorney. Interestingly, to continue through this second site, the attorney requires you to "sign" a Visitor Agreement which starts with the following language: "To access the free samples you must click on 'I agree' at the bottom of this Visitor Agreement. This Visitor Agreement outlines the terms and conditions of use of these web pages." The Visitor Agreement goes on to inform you that the information provided at the Web site is furnished on an "as is" basis and specifically disclaims all express or implied warranties, including those of merchantability, fitness for a particular purpose, non-infringement and title. (In other words, it may not be good for anything, and no warranty is being made that it was not the property of someone else.) The disclaimer section goes on to further state that no claim is made that the information is accurate, reliable, current, free of omissions or mistakes. Perhaps humorously, it adds a statement that the site specifically disclaims any representations or warranties that it is "Free of viruses or other harmful effects."

If you think that is strong, by reading on in the Visitor Agreement, you find that you may link to the site only after notifying the site in advance and agreeing to certain specific conditions, such as not removing page headers or copyright notices, and must agree to discontinue linking if requested. Additionally, by clicking your "agreement" at the end of the document, the new "virtual handshake," you agree that any dispute which arises with regard to use of the site must be arbitrated by the National Arbitration Forum, or if the arbitration clause is ruled by a court to be void or unenforceable, then suit must be brought only in Virginia Beach or Norfolk, Virginia.

In the next installment, we'll discuss some specifics on how to structure and draft the proposal, as well as the "magic" language which can help save you from disaster.

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