

ARGYLE ADVOCATE

I recently read the article in Money Management entitled “Countdown to Financial Services Reform” where it states “The issue of control becomes very problematic for a principal planner who has employed planners where the authorisation comes directly from the dealer. FSR says that the dealer has a direct relationship with clients but the employed planners has their major commercial relationship with the dealer!”

I am such an employed planner!

My question relates to how I can protect those clients that I brought into the business initially, and how I can protect any new clients that I introduce into the business in the future, i.e. what happens if I walk away from the employer, but not the dealer? Would it be possible for me to make an agreement with the employer whereby existing and new clients are recognised as belonging to me, and how would we need to consider the ramifications of such an agreement with the dealer in mind? I currently have an employment contract in place, but feel this needs to be re-written in light of FSR.

Whilst I have no intention of leaving my current employer, I am extremely mindful of the loss of my client base should relationships turn sour some time in the future. As the principal owner of the business has said to me on several occasions, “If you get your exit strategy in place first, you tend to find that everything else falls into place!”

If such agreements currently exist, could you please direct me to a legal firm that would be able to advise me on how to construct one that is relevant to my particular set of circumstances.

The right to contact clients and use information about them is often on the top of everyone’s agenda, but never more so following termination of the business relationship. Other issues may come and go, but not this one. Commonly called *Who owns the client?* it is really not one question but a series of questions that all lead to the one conclusion, as to who can most benefit from the client relationship.

Nevertheless, it is a useful way to summarise the series of questions in the one phrase; *Who owns the client?*

The first thing that one must always remember is that the “client owns the client”. What this question really focuses on is: after termination who has the right to contact the client and the right to use or copy client records?

In the post FSR environment the fact that representatives are the agents of the licensee ensures that each representative owes a duty to their dealer principal. And this applies to all of your interactions with clients. This gives us rule of thumb number one; if there is nothing else that alters the primary dealer/rep relationship, the dealer owns the client.

But the dealer/rep relationship can co-exist within an employment relationship. Where this exists, a fresh layer of relationship will affect *Who owns the client?*, a layer that is very much in favour of the dealer. The duties and obligations owed by an employee to their employer are well known and exist not only during the employment but can extend after it. This gives us the second rule of thumb; provided that there is nothing else that alters the dealer-employer/rep-employee relationship, then once again the dealer owns the client, but in a way that is built on a duty of employee fidelity to their employer.

Can an employee rep ever own the client? Yes, it is not common, but with some effort and cooperation on both sides, even an employee rep can own the client. But the rules that allow for this

must be clear and it is best if these are in writing.

The terms of your employment agreement both written and those that may be implied or otherwise found in statutory rules and case law will determine your employment relationship. As an employee, the individual acts on behalf of and for the benefit of their employer. As such, information obtained and recorded during that time is the property of employer. In addition, details of potential clients sourced whilst an employee are also the property of the employer.

Turning to the issue of client control, if the employment agreement does not deal with the right to contact clients and possession of client documentation, then the common law rules will dominate. If the employment agreement specifies the right to contact clients and client documentation, then those terms can and will override the common law rules. But the common law will still operate to affect how the written terms are to be interpreted and therefore the enforceability of the terms of client contact.

Most commonly, the right to contact clients (whether during or after the termination of the employment relationship) involves issues concerning the right to use and copy employer confidential information (which will almost always include telephone numbers saved to a mobile phone and email addresses on a lap top). This must be tested against the employee's common law duty of good faith to their employer, which in appropriate circumstances can give the employer the ability to restrain even a former employee against making contact with clients.

The NSW Supreme Court decision of Halliday's case is a good example of where the common law will impose responsibility against client contact after termination of employment, even where there is nothing in writing to limit the client contact. Here the issue turned on the importance of the relationship during employment. Effectively, the more important the employment role that a person may hold, the more likely the law will impose on the individual a restraint against client contact, at least for a reasonable period.

Where the restraint upon a former employee is written, it still needs to be assessed as to whether it is enforceable or not. This is dependant upon many factors, including its reasonableness, appropriateness and breadth. Restraints that are too broad, unreasonable or have other technical shortfalls provide no protection and will not be enforced by a Court. In such a situation the employer is left with their common law rights, whatever these may be.

Whilst all employment relationships are determined by their particular terms, generally, unless an employee has the right under an employment agreement to contact clients upon their termination of employment, their legal ability to do so will be restricted.

Can an exit strategy be put in place to deal with this? Yes, but to be confident in such a strategy it must be put in place with the clear agreement of the employer. A former employee can only contact and advise former clients with confidence where they have the contractual ability to do so. Absent the contractual rights to service former clients, any person who seeks to service their former employer's clients does so at potential personal financial risk and also, risk to their reputation.

Employers have been successful in obtaining Court injunctions and damages orders (for lost of profits as well as the cost of legal fees incurred by the employer in any Court action) from former employees who have sought to service their clients. Even in circumstances where the client has instigated contact with the former employee, or in circumstances where the employment agreement did not contain restraints. Halliday's case is another example of this, although that case went even further when the court also extended liability to the new employer!

Is there a simple answer to the issues of *Who owns the client?* Yes, think the rules through carefully and depending on which argument you want to support, document it very carefully. Then the rules and the answer will be clear to all.

But lets not forget, the client has the last *say*, and as such, even if an employee has the right to contact their former employers' clients, but the client wants to stay, then no agreement can change that.
