

## SOME IMPORTANT ISSUES TO CONSIDER WHEN NEGOTIATING AN AGREEMENT WITH AN AUTHORISED REPRESENTATIVE

(WHETHER AN EMPLOYMENT CONTRACT OR A CONTRACTOR AGREEMENT)

### Protection of the Client Base

1. Nobody "owns" a client. The use of this term in relation to clients is misleading and gives parties a false expectation as to what is possible.
2. Clients are free to obtain their advice from whomever they choose.
3. On the other hand parties may wish to agree that a party's client base is to be protected by an agreement preventing a dealer/proper authority holder or their former proper authority holder (as the case may be) from providing services to a particular group of clients. Such agreements are called 'restrictive covenants' or sometimes 'restraint of trade' clauses.
4. Note that such agreements must be carefully crafted or they will be unenforceable. > the duration of the support services, usually renewable annually

### Files, Documents and Computer Resources

#### 5. Employment Agreements:

The employer retains ownership of anything created by the employee during and as part of the employment including files, documents, computer programs, work systems etc. (This rule would not normally apply to anything that the employee brought to the job, such as employee's own laptop or resource materials.)

If this basic rule is not to apply in the specific case then the written contract should state clearly what the agreement actually is.

#### 6. Contractor Agreements:

The ownership of files, documents and the like is a matter that should be specifically set out in the written contract showing what the parties have agreed.

### Client Lists

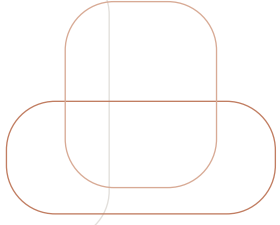
#### 7. Employment Contracts:

Unless specifically agreed to the contrary the employer/principal owns the client lists in whatever format they may be (ie written, computer generated, floppy disks, compact disks etc).

If there is an agreement to the contrary it must be set out in the written contract.

#### 8. Independent Contractor Agreements:

The written contract must clearly set out who is the owner of the client lists and what the entitlements are to retain those lists after the termination of the agreement. Note that there may in some circumstances be more than one list where, say, the practitioner has introduced a client base that he/she is entitled to retain after termination.



## Professional Indemnity Insurance

**9.** The parties should spend some time ensuring that there is in place a professional indemnity policy that provides the type and amount of cover that each of them wants.

If the practitioner is not happy with the available cover it may be necessary to obtain additional cover.

Practitioners should especially consider the likely ramifications of the termination of their relationship with the principal or the subsequent closure of the principal's firm.

Does the policy cover them even after they have left the firm? Is there a run-down clause which extends cover after the firm has closed?

It is not the purpose of this guide to provide detailed advice on professional indemnity insurance. Members are encouraged to seek advice and assistance from their insurance broker.

## Trail Commissions

**10.** The contract (whether it be an employment contract or an independent contractor agreement) should include a provision covering trails and setting out the parties' expectations regarding payment after termination.

**11.** Parties should be clear on the exact nature of trail commission payments. Are they payments by instalments for procuring the business in the first place, or are they payment for services to be rendered to the client through the life of the investment? Different rights would apply depending on which category applies.

## Dispute Resolution

**12.** Employment Contracts:

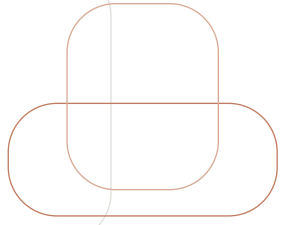
If, notwithstanding the parties' best endeavours, a dispute does occur with respect to an employment contract there are a number of avenues for its resolution including:

- > by mediation, where the obligation to mediate is a necessary precondition to litigation or the parties otherwise agree;
- > by application to the state industrial arbitration commission where the dispute relates to issues covered by the local state employment legislation;
- > by application to the federal industrial tribunal where the dispute relates to issues covered by federal employment law;
- > by application to the state court exercising jurisdiction over normal civil wrongs (eg torts such as wrongful dismissal);
- > by application to specialist tribunals for particular matters such as discrimination or equal opportunity.

The relative costs and inconvenience of these various forms of dispute resolution differ widely depending on which of the above is chosen.

## Independent Contractor Agreement

**13.** Although these agreements are not employment contracts, industrial tribunals could still play a part in resolving disputes between the parties as, particularly in NSW, industrial laws can extend to the 'doing of work' regardless whether under employment or independent contract.



Parties to independent contractor agreements can seek to resolve their disputes through

- > Mediation;
- > other alternate dispute resolution techniques such as conciliation, arbitration, mini-trial etc;
- > litigation in a court with appropriate jurisdiction.

## Protection of Client Base

### 14. If The Practitioner Brings A Client Base

If the practitioner has brought a client base into the principal's organisation it may not be appropriate for the standard rules to apply. In that case it may be preferable for the parties to agree to something different.

- > The client base introduced by the practitioner may be retained by the practitioner after the termination of the relationship, in which event the principal would have to give a promise not to approach those clients for a specific period following termination (called a "restrictive covenant"). OR
- > The client base may be purchased by the principal either at the time that the practitioner commences with the principal or following termination.

In the former instance the purchase price and the mechanism for payment should be agreed at the start.

In the latter case the agreement should include a formula for calculating the purchase price and the method of payment. In both of these instances where the principal has purchased the client base it will be the practitioner who provides the restrictive covenant.

### 15. If The Practitioner Brings No Client Base But Works Only For Clients Presented To The Practitioner By The Principal

In this instance it is generally conceded that it is reasonable for the principal to request that the practitioner provide a restrictive covenant to protect the goodwill created by the principal.

This is a matter for the parties to agree.

### 16. If Both Parties Introduce Clients

A number of possibilities apply

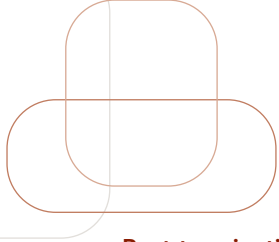
- > the practitioner is rewarded with a bonus, but the client remains part of the principal's client base;
- > the client introduced by a practitioner is part of the practitioner's client base, while clients introduced by the principal are part of the principal's client base;
- > the introduction of new clients by the practitioner is seen as part of the practitioner's normal job specification for which the salary is paid; no further remuneration is payable and the new client is part of the principal's client base.

### 17. Other Possible Agreements

Other possible agreements on this issue include:

- > the client base may be purchased from the practitioner by other practitioners who are remaining as part of the principal's business; OR
- > the client base may be sold by the practitioner to new practitioners joining the principal.

**18.** It is not the purpose of this guide to provide detailed advice on the legal aspects of restrictive covenants. There are a number of important legal issues relating to such covenants and their enforceability and you should contact me seek before agreeing to the terms of any restrictive covenant.



## Post-termination Communications With Clients

**19.** It may be preferable to reach agreement at the start of the relationship as to if and how approaches can be made to clients following the end of the relationship so as to avoid conflict over clients post-termination.

**20.** The parties may wish to minimise the potential for damage to client relations by telling the client about the practitioner's departure and helping the client understand his/her choices at that point.

**21.** One way of achieving this could be to send a joint letter to the client. It is open to the parties to decide on the contents of such letter but as a guideline the following could be considered:

- > the letter is compiled as a joint letter signed by both parties;
- > the practitioner is to cease to be a practitioner of the dealer with effect from (the effective date);
- > with effect from the date stated, any advice given to the client by either party is not given on behalf of the other party;
- > the aim of the parties is to ensure that following the change in the relationship the client continues to receive the best possible investment advice and service;
- > in order to achieve this aim the client has the choice as to which of the parties he/she wishes to remain a client;
- > a time limit during which the client has to advise the parties how he/she wants to proceed (and for this purpose enclosing a simple form to be completed and returned by the client to the parties would be preferable) and a statement of what will happen if no action is taken by the client; and
- > a statement that neither party will approach the client for a specified period of time so as to enable the client to be given an opportunity to make a choice without being pressured by either party.

AS DEAR OLD GRANNY USED TO SAY:

'AN OUNCE OF PREVENTION IS BETTER THAN A POUND OF CURE'.