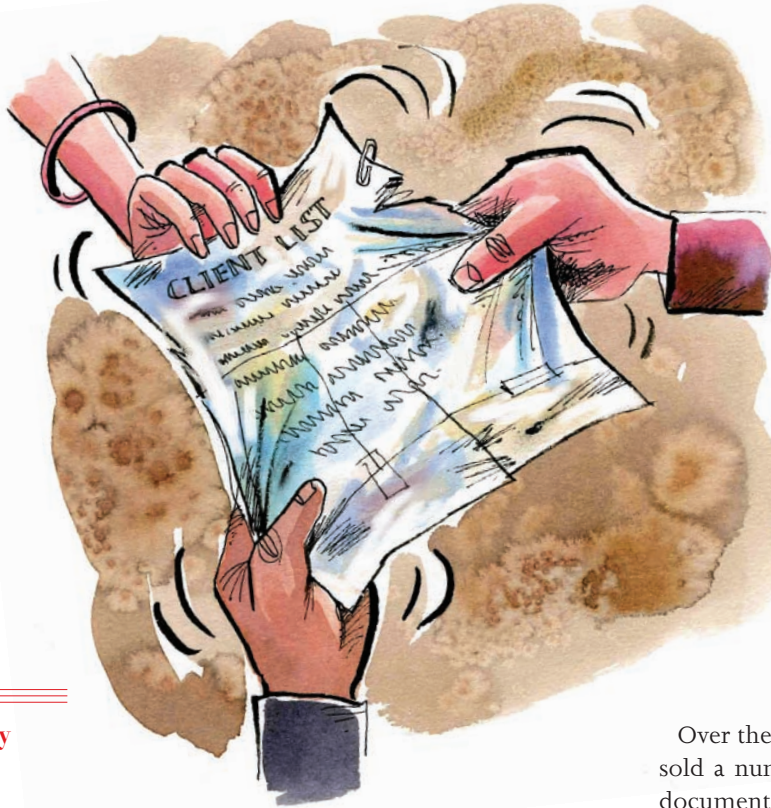


Who Owns It?



The CIP Society Ethic Series

The CIP Society Insurance Institute of Canada

The CIP Society represents more than 16,000 graduates of the Insurance Institute of Canada's Fellow Chartered Insurance Professional (FCIP) and Chartered Insurance Professional (CIP) Programs. The CIP Society, through articles such as this, is working to bring ethical issues to the forefront and provide learning opportunities that enhance the professional ethics of all insurance professionals.

As with all businesses, people move on to new jobs and new employers. But who is the rightful owner of the client list of a producer, having built an impressive book of business over two decades, when he or she heads out the door?

More than 20 years ago, an energetic university graduate began work as a producer in a small insurance brokerage office. At the time, he signed a contract containing non-compete and non-solicit clauses, which he assumed were standard fare for the industry. In time, the producer proved to be a key contributor to the brokerage's team and a valuable asset to the owner, growing an impressive book of business.

Over the years, the brokerage was bought and sold a number of times. Although the original documents were not typically referenced and the business ran quite harmoniously, things were about to change.

The brokerage went up for sale yet again, and a willing buyer was not difficult to find. A business valuation was made based on the consistency of the revenue stream that occurred and, in turn, a sale of the business to an outside party was completed.

But not everyone at the brokerage was pleased with the news, particularly the energetic producer. Armed with prior knowledge of the new owner's reputation as being someone who was difficult to work for, the producer handed in his resignation and notified his clients where he would be working in the future.

Having done a bit of pre-planning, he downloaded the details of his client base, copied the files and departed. The new owner was furious and the discussions began.

The producer felt the client list was his property; the former owner indicated there was



always an understanding that the clients belonged to the brokerage, yet at the same time felt it was incumbent upon the brokerage purchaser to do his due diligence; and the new owner suggested the price tag for the business was based on the brokerage owning the clients, pointing to the original 20-year-old documents signed by the producer. The producer then argued the terms of the old contract were too aggressive and would not stand up in court.

In the spirit of honourable business dealings, what remedies are available to the affected parties to resolve this disagreement amicably and ethically?

Nadine Austin, FCIP

Senior Investigator, Complaints & Investigations Department

Registered Insurance Brokers of Ontario

This is a difficult scenario, perhaps because the ethical issues are more subtle and exist within a legal interpretation of the contracts and events. An ethical perspective, in this case, can draw on compassion, but by downloading and copying files, our producer is off to a bad start.

The original contract was signed 20 years earlier. If the contract was between the company and the producer — and the company was still operating under the original name and in the absence

of an updated contract — the original contract will still be in effect.

The business had been bought and sold before and the producer never made any noise about owning the files that comprised what he referred to as “his book of business.” Clearly, the present owner believed the client list in to-

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tal represented his business and contributed to the value of the portfolio for the purposes of the sale and purchase agreements. The price tag is based on that fact.

The producer does not “own” his files and has no right to “download the de-

tails of his client base or copy the files.”

The policy documents issued by the insurers clearly indicate who the broker of record is, and in the absence of any other agreement that segregates the producer’s clients from the rest of the brokerage clients, this producer has no ownership. However, the new owner may quickly assess this producer will make an arrangement with another brokerage and actively pursue moving these clients’ policies to his new brokerage.

If the new owner agrees to sell the producer the files that he has identified as being his client list and the two parties agree to a price, the business is free to travel with the producer. Both parties have an obligation to advise the clients of the transaction in writing.

Whether a particular client stays with the brokerage or moves with the producer is up to the client. After a 20-year relationship the producer may have had with some of the clients, the new owner may feel it is better to receive some remuneration and let the files go.

Eric Walker

Partner

Cookson Walker LLP

This situation raises a number of important ethical conduct issues, including integrity, confidentiality and good faith.

The producer acted dishonestly by taking business he should have known was not his, and potentially breached client confidentiality by downloading client information and files to another broker without the clients' permission.

The brokerage accepting the producer and the business is not acting in good faith towards another broker by condoning the actions of the producer.

I have found this very situation in practice. My client was the broker looking to hire the producer with a book of business the producer did not own. With my assistance, she and the producer approached the broker of record and successfully purchased and moved the accounts in an orderly fashion, preserving and ensuring confidentiality was maintained, along with the quality of service to the clients.

Bradley Wells

Partner

Snowden LLP

As between a brokerage and a producer, the "ownership" of clients can be difficult to determine. A court will first consider the express terms and conditions of the employment contract between the parties for assistance. However, even where the employment contract stipu-

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lates the producer's book of business is "owned" by the brokerage, typically the issue to be determined (as in this example) is whether or not the producer is prohibited upon leaving the brokerage from competing with the brokerage or soliciting its clients.

Here, the producer's employment contract contains a non-competition clause, which, dependant on its terms, may or may not be enforceable. Setting

aside the legal issue of enforceability, the ethics of this situation are not clear-cut.

From the producer's perspective, it is understandable that he feels at least some ownership of the book of business. He built the book over a 20-year period, he likely has very close ties with his long-term clients who refer to him the majority of his new business, and he likely has a legal opinion that his particular non-competition clause may be unenforceable.

From the new owner's perspective, the price paid for the business included the producer's book of business. The new owner most likely did his or her due diligence and had the employment contracts reviewed by lawyers.

The producer does have a non-competition clause in his employment contract, which gave the new owner at least some comfort that the producer's book would remain.

As indicated, ethically there is no clear-cut answer here as there are ethi-



cal and moral factors that favour both the producer and new owner. Whether the reader feels that the producer can ethically solicit "his" clients will largely depend on where the reader sits (as owner/management or producer).

One solution to this issue is for the producer to buy the book of business from the new owner. While not ideal for either party — producer has to expend funds and likely negotiate a bank loan; new owner may be losing a large industry segment that was intended as a growth area — it is better than commencing legal proceedings.

Furthermore, by purchasing the business rather than "stealing" it (as it could be characterized), the producer has the opportunity to enhance his ethical reputation in the brokerage and insurance community.

LAST WORD

When a producer decides to move a book of business from one firm to another, he or she should consider what effect it will have on all parties involved. In this case, the producer worked hard over 20 years to build an impressive book of business and felt the original

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contract he signed was, in retrospect, too aggressive.

However, the producer failed to consider everyone else's interests when he downloaded and copied client files. After all, the insurance industry is a small pond and the producer has given his clients and both owners at least one reason not to trust him.

The best way for the producer to remedy the situation is to admit that the matter is not clear-cut and that an acceptable solution must consider the interests of the clients, the old owner and the new owner. The solution should maximize benefits for all.

Best practices suggest the way to avoid litigation is to get all parties to agree on a price for the business. Although it may not be easy to agree, an acceptable price can be reached that takes into account the effort of building the business, client wants, and the expectations of both the new and old owners.

Through a fair sale of the business, everyone wins, especially the producer, whose professional image remains intact. ≡