Agents using Principals' CRMs

Written for The MAA by **Susan Singleton, LLB, Solicitor, Singletons** www.singlelaw.com

Customer relationship management ("CRM") software or systems such as "Salesforce" are increasingly used by principals and indeed many companies in business today. This article looks at some of the legal issues which arise. It may be better and safer if instead the agent uses their own CRM system even if that costs the agent more money. Although this article looks mostly at the law, the reality is that the old saying "possession is 9/10ths of the law" is sometimes correct and the first question litigation lawyers ask. Who has the money (or in this case the database of clients)? It is much harder to wrest money or a database from someone in litigation than to be the person holding on to the money or database.

Principals push hard to require the agent to use their CRM systems. The agent should resist particularly where they have a good database of clients and may want to use that database for other non-conflicting agencies and after the contract is over. Keeping the data separate can be a good first step to improving the position of the agent.

Also, if the principal terminates the agency, then at the flick of a switch the agent can be shut off from all the contacts and customers immediately even if some of those customers came from the agent and are in a sense the agent's life's work. Now that so much data is digital, it has become easier and easier for principals to seize the agent's customer details. Avoiding the principal's CRM system helps protect the agent. That is not however the end of the story as even if stored by the agent, the contract might say the agent must not contact certain customers after termination. Yet it is still helpful if the data has been kept by the agent in his own database.

If the agent brings existing or new clients to the principal the agent probably feels those clients belong to the agent. Indeed, in the *Lonsdale v Howard & Hallam Ltd [2007] UKHL 32* case the Winemaker's Federation of Australia was allowed to "intervene" (i.e. become officially involved) in the court proceedings to argue the issue that if an agent takes his customers with him to a new principal when he leaves then because less is left behind of value the compensation paid to the agent will be less. The court agreed with the Federation.

However, that does not mean an agent always is allowed to take customers when the agency contract is terminated, but if the data is on the agent's system it will be easier for the agent to keep possession of it.

Look at the Contract

Look at any written contract first. It might well say that when the agent leaves, he may not take customers with him. It may not matter in whose possession they are - principal's CRM system or the agent's. There could be: -

(i) Restrictive covenants - non-competition clauses

The Commercial Agents (Council Directive) Regulations 1993 allow these where reasonable and provided they only apply up to two y ears after termination

This is what the regulations say:

> ***Restraint of trade clauses***
>
> ***20.***— *(1) A restraint of trade clause shall be valid only if and to the extent that—*
>
> *(a) it is concluded in writing; and*
>
> *(b) it relates to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract.*
>
> *(2) A restraint of trade clause shall be valid for not more than two years after termination of the agency contract.*

Many agents think every restriction is invalid. It is a popular myth but untrue. If well drafted many such clauses meet the requirements of regulation 20 and are valid. So, if Jim markets brushes for his principal in Leeds he could be restricted for, say, 12 months after termination from selling brushes in Leeds. if his principal tried to include tyres it would be void. In practice it can be expensive to enforce these clauses so there can be a difference between the legal position and what happens but even so it is safer for agents to stay on the right side of the law on this issue.

(ii) ***Confidentiality and Intellectual Property Clauses***

The agency contract probably states that the agent must not use the principal's confidential information after the contract is over. This could include a customer list. Those lists also can be protected by data base right - a form of intellectual property right so copying them even if there is no confidential information in them could breach that right.

(iii) ***Other Clauses***

There may be other clauses in the contract about customers eg. the contract might say customers introduced by the agent remain the agent's even if they have been entered on to principal's CRM, data base or otherwise passed to the principal. Even if this does not appear in the contract it is worth keeping a note of what customers the agent introduced particularly if there might be a dispute over any compensation or indemnity payment on termination of the contract. Sometimes the contract will include a clause stating what customers the agent brought to the principal when starting the agency and indeed the other way round - some principals hand agents' customers to help them start their agency and the principal may want those customers the principal found excluded in calculating compensation payments.

No written contract

If there is no written contract then the issues are similar although there will be no restriction on competition after termination of the agency. There will still be a requirement under the law for agents not to take customer lists of the principal as the common law of confidentiality may apply to those

lists (unless customers' names are in the public domain) and the lists will still be protected by database right and possibly copyright. In fact, some principals put the occasional fake detail or name in a database to catch out those copying it. Even the London street map A-Z contains a fake Islington Square to catch those copying the maps without consent.

Even with no written contract there is a requirement for the agent to act in "good faith" implied into agencies to which the 1993 regulations apply. Taking the principal's customers could breach that obligation.

The agent's customers

More interesting is the position of the agent's customers. The agent may have created a customer list/base before or during the contract and those customers are then put into the principal's database/CRM system. The agent had the pre-existing relationship and that might even have been a key reason the agent was hired. May the principal in effect "steal" (or buy) that customer and when the agent leaves be able to stop the agent using his own customers? That feels very unfair to everyone unless the agent is paid compensation for it (as was held in the *Lonsdale* case mentioned above).

Take on an agent with good contacts, milk those contacts dry and then terminate the agent's contract is, sadly, a very common scenario. The agent can protect against it by being clear in the agency contract that after termination the agent is not subject to a non-competition restriction and may continue to work with "his" customers. However, many principals do not agree any changes to their one-sided agency agreements or there is no written contract. In addition, by keeping the agent's own records and having an agent's CRM system instead and not using the principal's system simply because the agent does not have his own, can be sensible.

There is a risk that the agent will "lose" his contacts when a principal terminates the contract which is why the compensation under the 1993 regulations came about to ensure a payment would be made for that. In any agency settlement agreement resolving a post termination dispute it can be worth being very clear as to who can contact which customers.

In a case not involving agents the courts held that a LinkedIn account an employer required the employee to set up for work resulted in the employer "owning" all the LinkedIn contacts of the employee who was not allowed to use those after the employment was over. This surprises most people who would instead expect a personal LinkedIn account and the contacts on it to be personal to the employee, like a personal Facebook account. However, in the case concerned the employer had told the agent to set up the account. In other cases that would not be so and LinkedIn contacts could remain the personal contacts of the employee.

Agents need to be careful how they deal with data on termination of agencies as do employees. Just before leaving sending by email a list of all the principal's customers by the agent to himself is very likely to amount to breach of confidentiality and database right (never mind potentially breaching the Data Protection Act 2018 and the new 2021 "UKGDPR" if it includes names of individuals). In fact, employers routinely have the HR or IT department check for such attempts to "steal " data just before people leave as it is so common.

However simply having a pre-existing LinkedIn account (or handwritten little black book or whatever the agent wants to use) with lifelong contacts in it is less likely to cause legal problems. Yet it is not as

simple as that. Writing the principal's contacts in the agent's own notebook will not miraculously stop the customers being those of the principal. Instead, always check what the contract says and also do not take any confidential information or lists which are the principal's property.

The bottom line is that in most cases taking the principal's customer list is likely to breach the law. Putting the agent's customers into the principal's CRM systems will usually be required as the principal is selling those new customers goods.

Written for The MAA by **Susan Singleton, LLB, Solicitor, Singletons** www.singlelaw.com

Part 7: Conclusion

Agents wanting to preserve those customers as "theirs" (either to ensure in non-exclusive contracts that any sales to those customers result in commission to that agent and/or so that it is clear on termination the agent may introduce those customers to other principals) need to agree this in writing in advance when they start the agency as part of the agency contract. This is so there is no doubt later. Also try to keep the data outside the principal's CRM system.

Many agents hold several agency contracts with a number of principals for non-conflicting products. The agent might have a good relationship with one buyer at a big company and market a range of complementary products to them. So even during the agency the agent may be marketing non competing products to those customers. There is no problem with this continuing although as usual check the agency contract does not include any clause prohibiting that.

Just as important as the legal side is what happens in practice. Agents keen to retain relationships with "their" customers might want to try to ensure they are always physically present when the principal visits that client and they are copied with emails sent to that client. This is no different from other business sectors. Indeed, when some senior lawyers leave a partnership, they can even be required lawfully to stay at home on a form of "garden leave" for up to a year whilst their contacts with clients go "cold" and the partners spend a lot of time forging a direct relationship with that client so that when the partner moves to the new firm the clients are lost to that partner.