A sale is a sale; advice is independent, selling is not advice. Selling is the antithesis of advice.

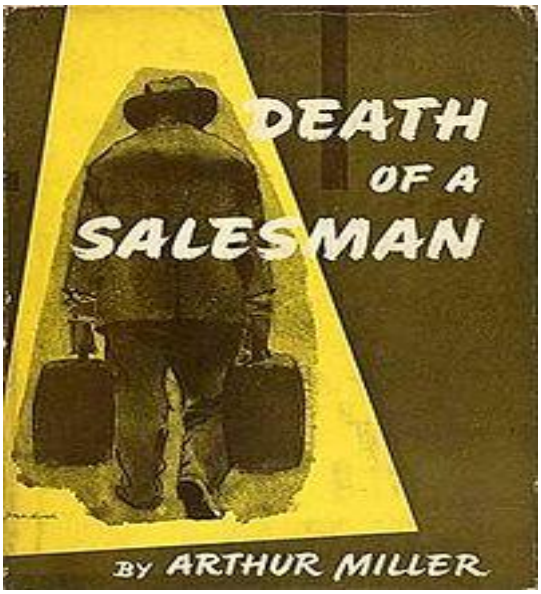
This may be stating the obvious but the lexicon used in the June 2012 draft consultation document regarding the distribution of KiwiSaver forgets these important realities.

The law has always ignored nomenclatures; it looks at the true legal relationship. This was made clear by Richardson J in *Marac Finance Ltd v Virtue [1981] NZLR 586 (CA)*.

The word "adviser" is, in the financial industry, used as a nomenclature to describe the true legal relationship which is vendor/purchaser of a financial product.

The FMA needs to analyse what the industry is actually at law doing, not what it says it is doing.

First – Insurance Salesman to Investment Advisor: a linguistic evolution



Arthur Miller's Pulitzer Prize-winning play, "Death of a Salesman" which came out in 1949, ironically foresaw the death of the word "salesman" as part of modern business usage. Through the main character in the play, Willy Loman, Miller explores the soul of what it was to be a salesman and inadvertently contributed to the slowly changing business lexicon that when the 1960's - The Kennedy's, Timothy Leary, Ralph Nader and NASA's 'space race' captured the American imagination, the 'salesman' had well and truly become a relic. The image of the insurance salesman was no more popular than the salesman selling hair brushes. The advertising men dreamed up another more plausible term, the "insurance executive", elevating the lowly status of the "insurance salesman" up a few notches.

But in the late 1960's, insurance companies had begun to diversify their product range to include a wider variety of insurance options. Confused customers needed advice and the insurance industry leapt at the opportunity to 'advise' customers rather than 'sell' to them and what was the somewhat despised "insurance salesman" now became the trusted friend and advisor. As insurance companies again broadened their product range to include pension schemes and guaranteed savings schemes, the same "insurance advisor" was used to promote the products by offering friendly and trusted advice on the new products. The only problem that the insurance companies faced, was that under scrutiny, these new products were not insurance products but investment and savings products, traditionally the domain of major banks.

In the 1980's, banks and insurance companies cross-pollinated insofar as both came together in an unholy alliance for mutual benefit. Unfortunately the term, "insurance advisor" no longer fitted and once again the name changed, this time to "investment advisor".

The method of remunerating either the "insurance salesman" or the now "investment advisor" never changed. Commissions. The $Million Club to which only the top performers in the profession were admitted, had suddenly become a singular sign of success.

In America though, times have changed. The distinction between what now constitutes "advice" and "selling" is sharp and clear. The word "independent" is key to the distinction. For instance, the act of selling can never be independent yet the offering of advice needs to be, otherwise the distinction becomes blurred. The customer knows that the former is selling a product, where the latter is deriving an income from advice, which has become the product. Hence, selling a Life Insurance Policy can easily be distinguished from selling advice over a range of competitive Life Insurance Policies.

When is advice advice?

The FMA states in the guidelines that *"the clients expectation of the service is a key factor in determining whether advice is personalised"*. This is only partially correct; the other key factor is the intent of the "adviser" - if the intent is to close a sale then the inferring of an adviser/client relationship is misleading. Where one party is intent on closing a sale and the other is led to think the salesperson is a friend, confidant and adviser, is the salesperson misleading the customer.

Advice

The legal relationship between an investment adviser and the client is in need of careful analysis.

EXAMPLE 1 : When the "adviser" has a fee paid by the client for the advice. The product range advised on is all KiwiSavers (without fear or favour) and the adviser does not enter the client's transaction in any way. This is advice; it is fee paid by the client and truly independent. The legal relationship is adviser/client. The relationship is one where the client can have trust and believe the adviser is their friend and confidant.

EXAMPLE 2 : One product for sale.

Where the "adviser" has one product available the issue becomes the relationship established between the "adviser" and the client.

The intent of the "adviser" is to have the client sign the product application form.

This intent to achieve the sale of the product is wholly inconsistent with the creation of a relationship of trust and confidence that is essential to the creation of an adviser/client relationship. The existence of such an intention on the part of the "adviser" cannot at law lead to an agreement

to give advice. The parties are never *ad idem*, worse, one party is proceeding (to their detriment) under a false impression as to the other's intent.

The fact the "adviser" uses that title "adviser", introducing themselves is misleading. It infers a context different to the intent of that party; there is no intent to advise, the intent of one party throughout is to sell, if the client (in reality the customer) in any way believes they are getting advice then they have been seriously misled.

If the "adviser" drops the title "adviser" and states openly and honestly his intent, ie achieving a sale, then he can rely on s10. He must acknowledge that he is no more than a vendor. If he does not he still is not giving advice as the legal relationship is not adviser/client; it is vendor/purchaser. He has however misled the customer into the false sense of believing the relationship is adviser/client - something it is not. If the salesperson seeks to use s10 in the examples given they do not escape the fact that their conduct has throughout been misleading. They should not be stating they are an adviser, they should not do anything that infers to the customer that the relationship is something other than the truth; is vendor/purchaser.

EXAMPLE 3 : The "adviser" has a suite of KiwiSaver products and is meeting the client with the intent to have the client enter into the purchase of one of these products.

There is an element of advice, ie the selection of which of the products the "adviser" has for sale that the client may decide to buy, ie high risk, low risk or whatever. The outcome is the client purchases one of the products the "adviser" has for sale.

Under the legislation this act is "advice" and can only be undertaken by a person with the appropriate licence. The existence of that licence has no effect on the relationship with the customer; the sales person under the law needs a licence to undertake this part of what is a sales activity.

Having a licence by any name has no effect on the actual legal relationship which is determined by the intent of both parties. The legal consequences need close analysis and the question asked "what is the true legal nature of the relationship between the "adviser" and the client"?

To comply with the law the adviser will acknowledge that he is in a conflict, ie he only has a certain selected set of product to advise on (1st misleading behaviour). The adviser will continue to label himself as an adviser (2nd) and proceed to explain the range of products he is advising on (3rd), helping the client select the product most suited to the client's needs (4th). At the end of the meeting, assuming the adviser is successful, the client agrees to enter into the KiwiSaver scheme as per the advice (5th) and the adviser leaves with the signed documents.

In my opinion

Firstly: the legal description of what has occurred has been the sale of a product from a range of samples. Legally it is a sale. Where one party intents to sell a product there cannot be a contract or a relationship to give advice let alone independent advice.

Secondly: As stated in the guidelines summary "the context shapes the customer's expectations and understandings of the service". The use of the term "adviser" has misled the investor on five separate occasions namely;

1. The adviser is not intending to give advice; he is intending to sell a part of his product range to the client. The introduction of himself as an adviser is misleading the customer. There is no intent to give advice; the intent is to achieve a sale they are in legal fact a salesman. The use of adviser is a soft fluff and the use of a nomenclature that falsely describes the intent of the "adviser "and is designed to render the customer into believing they are a "client" and the "adviser" is their friend and confidant.

2. The same misleading behaviour as (1) continued. The meeting continues under the soft fluff nomenclature. It is still falsely describing the "adviser's" intent and not declaring the true nature of the relationship to the "client" - in fact the customer.

3. The "adviser" is not advising on the products, he is selling products. The use of the false nomenclature continues to mislead and create a belief by the customer that this is advice.

   It is not, it is a sales technique devised to off guard the customer.

   There is a product selection but the intent is to achieve a sale. The use of the nomenclature continues.

4. The agreement leads to the true legal outcome; the sale of one of the adviser's product range. The continuation of the notion this was the giving of advice is an insult to the legal reality. The adviser at law has completed a sale.

   The use of the word "advice" and "adviser" has misled the customer (they are not even a client); the arrangement was vendor/purchaser not client/adviser.

This is not advice, it is not independent advice, it is a sales pitch. In the FMA's overview (para. 4) the term "advice services" is used. This is a distortion of the language as there is advice, or selling. There is in fact no such thing as an "advice service" when a salesperson is selling Kiwisaver products.

The statement they have a licence (of whatever category) equally can contribute to the customer believing the FMA has certified what is about to occur as advice and the customer can feel confident that the person selling to him has his best interests at heart. This is an abuse of the FMA licensing process. The intent of the licensed person is to sell part of his product range, the customer is misled.

It is important to note the submissions of the Institute of Financial Advisers to the select committee on the Financial Markets Conduct Bill; they assert correctly that the prohibition of advice at unsolicited meetings with the adviser will prevent them obtaining new clients. Peter Lee is quoted as saying, "if the first one (meeting) was unsolicited then you cannot offer products." Advice is not a product. The reality is under the name of being an adviser; the licensed advisers are in fact selling their spread of products.

Conclusion

When is a salesperson an adviser? The answer is simple. Never!

The guidelines have unwittingly strayed into and accepted the industry practises that caused the financial collapses prior to 2008, with some notable exceptions. These investment advisers were sales people and nothing else. In the market since 2008 much has changed but with KiwiSaver many "financial advisers" are a salesperson for a book of specific investments.

The guidelines need to deal with the actual intent of the “adviser” and force them to tell the customer their true intent at the outset, ie they are there with the intent of selling a product. They are not a friend and confidant. They are not an “adviser”. This could be likened to the requirement that they give a declaration of war, in fact, it is giving a declaration of their true intent. The “client” understands then that they are a “customer", not a “client”.

It is only after this honest declaration that the relationship starts out with honest expectations on both sides.

S10 is a very important exception to the legislation and in my opinion requires the simple honest act of declaring the true nature of what is intended by the meeting with the customer - advising a sale of product. Failure to do so misleads the customer from the outset.

The use of section 10 may provide an excuse as discussed from the licensing standpoint but it does not save the salesperson from the fact the pretence they intend to advise misleads and deceives the customer from the outset.

The declaration the sales person is there to sell a product and the openly understood sales pitch that follows is what s10 protects, not an “adviser” who is a salesperson but is not honest to admit their real intent and acknowledge the true nature of the relationship with the customer.

In Marac Finance Ltd v Virtue [1981] NZLR 586 (CA) Richardson J stated (at 588) that a sham could exist at the outset when documents are created. Alternatively, the documents might be bona fide when created but could later become shams. This would happen when the parties agree to change the terms and conditions of their transaction, but decide to leave the original documents unchanged so as to mislead third parties:

Where the essential genuineness of the documentation is challenged a document may be brushed aside to the extent that it is a sham. There are two such situations (1) where the document does not reflect the true agreement between the parties in which case the cloak is removed and recognition given to their common intentions; and (2) where the document was bona fide in inception but the parties have departed from their initial agreement and yet allowed its shadow to mask their new arrangement."

See similar statements in *Mills v Dowdell [1983] NZLR 154 (CA) at 160*
See *IRD interpretation Guidelines: IRG 12/01*