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Set the record straight

Client transfers are a source of resentment in the industry

Client epiphany. Had one lately? Don't know what one is? It is the comprehension or perception of reality by means of a sudden intuitive realisation about your clients. It is the moment of truth, and it always happens when the representative relationship ends.

Client epiphanies do happen, and somehow advisers and dealers are still shocked by them. And fund managers, who are the gateways to the money flows upon which the industry is based, continue to duck the issues. Who can blame them?

In the post-FSR, post-SOA and post-privacy reform world of financial services, it is procedure, protocol and principle that dominate client transfers when a representative relationship comes to its end. Let's look at some undeniable truths. First, the authorised representative acts on behalf of the Australian Financial Services Licensee (AFSL) — this means that any question about who is dominant in the client relationship will, from a legal point scoring perspective, be decided in favour of the AFSL.

So lesson one is get the agreement right, for all of you. Clear, concise and effective is not just an aspiration for financial services, it is the goal in all commercial relationships.

Second, the authorised representative (AR) usually developed and/or has maintained the client or referral source — this often means that it is the AR who will dominate the practical aspects of the post-termination relationships. But don't get too cocky; inertia will always mean that there will be leakage in any AFSL transfer.

Third, the platforms, fund managers and super funds just want the client funds under administration. They cannot afford to be caught up in your stoush over who owns the client.

ESTABLISH THE BOUNDARIES

Now to the client epiphany and your business model. Without clients, you do not have a business model. This is why I advocate getting the legal paperwork done at the beginning of the relationship. A good pre-nuptial AR/AFSL (whether an employment, contractor or sub-contractor agreement) is one that respects each other as well as the client. It sets out the clear path when the separation occurs. But this is not enough — you must resolve the practical aspects as well.

The Scriptures tell us there were 12 disciples, and that they all preached the same principal tenets. But when the pressure came, some disciples remained steadfast, others wavered — and at least one denied the past and sold out for a handful of silver coins. If you are willing to rely on the preaching of another, I recommend that you know how to pray. Otherwise, I suggest that you make sure the rhetoric matches the provable promise.

Clients do not want to become commercial litigation fodder.

And at the Argyle Partnership we know all about this. During any single week we get at least one (often more) urgent question about how can I take/keep/protect my clients. Ten years ago it was the dealers who asked. Nowadays it is the planner, many of them head planners with employed planners or paraplanners who are keen to maintain their business by securing the client relationships.

The single most secure way to protect client relationships is in co-operation with the dealer, incorporating realistic restraints and confidentiality principles, all backed up with clear engagement and disengagement policies, practices and procedures that dovetail with an understanding of the way the business operates.

In other words, no matter where you sit in the financial servicing model, make an effort to make it work for you in the way that it needs to work. If you cannot, move on to the next relationship where they aim to be more honest about who and what they are and what they will do.

AGREEMENT MYTHS

Authorised representative agreements that do not match the principal client relationship tenets espoused by a dealer represent to me a management team that is led by the lawyers. If management promises a come and go relationship but the agreements say something to the contrary, the conflict of documentation has resulted in management engaging in continuous misleading and deceptive conduct. Don't take any great comfort in this. In today's environment, if the agreement cannot match the reality you have to ask: who is really running things and what else may be hidden or pop up in the future?

Are bulk client transfers available? No and yes, depending on whether the privacy protocols have been pre-resolved and the platforms or master trusts agree. If privacy has not been pre-resolved, forget about a bulk transfer, even if all want it. It must not happen; client data must not be transferred without the client's direct and informed consent. Is a formal, client-directed notice of separation needed? Yes, no matter whether it is a bulk transfer or a letter by letter transfer.

Under the Corporations Act, the AFSL is primarily responsible to the client. So if an AR/AFSL relationship comes to an end, there is a need for the AFSL to inform the client about it formally, in an audit-traceable manner. It is called good risk management by liability limiting. If the planner and the new AFSL do not get around to telling the client for 12 months of the planner's AFSL move, the client has every expectation that they are still with the old AFSL, and it is to them that they will have a compensation claim if something happened that they were not told of but should have been.



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LIABILITY LOOPHOLES

So there is a proper legal basis to the common practice of a dealer requiring a planner to secure the client's formal consent before their affairs are transferred out of the dealer group, together with the redirection of trail commissions and/or servicing commissions. But what about the other conditions that sometimes make their way into planner termination advice letters. Are these "legal"?

Can a dealer impose an indemnity clause on another dealer for any and all of the past sins of the planner? Of course, but only if the second is silly enough to accept.

Run-off professional indemnity insurance is really in the interest of all parties. You will be glad to have it, although it would be cheaper to live without it

So what is the new dealer liable for? All the actions and omissions of the planner, but only from the time they became a planner with them. What about the times before then? Can the new dealer be liable? No, there is really no basis to it, other than for a change in circumstances about which the planner needed to update the client because of the new dealer arrangement.

It is for the foregoing reasons that run-off professional indemnity insurance is really in the interests of all parties. If it is available, it is very advisable to have it. I can assure you, as a dealer and planner once said to me, you will be glad you have it, although it would be cheaper to live without it.

The risk in a client transfer (bulk or otherwise) of a lack of update and contact is, in part, the reason why it is also commonplace for a client transfer agreement to require a commitment to notify all

clients within seven or 14 days. At least the former dealer will know that, if the client lost, ignored or did not understand their severance letter, they will very shortly know that the dealer relationship has changed.

What about cancelling trail commissions? Can this really be done? Don't ask me, ask the clients. What is their expectation of trail? Is it the dealer/planner reward for service? If yes, and one of them is not servicing the client (because the separation is yet to be resolved), the trail must not be paid to them. Even fund managers have the right to cancel commissions. If they pay the original pre-split commissions based on the fact that the client is being serviced, they have an obligation to turn the money flow off until the client is serviced again. Look at the product disclosure statement of many of these platforms. In an attempt to soften the fee payment concepts, most describe it as the planner service fee for services. So when the services are not being provided, if the fund manager is on notice of this, isn't it reasonable or responsible of them to ensure that the commission flow stops?

Back to the termination letter to the client. Is it fair to say that only clients who respond positively to a transfer will be transferred and all other silent clients will stay with the first dealer/head planner? Again, the answer is yes. It is the same lack of privacy and engagement protocols, which have not been pre-set to allow a move-default instead of a stay-default, that result in a client termination letter that must allow the silent clients to stay.

Experience makes for a great teacher, and it has been your experience and client epiphanies that have taught me that getting it right the first time is the only respectful solution, particularly for clients.

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