

**“DECEITFUL.” “DISHONEST.” “SELF-SERVING.”**

How does it feel to be a member of an emerging profession to which such terms are often applied?

If you are like me, those terms make one ashamed to be called a “financial planner.”

**INCREASED LIFE INSURANCE SALES ABUSES – “PRIVATE PENSION PLANS” / EIUL.**

I had the opportunity to review a financial plan prepared by a dual registrant – one who works for a large firm which takes prides in doing financial planning. The recommendations were shocking. The most brazen of the recommendations was to fund a variable universal life insurance policy with “extra funds” – even though Roth IRA contributions were not maxed out yet, nor were 401k contributions maxed out. What was the impetus for this recommendation? The 2.4% average annual disclosed fees and costs for the subaccounts into which the funds were placed, as well as a 1.4% average “hidden fees and costs” (transaction costs within the funds, opportunity costs). So – 3.8% total fees and costs – and that does not even count the insurance costs and policy admin fees.

Why was this life insurance policy sold? For the ability to undertake “tax-free withdrawals and loans” during retirement from the life insurance policy. That may be true (at least to an extent, although in some situations there is the risk of “policy collapse”) – but given all of the fees and costs relating to this investment product, it was unlikely to possess a substantial accumulated value by the time of retirement. Here’s the other shocking thing. The financial consultant’s client was age 32, single, with no dependents, and no *real need for life insurance* at all.

I wish this was an isolated incident. *But it is not.* Life insurance is increasingly sold as an investment vehicle (rather than as a risk mitigation device), and as part of the “financial planning process.” There is even an entire sales program designed to have clients of investment advisers take out mortgages on their homes to invest in *equity indexed universal life insurance* (EIUL). If equity-indexed annuities become securities, as the SEC has recently proposed, you can be certain that those who don’t desire FINRA oversight will turn to selling EIULs instead – as a “private retirement plan.” And they will often tell their clients to not fund Roth IRAs or qualified retirement plans.

The sad thing is that such sales techniques are utilized today. Insurance salespersons are registering as investment advisers (since, by necessity, that are providing advice regarding securities in some fashion, even if merely by making comparisons to a stock market index). You can tell by exploring the web sites of these new RIA firms that they have absolutely no idea what the word “fiduciary” really means.

## ANGRY. BEWILDERED. VIOLATED.

That's how the American consumer feels when they find out that the "financial planner" in which they placed their trust and confidence made recommendations which were self-serving and inappropriate. That's what happens when the consumer finds out they were sold higher-cost products – not because they were better, but for the ability of the product to generate higher commissions and fees for the financial planner selling it. When the client finds out the products were "proprietary" to the firm, real fury sets in.

Clients have every reason to be angry when the financial advice they receive is **poor**, and when the "objective advice" they were led to believe they were receiving is, in fact, **tainted** by numerous non-disclosed conflicts of interest.

What is the result? Sadly, many of those whose trust has been violated retreat forever from participation in the capital markets. They put their money in CDs, unable to accept sound investment advice from even the most honest, communicative investment adviser. I've seen this occur many times.

## A PERSONAL SENSE OF FRUSTRATION.

We have the means to address this problem. We have the means to raise the bar – to establish meaningful standards of conduct for a profession of "financial planners." We have the means to become what the public wants us to be – trusted, fiduciary advisors. A true profession. Not just "pretenders."

Why are we not there yet? I don't know. Perhaps it is complacency. Poor strategic planning, even. Or perhaps a lack of courage. Our institutions and associations always find it far easier to "move slowly."

Given the harm that occurs every single day – upon tens of thousands of Americans who are led to purchase inappropriate, often highly expensive products, and who receive extremely poor financial and investment advice along the way – why should we move slowly? Why not act *with all deliberate speed*?

Given the fact that FINRA now seeks to expand its authority to inspect investment advisers for "suitability" (another move down the road for FINRA toward becoming the all-encompassing "financial regulator" it so often denies attempting to be, despite all evidence to the contrary), where is the sense of urgency? Does not anyone see that it is far easier to be proactive now, and establish the *right* scheme of fiduciary regulation, than to later try to cast off inappropriate, standards-lowering FINRA regulation? The big broker-dealer firms that so dominate FINRA would like nothing better than to have the final say on when fiduciary duties don't apply, and to be able to lower fiduciary standards (even when they do apply). The opportunity to become a true profession exists, but it will not always exist.

While recent developments have advanced the application of the fiduciary standard greatly, what is now needed is a final, large step. It won't be easy. It will take hard work and a concerted effort. But the rewards for achieving that final destination – a true profession, empowered by law to maintain high standards of conduct, are so great.

I once asked a leader of the financial planning movement when that person thought that "financial planners" would achieve status as a "true profession." The reply? "Not in my lifetime." *And that person is far younger than me.* I find this unacceptable. If we do not aid our fellow Americans now, by establishing and maintaining high fiduciary standards of conduct for all those who provide financial and investment advice, countless millions of Americans will fail to achieve their financial goals. And America itself will be burdened by an ever-growing population of those unable to provide for their own financial security.

## RECENT POSTINGS TO THE FIDUCIARYNOW.COM SITE.

I possessed the privilege to speak to investment adviser examiners at an early August 2008 conference of the North American Securities Administrators Association (NASAA). The slides of my main presentation (on fiduciary duties and recent developments) are posted to the web site, along with a research outline addressing many issues. This outline contains citations to 17 cases which apply fiduciary duties upon financial advisors based upon state common law, as to relationships based upon trust and confidence. The outline also sets forth 21 specific fiduciary duties of investment advisers, and suggests questions state securities examiners can ask when undertaking inspections. Other topics, such as “two hats” and preemption issues, are also addressed.

Also posted to the site are two case studies, and “commentaries” thereon, which I presented at the NASAA conference. One case study addresses the due diligence required for an investment advisory firm with respect to mutual funds – especially in the context of selling proprietary mutual funds. The other, longer case study addresses the improper sale of EIUL products by registered investment advisers, where lack of disclosures of fees, costs, and risks and deceitful statements often leads client to make tragic decisions. These sales programs – based upon the “Missed Fortune” series of books (and other books) – are blossoming everywhere. I hope state securities regulators will form a “nationwide task force” to tackle these programs. It will take some specialized expertise – including assistance from insurance regulators – to uncover all of the nondisclosures of fees and costs and simply poor financial advice. Violations of the fiduciary duties of due care and loyalty abound. I hope the materials provided will assist them in commencing this effort.

## NEW FOCUS ON EDUCATION – RIA FIRMS, EXAMINERS, AND CONSUMERS.

For over four years now, I’ve been concentrating on attempting to influence federal and state regulators to apply fiduciary duties to financial planning and investment advisory activities more broadly, and applying stricter inspection regimes. While I will continue to assist organizations to react to regulatory proposals in this area, I believe I might have a greater impact by changing my focus to educational efforts. (This change of focus was recently suggested to me by several securities regulators.)

So, over the next several months (or longer), I’ll devote my “spare time” to developing educational materials for:

- ✚ **RIA firms and their representatives** – especially newly formed ones – on how to comply with fiduciary duties and all of the compliance requirements imposed by law and regulation;
- ✚ **State securities examiners of RIA firms** – as to how a breach of (common law) fiduciary duties constitutes “constructive fraud” and therefore a violation state securities laws, and in better understanding fiduciary duties (and how to inspect for compliance with same); and
- ✚ **Consumers** – on a wide range of subjects relating to financial planning, including what questions to ask in order to ensure that their “financial planner” is a true fiduciary (at all times), not just merely “disguised” as one.

*I’ll post another update to the FiduciaryNow.com web site when the situation merits.*

*- Thank you. Ron*