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# **2022 PIABA MID-YEAR MEETING**

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**Public Investors Advocate Bar Association  
1225 W. Main St., Ste. 126  
Norman, Oklahoma 73069  
Office: 405.360.8776  
Fax: 405.360.2063  
E-Mail: [piaba@piaba.org](mailto:piaba@piaba.org)**

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## 2022 PIABA Mid-Year Meeting

### Table of Contents

	PAGE
2022 PIABA Mid-Year Meeting Speaker Biographies.....	iv
2022 PIABA Board of Director Biographies.....	xi
<b>§ 1 Financial Elder Abuse – State Civil Claims and Overview of a Financial Elder Abuse Case</b> Darlene Pasieczny, Moderator; Robert Port, Richard Szuch	
<b>Financial Abuse of Elders and Other Vulnerable Adults, Civil and Other Remedies, Robert C. Port</b> .....	1
I. Common Themes, Fact Patterns, and Scenarios.....	1
II. Remedies for Elder Financial Abuse .....	3
1. Criminal Prosecution .....	3
2. Civil Remedies .....	3
3. Specific Causes of Action for Elder Financial Abuse or Exploitation .....	3
4. Disinheritance Statutes .....	4
5. Registries of Persons Convicted of Elder Abuse.....	4
6. Probate Court Remedies.....	4
7. Defensive Use of the General Durable Power of Attorney .....	6
8. Use of Revocable Living Trusts Instead of Powers of Attorney.....	7
9. Adoption of Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act .....	10
Additional Resources re: Financial Exploitation of Seniors and Other Vulnerable Persons .....	12
3241. Registered Person Being Named a Customer’s Beneficiary or Holding a Position of Trust for a Customer .....	15
FINRA Regulatory Notice 20-38, Registered Person Being Named a Customer’s Beneficiary or Holding a Position of Trust for a Customer, October 29, 2020 .....	17
2165. Financial Exploitation of Specified Adults .....	31
FINRA Regulatory Notice 22-05, Senior Investors, February 15, 2022 .....	33
<b>States Adopting NASAA’s Model Act to Protect Vulnerable Adults From Financial Exploitation (Mandatory and Permissive Conduct by Financial Advisors), Darlene Pasieczny</b> .....	39
Introduction.....	39
Financial Exploitation of Elders is a Recognized National Problem.....	40
Mechanics of the Model Act .....	41
A. Mandatory Reporting and Permissive Disclosure.....	42
B. Delay of Disbursements .....	42
C. Record Keeping .....	43
D. Safe Harbor Immunity .....	43
E. Penalties .....	44
Conclusion.....	44
States Adopting the Model Act .....	45
<b>States With a Civil Private Right of Action for Financial Elder Abuse and Exploitation,</b> Jeff Aidikoff, Ashley Rivkin .....	79
Introduction.....	79
A. Tier 1 .....	79
B. Tier 2.....	88
Conclusion.....	91
<b>§ 2 Compliance, Supervision and Best Interests in Senior Citizen Accounts</b> Courtney Werning, Moderator; Mary Shea Tucker, Hollie Mason, Jeanette Wingler	
<b>Senior Investors: Common Issues and Best Practices for Compliance and Supervision,</b> Courtney Werning, Hollie Mason, Mary Shea Tucker.....	92

**§ 3 Dealing with People with Diminished Capacity (Ethics)**

Nicole Iannarone

**Representing Clients With Diminished Capacity**, Nicole G. Iannarone, Mary Kate McDevitt..... 95  
Introduction..... 95  
I. Diminished Capacity: Risk and Types..... 95  
II. Ethical Considerations for Clients with Diminished Capacity..... 97  
    A. Maintaining a Normal Client-Lawyer Relationship When a Client Has Diminished Capacity ..... 97  
    B. Protective Action When the Normal Client-Attorney Relationship is Impossible..... 99  
III. Resources for Lawyers Representing Clients With Diminished Capacity ..... 100  
Conclusion..... 102

**§ 4 Economic and Non-Economic Damages in Dealing with FINRA Arbitrations Involving Senior Citizens**

Tom Mauriello, Moderator; Frank Fox, Stacey Wood

**Economic and Non-Economic Damages in Dealing with FINRA Arbitrations Involving Senior Citizens Fraud**..... 103  
Goals of Lecture ..... 105  
Case Example: Mr. G ..... 106  
The Non-Economic Costs of Fraud: Emotional Distress ..... 108  
Fraud Victims are Similar to Other Crime Victims ..... 109  
Research Related to Physical Health and Importance of Financial Recovery ..... 110  
Premorbid Vulnerabilities Increase Risk of Emotional Distress ..... 111  
Using the Research at Case Intake: How Not to Overlook the Significant Case ..... 112  
Overall Approach..... 113  
Using Assessment Tools to Develop Non-Economic Damages for Settlement and Discovery ..... 115  
Research From Ponzi Scheme Victims ..... 116  
Research From Ponzi/Pyramid Scheme Victims ..... 118  
Trial: Using Thorough Evaluation of Non-Economic Damages for Trial Preparation ..... 119  
Trial: Proving the “How and Why” of Non-Economic Damages ..... 120  
Factors Present in Case Example ..... 121  
Literature Review ..... 122  
Contact Information ..... 123

**Financial Elder Abuse, How to Assist Seniors and Other Vulnerable Victims of Financial Exploitation**, Jon C. Furgison, Dr. Stacey Wood..... 124  
What is Financial Exploitation, and How Does it Happen? ..... 124  
What Are the Non-Economic Impacts of Financial Exploitation? ..... 124  
PTS Type Symptoms ..... 125  
Decreased Physical Health ..... 125  
Anxiety and Depression..... 125  
Social Isolation and Social Relationships ..... 125  
Lack of Trust..... 125  
Families of Victims ..... 126  
What Are the Warning Signs of Financial Exploitation? ..... 126  
How Can Attorneys and Other Supporting Professionals Help?..... 127  
Treble Damages via Civil Code § 3345 ..... 127  
Summary ..... 128

**§ 5 Strategies and Techniques in Dealing with FINRA Arbitrations Involving Senior Citizens**

Jenice Malecki, Moderator; Christine Lazaro, Sandra Grannum

<b>Getting Grandma’s Nest Egg Back</b> .....	129
Introduction.....	129
FINRA, the SEC and NASAA Respond.....	130
Identifying the Victims .....	133
Identifying the Respondent, the Path & the Forum.....	135
Arbitration .....	136
Experts & Special Witnesses.....	137
Settlement & Mediation .....	137
Reports to Authorities .....	137
Conclusion.....	137

## 2022 PIABA Mid-Year Meeting Speaker Biographies

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**Frank J. Fox, Esq.**  
**Majors & Fox**  
**LaMesa, California**

Frank Fox has practiced law for 37 years since earning his law degree from Stanford Law School. After forming the San Diego firm of Majors & Fox in 1992, he served as lead litigation counsel throughout the Southwest for several Fortune 500 companies in over 100 business litigation matters. He and his firm moved to the other side of the "v." around the turn of the century and began representing vulnerable consumers victimized by predatory payday lenders, debt collectors, proprietary vocational schools, rent-to-own companies, understaffed nursing homes, a so-called "military friendly" lender, dishonest financial advisors and unscrupulous insurance agents.

Mr. Fox's work in this area has recovered more than \$100M for financially-abused elders and other vulnerable consumers, has generated more than \$25M in cy pres funds which continue to benefit California consumers and is reflected in reported cases like *Brack v. Omni Loan Company, Ltd.* (2008) 164 Cal.App.4th 1312, *Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609 and *Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841. In April of 2019, a Butte County California jury awarded Mr. Fox's 81-year-old client \$4.3M against an insurance company and its agent who had used a

"trust mill" to sell an unsuitable annuity causing a \$19,000.00 economic loss. When the insurance company appealed, and the Court of Appeal reversed, more than thirty amici (including PIABA, and the California Department of Insurance) submitted letters in support of his elderly client's Petition for Review to the California Supreme Court. The Supreme Court promptly granted review and immediately remanded the case to the appellate court with instructions to vacate the opinion and reconsider the law in light of certain statutes and caselaw.

Mr. Fox is a graduate of the Trial Lawyers College and is a frequent speaker on the subject of elder financial abuse at CLE and other conferences. He has provided training on elder financial abuse, pro bono publico, to judges, attorneys and Adult Protective Service workers. His work has been recognized by the California Consumer Federation, which gave him its "Consumer Champion" award, the Consumer Attorneys of California, which nominated him as "Streetfighter of the Year" and California Advocates for Nursing Home Reform, which honored him with its "William F. Taylor Memorial Award" in recognition of his efforts in "promoting justice for elder financial abuse victims."

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**Sandra D. Grannum, Esq.**  
**Faegre Drinker Biddle & Reath LLP**  
**Florham Park, New Jersey**

Sandra Dawn Grannum is a Partner in the Business Litigation Group at Faegre Drinker Biddle & Reath LLP where she serves on the Firm's governing board and is co-chair of the Firm's nationwide Securities and Financial Services Litigation Team. Sandy is a fellow of the American College of Trial Lawyers and concentrates her practice on securities, broker/dealer arbitration, litigation, mediation, and regulatory defense. Sandy has written and lectured widely on securities, ethics and diversity and inclusion issues. She assists in preparing clients for SEC Regulation Best Interest and Interpretation RIA. She chairs the full-day PLI Securities Arbitration Seminar conducted annually in New York City and regularly speaks at the SIFMA C&L Annual Conference, ABA Conferences and on other CLE programs addressing securities and employment law. Sandy was one of 13 individuals on the 2015 FINRA Dispute Resolution Task Force which FINRA impaneled to suggest strategies to enhance the transparency, impartiality, and efficiency of FINRA's securities dispute resolution forum for all participants. Sandy earned her law degree from Harvard Law School and her bachelor's degree from New York University. She began her career as a litigation associate at the New York law firm of Cravath, Swaine & Moore before moving to Tenzer Greenblatt to practice securities litigation. Sandy moved in-house to be an Associate General Counsel handling securities litigation at PaineWebber (now UBS Financial Services) in 1997. In November 2001, she became Senior Vice President and Senior Associate General Counsel in UBS's Employment Law Unit. In 2003, she formed her own firm, Davidson & Grannum, with a former PaineWebber/UBS colleague. She joined Drinker in January 2016 and that firm merged to become Faegre Drinker in February 2020.

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**Nicole Iannarone, Esq.**  
**Assistant Professor of Law**  
**Drexel University Thomas R. Kline School of Law**  
**Philadelphia, Pennsylvania**

Nicole Iannarone, Assistant Professor of Law, Drexel University Thomas R. Kline School of Law

Nicole Iannarone is a scholar and leader in the practice community whose work focuses on an array of issues including regulation of financial intermediaries, the consumer's experience in resolving securities disputes, professional ethics, and law and technology.

Before joining the faculty in 2019, Professor Iannarone directed the Investor Advocacy Clinic at Georgia State University College of Law. There, she oversaw students' representation of consumer investors with small claims against their brokers before the Financial Industry Regulatory Authority (FINRA), their efforts to educate investors, and their work representing the voice of retail investors in evaluating and commenting on FINRA and SEC rule proposals.

Previously, Professor Iannarone taught at Mercer Law School and at Vanderbilt Law School.

Professor Iannarone has published extensively on an array of topics that includes financial technology, regulation of financial intermediaries, resolution of securities disputes, technology and ethics in legal practice, as well as experiential education. Her articles have appeared in the *Tennessee Journal of Business Law*, *Chicago Kent Law Review*, and the *University of Toledo Law Review*. Her article, "Finding Light in Arbitration's Dark Shadow," is forthcoming in the *University of Nevada Las Vegas Law Forum*.

She testified about fraudulent schemes targeting retail investors before the U.S. Securities & Exchange Commission Division of Trading and Markets Roundtable on Combating Retail Investor Fraud in 2018 and on the role of security arbitration clinics in ensuring economic justice before the commission's Dodd-Frank Investor Advisory Committee in 2017.

Before entering academe, Professor Iannarone practiced at Bondurant, Mixson & Elmore, where she was deputy general counsel and her practice focused on complex litigation.

Professor Iannarone is the chair-elect of the AALS Section on Employee Benefits and Executive Compensation and a member of the Section on Professional Responsibility. She is also a member of the FINRA National Arbitration and Mediation Committee. The immediate past president of the Atlanta Bar Association, Professor Iannarone previously served on numerous committees and held diverse leadership roles during her years in Georgia. She is a fellow of the American Bar Foundation.

From 2017-2019, she served as chair of the State Bar of Georgia's Professionalism Committee and as a liaison to the Georgia Chief Justice's Commission on Professionalism.

She received her JD from Yale Law School, where she served on the *Yale Journal on Regulation*.

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**Christine Lazaro, Esq.**  
**St. John's University School of Law**  
**Brooklyn, New York**

Christine Lazaro is a Professor of Clinical Legal Education and the Director of the Securities Arbitration Clinic at St. John's University School of Law. The students in the Clinic represent investors in arbitration claims against brokerage firms and brokers on a pro bono basis. Professor Lazaro also teaches Broker-Dealer Regulation and Business Basics at St. John's, and is a faculty advisor for the Corporate and Securities Law Society and the Moot Court Honor Society. She joined St. John's in 2007 as a Supervising Attorney for the Clinic. Professor Lazaro is also currently Of Counsel to the Law Offices of Brent A. Burns, LLC, where she consults on securities arbitration and regulatory matters.

Professor Lazaro has been a member of the Public Investors Advocate Bar Association (PIABA) since 2008. She served as the President of PIABA from October 2018 through October 2019. Professor Lazaro has also served on the PIABA Board of Directors since 2015 and its Executive Committee since 2016. She is currently co-chair of the Association's Fiduciary Standards Committee. Professor Lazaro is also a member of the New York State Bar Association and is co-chair of its Securities Disputes Committee. Professor Lazaro serves on the FINRA Investor Issues Advisory Committee. She is also a member of the Editorial Advisory Board of the Securities Arbitration Alert, and occasionally contributes to its newsletter.

Professor Lazaro holds a B.A. from New York University and a J.D. from Fordham Law School. After graduating from law school and prior to joining St. John's, she was an associate at Davidson & Grannum, LLP, representing broker-dealers and individual brokers in disputes with clients in both arbitration and mediation, and handling employment law cases and debt collection cases. She also advised broker-dealers regarding investment contracts they had with various municipalities and government entities.

Professor Lazaro speaks and writes regularly on the topics of securities arbitration and the duties of brokers and brokerage firms.

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**Jenice L. Malecki, Esq.**  
**Malecki Law**  
**New York, New York**

Jenice L. Malecki, Esq. is a well-known New York securities attorney, adjunct professor at NY Law School and has been a FINRA arbitrator and Chairperson. She represents individual and institutional investors in arbitration and litigation, as well as licensed industry participants in regulatory hearings, employment disputes and whistleblower matters. She has represented private and public companies around the world, as well as individuals, from blue-collar workers to athletes, musicians, and billionaire founders of well-known international companies. Malecki Law has represented clients in the United States, many Western European countries, India, China, Hong Kong, Singapore, Israel, Puerto Rico and in several South American countries.

Ms. Malecki is also the Co-Chair of the NYS Bar Association Commercial and Federal Litigation Section's Securities Arbitration Committee. She has been a member of FINRA's National Arbitration and Mediation Committee, on the Board of Directors (and an Officer of) of both the Public Investors Arbitration Bar Association (PIABA) and the PIABA Foundation, as well as has been a member of the Securities and Exchanges Committee at the New York City Bar Association, as well as has been a member of the American and New York State Bar Associations. She has spoken at the Practising Law Institute (PLI), the New York City Bar Association and the New York County Lawyers Association on several panels, and at Fordham Law School, St. John's Law School, Brooklyn Law School and New York Law School, in addition to speaking at PIABA's annual conferences. Ms. Malecki has also participated in mock trials at Yale, Columbia, Albany, Fordham and FINRA.

Jenice L. Malecki's experience as a New York securities attorney began in class action litigation, *In re Crazy Eddie*, counsel's office of the lead plaintiffs. Throughout the 1990s she represented numerous broker dealers and was instrumental in regulatory matters against well-known "boiler room" stock fraud of the era, including working with people and firms associated with the notorious "Wolf of Wall Street." In 1999 Ms. Malecki founded her own practice, MALECKI LAW, in Manhattan.

Since 2012, Ms. Malecki has been named a Top Attorney by Super Lawyers and the National Law Journal, featured in the New York Times Magazine, New York Magazine, National Law Journal and other publications, as well as being named as one of "New York's Women Leaders in the Law 2014." Ms. Malecki is Martindale- Hubbell's highest legal ability rating of "AV Preeminent." She appears regularly on TV, in the news and on the radio. She is a frequent bar association and law school speaker, as well as a seasoned authority on New York law, who frequently files official comments for consideration on new rules and laws. In 2014, 2015 and 2019, she visited Senators and House of Representatives members' offices to gain support for investor related laws.

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**Hollie Mason, Esq.**  
**Expert Witness, the Brattle Group**

Hollie Mason has more than 15 years of financial industry experience, involving Securities litigation and regulation.

Prior to joining Brattle Ms. Mason served as Senior Enforcement Counsel at the Financial Industry Regulatory Authority (FINRA), where she was responsible for ensuring that its members complied with FINRA and Securities & Exchange Commission regulatory requirements. Ms. Mason was also a certified FINRA dispute resolution arbitrator for over 10 years. She also spent several years as Inhouse Legal Counsel for a large broker-dealer, where she handled complex litigation and compliance matters, including those involving auction rate securities, market manipulation, senior investor, margin requirements, supervisory systems, and suitability obligations.

Ms. Mason's professional experience includes, among other things, presenting multifaceted securities cases before arbitration panels and regulatory bodies, determinations of compliance and causation, rule interpretation, market and trading analysis, and risk assessment. Given her unique experience, Ms. Mason provides expert testimony and analysis as well as consulting services concerning securities markets and regulation, regulatory compliance and risk management. Ms. Mason holds a J.D. and M.S. degree from Creighton University.

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**Thomas D. Mauriello, Esq.**  
**Mauriello Law Firm, APC**  
**San Diego, California**

Tom Mauriello is the principal of the Mauriello Law Firm, APC in San Diego, which he founded after beginning his legal career at a large national plaintiffs' securities class action firm. The firm focuses on investment disputes representing investors in FINRA arbitrations and courts and also has represented registered representatives, broker dealers, institutional investors, and issuers in various contractual, operational, employment, and other matters. Tom is a member of the California, New Jersey and Pennsylvania bars. He received his BA from Brown University in 1983 and his JD from the University of San Diego School of Law in 1988. Prior to law school, he worked as a paralegal at a New York City law firm registering securities offerings with the SEC and state securities regulators. After law school, Tom served as a judicial clerk to Judge Robert E. Cowen of the U.S. Court of Appeals for the Third Circuit. He is in his second term on the Board of Directors of the Public Investors Advocate Bar Association ("PIABA"), where he has served as secretary and currently serves as treasurer.

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**Darlene Pasieczny, Esq.**  
**Samuel Yoelin Kantor LLP**  
**Portland, Oregon**

Darlene Pasieczny ("Pah-shetch-nee") is a securities and fiduciary litigator, and leads the Investor Defenders practice group at Samuels Yoelin Kantor LLP, based in Portland, Oregon. Darlene works on all stages of securities litigation and FINRA arbitration, fiduciary litigation in trust and estate disputes, elder financial abuse cases, complex civil litigation, and has a growing appellate practice. She is a frequent speaker on FINRA arbitration, trust and estate litigation matters, and elder financial abuse prevention, recognition, and recovery.

Darlene serves on the Board of Directors of the Public Investors Advocate Bar Association (PIABA) and was the 2021 Chair of the Oregon State Bar's Securities Regulation Section. In June 2021, Darlene was appointed to FINRA's National Adjudication and Mediation Committee (NAMC) for service as a public member. Selected to the 2021 Oregon Rising Stars list, her professional affiliations include the admission to the Oregon State Bar, Washington State Bar, U.S. District Court for the State of Oregon, and Multnomah Bar Association. Darlene earned a B.A. from Reed College, *Phi Beta Kappa*, an M.A. from Columbia University, and J.D. from Lewis & Clark Law School, *magna cum laude*.

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**Robert C. Port, Esq.**  
**Gaslowitz Frankel LLC**  
**Atlanta, Georgia**

Robert C. Port is the Managing Partner of Gaslowitz Frankel LLC, Atlanta, Georgia. The firm focuses its practice on fiduciary litigation arising from disputes related to trusts, wills, estates, guardianships, conservatorships, partnerships, closely-held corporations, and securities and investment fraud.

Robert is a member of the Georgia and Tennessee Bars. He is admitted in the Northern, Middle, and Southern Federal Districts of Georgia, United States Court of Appeals for the Eleventh Circuit, and the U.S. Supreme Court. He is a member of the Georgia Bar, the Atlanta Bar Association, the American Bar Association (ABA), and the Public Investors Arbitration Bar Association (PIABA).

He has litigated cases in federal and state courts in Georgia and throughout the country, as well as before NASD, FINRA, and AAA arbitration panels. He also serves as a FINA chair-qualified arbitrator, and has been appointed to the national roster of arbitrators for the Consumer Panel of the American Arbitration Association (AAA).

Robert is a frequent speaker on estate and trust litigation, securities litigation, and securities arbitration before a variety of audiences, including the Georgia Institute of Continuing Legal Education (ICLE), the Atlanta Bar Association, The National Association of Personal Financial Advisors (NAPFA), the Georgia Society of CPAs, and the National Business Institute (NBI), and the Public Investors Arbitration Bar Association (PIABA). He has also published numerous articles on fiduciary litigation, securities law, and other legal topics in the Georgia Bar Journal and other publications.

He attended the University of North Carolina, where he obtained a B.A., with Honors, in 1979, and a J.D., with Honors, in 1983. Following law school, he was a Law Clerk for Hon. Eugene N. Gordon, United States District Court Judge for the Middle District of North Carolina.

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**Richard Szuch, Esq.**  
**Enforcement Chief**  
**New Jersey Bureau of Securities**

I have served in public and private roles in the law for 35 years. I started my career as a prosecutor in 1988, and tried approximately 40 criminal cases to verdict by the age of 30. Since 2019, I have served as the Enforcement Chief for the New Jersey Bureau of Securities. New Jersey has jurisdiction over more than 200,000 registered agents. The enforcement unit handles investigations and makes recommendations about enforcement actions related to securities law violations, whether by Investment Advisers or Broker Dealers (and their agents) or unregistered persons.

I oversee the administration of financial exploitation reports filed in the state pursuant to New Jersey's SAFE Act, a report and hold law requiring reports by financial services firms whenever older/vulnerable investor exploitation is suspected. I am the Chair of NASAA's Senior Issues and Diminished Capacity Committee, and I host NASAA's new webinar series, NASAA Presents, which gives air time to the best and brightest minds working in the at-risk investor protection risk.

Prior to this, I defended the financial services industry for decades. Most recently, I was a senior partner and member of the Financial Institutions Litigation and Arbitration Group at Bressler, Amery & Ross, P.C. There, I represented national and regional banks, broker dealers and investment advisers and counseled them with respect to their legal and regulatory obligations. I was one of the firm's lead trial attorneys and helped coordinate the defense of some of the largest securities arbitration cases in the country.

I also formed the firm's Senior & Vulnerable Investor Group and was a primary architect in the construction of its trademark tool, the Bressler Map, an internet-based search engine designed to help regulators and the industry navigate the country's complex mosaic of at-risk investor exploitation laws. I have defended scores of witnesses called to give "on the record" interviews before the SEC, FINRA and state regulators and I regularly lecture

nationwide about my work experience, the financial markets and industry issues at NASAA, NSCP, SIFMA and similar conferences.

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**Mary Shea Tucker, Esq.**  
**Recently Retired, Senior Counsel to the**  
**Elder Client Initiatives Team at Wells Fargo**

Mary Shea Tucker is an attorney with more than 30 years of experience and is an innovator in financial services industry efforts to prevent elder financial abuse. She joined the Law Department at Wells Fargo Advisors (then A.G. Edwards) in 2004. She helped to create the Elder Client Initiatives Team. Under her leadership, WFA became a national leader among investment firms in reporting suspected elder abuse to Adult Protective Services and state securities agencies across the U.S. and providing guidance to financial advisors. Ms. Tucker co-founded the Saint Louis Elder Financial Protection Multidisciplinary Team in 2017 and continues to serve as facilitator for a coalition of MDT stakeholders including state and local government, the aging services network, law enforcement and financial institutions.

Ms. Tucker has made numerous presentations and conducted training sessions at national forums and local community groups about how financial institutions front-line staff can help fight elder abuse. In January 2021 she worked with the CFPB Office for Older Americans and the National Adult Protective Services Association to develop and produce the Bureau's first virtual Elder Justice Network Retreat for the St. Louis MDT and Missouri elder protection stakeholders. She received her B.A. in English from Yale University and her J.D. from New York University School of Law. She is admitted to practice law in New York, Utah, and Missouri.

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**Courtney Werning, Esq.**  
**Meyer Wilson Co., LPA**  
**Columbus, Ohio**

Courtney Werning is an attorney in the investor claims practice group at the law firm of Meyer Wilson. She devotes her practice to the representation of investors who suffered investment losses as the result of the misconduct of their financial advisors and brokerage firms. Ms. Werning's court cases and arbitrations involve unsuitable investment strategies, securities fraud, Ponzi schemes, elder financial abuse, and state and federal securities act claims. She is currently on the Executive Committee for the pending Robinhood Outage Class Action in the Northern District of California. Ms. Werning has published several articles addressing investor protection and is an active member of PIABA. She serves as an arbitrator in the dispute resolution forums of both the Financial Industry Regulatory Authority and the National Futures Association. She is also a member of the Central Ohio Association for Justice, the Ohio Association for Justice (OAJ), and the Ohio State Bar Association.

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**Jeanette Wingler, Esq.**  
**Associate General Counsel, FINRA**  
**Washington, DC**

Jeanette Wingler is an Associate General Counsel in FINRA's Office of the General Counsel. Ms. Wingler's responsibilities involve a variety of regulatory areas, including research analyst conflicts, cybersecurity, seniors and other vulnerable investors and recruitment practices. Prior to joining FINRA in 2014, Ms. Wingler was an associate at Dechert LLP, where she advised on regulatory and compliance matters for broker-dealers, investment advisers and investment companies. Ms. Wingler graduated from the University of North Carolina at Chapel Hill with a bachelor's degree in political science and history. She has a law degree from Duke University School of Law.

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**Dr. Stacey Wood PhD**  
**Stacey Wood PhD**  
**Claremont, California**

Dr. Stacey Wood PhD ABPP is the Molly Mason Jones Professor of Psychology at Scripps College in Claremont, CA and is board certified in Geropsychology.

Dr. Wood received a B.A. in Bio- Psychology from Middlebury College, and a MA and PhD in Clinical Neuropsychology from the University of Houston. Dr. Wood completed further training as an intern at the University of Arizona and as a NIMH (National Institute of Mental Health funded) post-doctoral Fellow at UCLA.

Dr. Wood's research has examined factors that increase susceptibility in fraud victims, tactics that are commonly employed by scammers, and the psychological effect on these crimes on the victims with an emphasis on elderly victims.

Dr. Wood has published over 70 papers in peer-reviewed journals. Dr. Wood has had research funding from NIH, NIJ, Robert Wood Johnson Foundation, the Haynes Foundation, the Borchard Foundation among others.

In her other life, Dr. Wood works as a consulting psychologist on cases related to elder financial exploitation for Adult Protective Services and as a court appointed expert. In this role, Dr. Wood has testified over 40 times in State and Federal courts, as well as at FINRA hearings.

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**Philip M. Aidikoff, Esq., Director Emeritus**  
**Aidikoff, Uhl & Bakhtiari**  
**Beverly Hills, California**

Philip M. Aidikoff is a partner in the law firm of Aidikoff, Uhl & Bakhtiari and exclusively represents clients in securities arbitration and litigation. Mr. Aidikoff graduated from the University of California at Berkeley in 1969 where he was on the Dean's List and obtained his Juris Doctor degree from Southwestern University School of Law in 1975 where he was a member of Law Review. He is a past President and Director Emeritus of the Public Investors Arbitration Bar Association (PIABA). He served a five-year term (with three years as chair) on the National Arbitration and Mediation Committee of FINRA (formerly the NASD) which provides recommendations on rules, regulations and procedures governing arbitrations, mediations and dispute resolution. He served as one of three public members of the Securities Industry Conference on Arbitration (SICA), which was created with the support of the Securities and Exchange Commission to help protect the interests of public investors in securities arbitration. He also served as one of two investor advocates on the Securities Investor Protection Corporation (SIPC) Modernization Task Force. He served as a member of the FINRA Arbitration Task Force (2014-2015) which provided recommendations aimed at improving the transparency, impartiality and efficiency of securities arbitration. Mr. Aidikoff was recognized as a 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016 Southern California Super Lawyer and was profiled in the February 2012 issue of Southern California Super Lawyers Magazine. He was also named by the National Law Journal as one of the 50 Litigation Trailblazers & Pioneers (2014). His legal rating as an attorney is the highest available "AV".

Mr. Aidikoff has spoken before numerous professional and lay groups on the topic of stockbroker abuse and the handling of arbitration and litigation involving brokers and firms. He has authored or co-authored a number of articles including: *Broker Abuse: Recovering for your Client*, Los Angeles Trial Lawyers Advocate (1993); *Take it or Leave it: Case Evaluation and Retention*, Practising Law Institute Securities Arbitration Handbook (1995); *Recognizing and Evaluating Stockbroker Liability*, Consumer Attorneys Association of Los Angeles Convention (1995); *The Brave New World of Banks Selling Securities: Offline and Online*, Practising Law Institute Securities Arbitration Handbook (1996); *Stockbrokerage Firm Liability: A Pre-Litigation Analysis*, Consumer Attorneys Association of Los Angeles Advocate (1996), reprinted in the Arizona Trial Lawyer Association Advocate (January 1997); *Recognizing and Guarding Against Fiduciary Abuse*, National Guardianship Association Annual Convention (1996); *Control Person Liability in the Securities Industry: A Legal Overview and Practical Applications*, Practising Law Institute Securities Arbitration Handbook (1997); *Liability of Control Persons at Second Tier Firms*, Public Investors Arbitration Bar Association (1997); *Clearing Firm Liability: A Forward Looking Analysis*, Practising Law Institute Securities Arbitration Handbook (1998); *Why Shouldn't Clearing Firms be Liable*, Public Investors Arbitration Bar Association (1998); *Motion Practice in Securities Arbitration: A Claimants Point of View*, Public Investors Arbitration Bar Association (1999); *Selective Recession and the Offset Defense in Securities Cases: A Survey of the Law*, Public Investors Arbitration Bar Association (2000); *After the Correction: Are Your Losses Recoverable?*, American Pathology Foundation (2001); *2001: An Update On Best Execution and Suitability Standards For Online Trading*, Public Investors Arbitration Bar Association (2001); *Arbitration: Can It Be Waived?*, Practising Law Institute Securities Arbitration Handbook (2002); *Comments on The Claimants Bar On Proposed Changes In The Expungement Process*, The Association of the Bar of the City of New York (2002); *Due Diligence or Dont: Pre-Filing Considerations and Claim Drafting*, Public Investors Arbitration Bar Association (2003); *Confidentiality and Compliance Manuals: The Fight for Unfettered Access*, Public Investors Arbitration Bar Association (2004), republished in the Practising Law Institute (2005); *From Wall Street to Main Street: A Guide to Litigation Over Hedge Funds Sold by Brokerage Firms to Retail Investors*, Public Investors Arbitration Bar Association (2005); *I Didn't Say That / Oh Yes, You Did: The Use of Court Reporters in Securities Arbitration*, Public Investors Arbitration Bar Association (2005); *Third Party Money Managers: Brokerage Firms Duty to Monitor and Resulting Liability*, Practising Law Institute (2005); *A Practical Guide To The New NASD Code of Arbitration Procedure For Customer Disputes*, Practising Law Institute Securities Arbitration Handbook (2006); republished Public Investors Arbitration Bar Association (2006); *Trying Asset/Mortgage Backed Securities Cases: A Practical Guide*, Public Investors Arbitration Bar Association (2007); *Wall Street Does It Again: The Auction Rate Securities Fraud*, Public Investors Arbitration Bar Association (2008); *The Prospectus Defense: Defeating It As A Matter of Fact and Law*, PIABA Bar Journal, Vol. 16, No. 4 (2009); *Discovery of Regulatory Documents: Debunking the Myth of the SEC Privilege in Securities Arbitration*, Public Investors Arbitration Bar Association (2010); *Arbitrators Misclassified: Looking Back to Move Forward*, PIABA Bar Journal Vol. 18, No. 1 (2011); *Discoverability Of Wells Submissions: What They Are And How To Get Them*, PIABA Bar Journal Vol. 19, No. 2 (2012); *FINRA Six-Year Eligibility Rule 12206: The Purchase Date is Often Not the Triggering "Occurrence or Event Giving Rise to a Claim"*, PIABA Bar Journal Vol. 20, No. 1 (2013); *Market Adjusted Damages in the FINRA Forum*, PIABA Bar Journal Volume 21, No. 2 (2014), reprinted in the Consumer Attorneys Associations for Southern California Advocate (April 2016); and most recently published *The Use of Third Party Subpoenas to Determine a Brokerage Firm's Pre-Hiring Due Diligence and Post-Hiring Supervision*, Public Investors Arbitration Bar Association (2015).

Mr. Aidikoff has served on the faculty of the Practising Law Institute (1996, 1997, 2002), NASD Fall Securities Conference (2002, 2004, 2005, 2006), NASAA Enforcement Conference (2002, 2004), NASAA Attorney/Investigator Training Conference (2006),

University of Cincinnati School of Law Symposium-Twenty Years after Shearson v. McMahon (2007), SCMA Conference (2005), NERA Securities Litigation Seminar (2004), New York City Bar Securities Arbitration program (2002), Los Angeles County Bar Association Securities Arbitration program (2006, 2011, 2013 and 2015), the NASD faculty for training of discovery arbitrators, and on the JAMS faculty for training of securities arbitrators. He was a member of the NASD Neutral Roster Task Force (2005-2006), the FINRA Arbitrator Training Task Force (2009- 2010), FINRA Discovery Guide Task Force (2010–2013) and National Roundtable on Consumer and Employment Dispute Resolution, Pepperdine University 2012. He has appeared on CNBC, CNN/fn, PBS Nightly Business Report, National Public Radio, CBS Radio, and the Business Channel addressing investor rights topics, and has been quoted on securities matters in the Wall Street Journal, the Dow Jones News Service, Newsweek, Reuters, Fortune Magazine, Business Week, Money Magazine, Bloomberg News Service, Forbes, Medical Economics, Registered Representative, The New York Times, USA Today, The Los Angeles Times, The Washington Post and other national and local press. For five years he wrote a weekly column in the Palm Springs Desert Sun on issues of interest to investors. ([www.securitiesarbitration.com](http://www.securitiesarbitration.com))

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**Robert S. Banks, Jr., Esq., Director Emeritus**  
**Samuels Yoelin Kantor, LLP**  
**Portland, Oregon**

Bob Banks has been practicing law for 36 years. He represents individuals and businesses in disputes with financial advisors, legal malpractice cases, and in business tort and minority shareholder rights cases. Mr. Banks has been an adjunct professor at Lewis and Clark Law School in Portland, Oregon. He practices at Banks Law Office PC in Portland, Oregon.

#### **Honors**

- 2017 Investor Champion Award, given by the North American Securities Administrators Association (NASAA)
- Distinguished Service Award, Public Investor Arbitration Bar Association (PIABA), 2016
- Distinguished Service Award, Federal Bar Association, Oregon Chapter
- Director Emeritus, PIABA
- PIABA President's Award, "For Leadership Efforts In Protecting Investors Throughout the Country"
- Oregon Super Lawyers, 2006 – 2019, every year that it has existed in Oregon
- Chambers Best Lawyers In America
- Best Lawyers in America – Securities Law
- Martindale Hubbell Law Directory, Highest Rating
- Multi-Million Dollar Advocates Forum

#### **Bar Leadership Positions**

- Past President and 10-year board member, PIABA
- Past Chair, Oregon State Bar Securities Regulation Section
- Past Chair, Oregon State Bar Alternative Dispute Resolution Section
- Past President, Federal Bar Association, Oregon Chapter
- Past Chair, FINRA Arbitrator Training Committee Task Force, 2008-2009

#### **Current Bar Committees**

- Investor Representative Member, FINRA National Arbitration and Mediation Committee (NAMC)
- Chair, Rules and Procedures Subcommittee for FINRA's NAMC
- Member, National Federal Judicial Selection Committee, American Constitution Society

#### **Selected Publications**

- "Securities Arbitration" Chapter in Oregon State Bar Manual on Arbitration and Mediation, to be published in 2019
- PIABA Bar Journal Vol. 21, No. 3 2014, Muzzling the Claimant: Due Process Denied in FINRA Expungement Hearing
- Northwest Securities Institute CLE, Investment Portfolio and Brokerage Statement Danger Signals, July 2013 [osbar.inreachce.com](http://osbar.inreachce.com)
- Practicing Law Institute, 1 Securities Arbitration 2006 at 225, The NASD's Explained Awards Rule Filing
- Practicing Law Institute, 1 Securities Arbitration 2003 at 253, Clearing Firms and the 2002 Uniform Securities Act: What You Didn't Know Could Have Hurt You
- Practicing Law Institute, Securities Arbitration 2001 at 565, Clearing Firms, The Uniform Securities Act, and Koruga v. Fiserv Correspondent Services, Inc.
- Practicing Law Institute, Securities Arbitration 2000 at 995, Investor Protection-Not! SIPC and The Securities Investor Protection Act of 1970
- Practicing Law Institute, Securities Arbitration 2008 A Comment On the Financial Industry Regulatory Authority's Proposed Rules On Motions To Dismiss.

### **Selected Speaking Engagements**

- “Challenges in Administering a Large Receivership” National Association of Federal Equity Receivers (NAFER) Seattle, Washington, (January, 2019)
- “Recent Developments at FINRA” Northwest Securities Institute, Seattle (May 2018)
- “View From the Claimant’s Perspective” CNA Insurance Broker-Dealer Conference, Tampa (March 2018)
- “Becoming a FINRA Arbitrator,” with FINRA Executive Vice President and Director of Dispute Resolution, Richard Berry (April 2017)
- “Ethics Issues for Securities Lawyers” Oregon State Bar 35th Annual Northwest Securities Institute (April 2015)
- “What Every Securities Lawyer Should Know About Arbitration, Forum Selection, and Choice of Law Provisions” Oregon State Bar Securities Regulation Section Meeting (January 2014)
- “Remedies and Recompense: An Examination of Securities Arbitration and Class Actions” North American Securities Administrators Association (NASAA), Washington D.C., (October 7, 2013)
- “Detecting Anomalies in Investment Statements” Oregon State Bar seminar (July 16, 2013)
- “Recent Developments at FINRA,” 3rd Annual Northwest Securities Institute seminar (May 2013)
- “Securities Arbitration Cases” Oregon Trial Lawyers Association Business Litigation Section Meeting (February 2011)

### **Selected Court Decisions**

- Brown v. Price, WL 3207235 2017 (D. Or. 2017) Representing Aequitas Investors
- Amerivest v. Maloof, Oregon Court of Appeals, No. A144457 (Pending) Representing North American Securities Administrators Association as Amicus Curiae
- Boyer v. Salomon Smith Barney, Inc. 344 Ore. 583 (2008) Representing Public Investors Arbitration Bar Association as Amicus Curiae
- Houston v. Seward & Kissel, LLP, 2008 U.S. Dist. LEXIS 23914 (March 27, 2008)
- Marshall, et al. v. McCown DeLeeuw, 391 F. Supp. 2d 880 (D. Idaho 2005)
- Estate of Aguirre v. Koruga (I) 2002 U.S. App. LEXIS 14632 (9th Cir. 2002)
- Koruga v. Fiserv Correspondent Services, Inc., 183 F. Supp.2d 1245 (D.Or. 2001), 2002 U.S. App. LEXIS 6439 (9th Cir. 2002)

### **Prior Clients**

Bob has served a broad array of individuals, organizations and groups, including physicians, teachers, gas pipeline workers, attorneys, judges, investment advisors, accountants, NBA basketball players, a former US Congressman, FINRA (opposing broker expungement), North American Securities Administrators Association and Public Investors Arbitration Bar Association (as amici curiae), retirees, and many others who have been victims of negligent investment advice and fraudulent conduct.

### **Educational Background**

Reed College, B.A. 1977

University of Wisconsin Law School, J.D. 1982

### **Bar Memberships**

Oregon, Washington.

### **Other**

Finra Arbitrator Since 1989

Arbitration Services of Portland Arbitrator

### **Personal**

Bob was born in New Jersey and grew up in upstate New York. He moved to Portland to attend Reed College and has considered himself to be an Oregonian for 40 years. He has completed 10 marathons, (2:46 PR), backpacked throughout the NW, and is an avid fly fisherman. He is married to Valerie Banks (25 years) and they have two adult sons.

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### **Hugh D. Berkson, Esq.**

**2022 Executive Vice President/President Elect**

**McCarthy, Lebit, Crystal & Liffman Co., LPA**

**Cleveland, Ohio**

Hugh Berkson is a principal with the firm of McCarthy, Lebit, Crystal & Liffman, Co. LPA in Cleveland, Ohio. He is also of counsel with the firm of Rosca Scarlato, LLC. Hugh is rated AV® Preeminent™ by Martindale-Hubbell® and has been selected as a Super Lawyer from 2013 through 2022. He is rated 10.0 by Avvo. He obtained a business degree in Finance from the University of Texas at Austin in 1989, and is a 1994 graduate of Case Western Reserve University School of Law, where he was a member of the Order of the Barristers and received both the American Jurisprudence Award, (National Mock Trial) in

1993 and the Jonathan M. Ault Mock Trial Prize for 1993-1994. Hugh later served as an Adjunct Professor of Law at the CWRU School of Law, where he taught trial practice from 1995-2004.

After gaining extensive trial experience in both business and personal injury litigation, Hugh decided in 2000 to focus on the representation of injured investors. Hugh tries and arbitrates investment cases and also puts his finance background to good use by performing much of the technical analysis required for his cases. He is a past President of the Public Investors Advocate Bar Association, has been a member of PIABA's Board of Directors since 2011, and is currently serving as PIABA's Executive Vice President.

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**Michael Bixby, Esq.  
Levin Papantonio et al.  
Pensacola, Florida**

Michael Bixby is a shareholder with Levin Papantonio Rafferty in Pensacola, FL. He has been a PIABA member for 7 years and is the co-chair of the Arbitration Committee. He has successfully represented hundreds of clients around the country in a variety of forums including arbitrations, state court, and federal court. He focuses his practice on representing retirees and public investors.

Mr. Bixby has obtained numerous million dollar plus verdicts and judgments for his clients, including a \$19 million dollar verdict against UBS (the largest UBS Puerto Rico Closed-End Fund award to date) and a \$1.16mn verdict against Berthel Fisher (the largest FINRA arbitration award ever obtained against Berthel Fisher), multiple full well-managed damages awards, and multiple million dollar plus civil theft judgments in state court. His broad experience in securities and investment fraud cases includes representing clients in claims involving suitability, overconcentration, failure to supervise, breach of fiduciary duty, lack of due diligence, fraud, selling away, sale of unregistered securities, and ERISA 401(k) and retirement plan litigation.

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**Scot D. Bernstein, Esq., *Director Emeritus*  
Law Offices of Scot D. Bernstein  
Folsom, California**

Mr. Bernstein has practiced law in California since 1980. For more than a dozen years, he has concentrated his practice on representing plaintiffs in class actions. He has been named class counsel in more than 25 cases, including both employment (wage-and-hour) and privacy class actions. He has been co-counsel in successful appeals that resulted in published decisions as well. He also has served as counsel in cases involving securities and franchise law violations, unfair competition, unlawful business practices and false advertising. And he has handled numerous arbitration matters, including one that resulted in an unusual judgment that is viewable on his website.

Mr. Bernstein studied engineering and economics at UCLA, where he received his bachelor's degree Magna Cum Laude in 1977 and was an officer of the UCLA chapter of Tau Beta Pi, the engineering honors society. He was a member of Omicron Delta Epsilon (economics honors society) and Phi Beta Kappa as well. He received his Juris Doctor degree at Boalt Hall School of Law, University of California at Berkeley, in 1980.

Mr. Bernstein is a member of the board of directors of the California Employment Lawyers Association ("CELA"), an association of more than 1,200 attorneys dedicated to representing employees in employment disputes. He currently co-chairs CELA's Legislative Committee and serves on its Wage and Hour Committee as well.

Mr. Bernstein served for eleven years as a director of the Public Investors Arbitration Bar Association ("PIABA"), a national association of attorneys dedicated to representing investors in disputes with the securities industry. He has published numerous articles in the PIABA Bar Journal and its predecessor, The PIABA Quarterly. Since 2008, he has worked hard to help PIABA defeat multiple attempts to pass legislation that would have created a broad new exemption for securities sold through general solicitation and general advertising in California. More recently, he has negotiated with the sponsors of those prior bills to arrive at a bill, supported by PIABA, which would be beneficial to investor protection. Mr. Bernstein has given continuing legal education lectures to PIABA, the North American Securities Administrators Association, CELA and other professional groups on investors' rights and remedies and on employees' rights under the wage and hour laws. He is a member of the National Employment Lawyers Association ("NELA") as well.

**Reported Cases.** Mr. Bernstein has served as co-counsel in successful federal and state appeals:

*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4<sup>th</sup> 1244 (co-counsel for successful appellants);  
*Stop Youth Addiction v. Lucky Stores*, 17 Cal.4<sup>th</sup> 553, 950 P.2d 1086, 71 Cal.Rptr.2d 731 (1998) (attorney for amicus curiae in support of successful appellant);

*Lippitt v. Raymond James Financial Services, et al.*, 340 F.3d 1033 (9<sup>th</sup> Cir. 09/22/2003)  
(co-counsel for successful appellant);

*Lazarin et al. v. Total Western, Inc.* (2010) 188 Cal.App.4th 1560, 116 Cal.Rptr.3d 596, review denied, Jan. 19, 2011, S188164  
(co-counsel for successful appellant).

Mr. Bernstein has been recognized as a Northern California Super Lawyer® every year from 2010 through 2019.

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**Steven B. Caruso, Esq., Director Emeritus**  
**Maddox, Hargett & Caruso P.C.**  
**New York, New York**

Steven B. Caruso, the Resident Partner in the New York City office of Maddox Hargett & Caruso, P.C. ([www.investorprotection.com](http://www.investorprotection.com)), concentrates his practice on the representation of individual, high net worth and institutional investors in securities arbitration and litigation proceedings.

Mr. Caruso is the Chairman and a public member of the National Arbitration and Mediation Committee (“NAMC”) of the Financial Industry Regulatory Authority (“FINRA”); former Chairman of the Discovery Task Force Committee of FINRA; former member of the Nasdaq OMX BX Arbitration Committee; former member of the Securities Investor Protection Corporation (SIPC) Modernization Task Force; Director Emeritus and former President of the Public Investors Arbitration Bar Association (“PIABA”); testified before the U.S. House of Representatives, Committee on Financial Services, Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, in March 2012 and September 2010; and has served as a judge for the Yale University Mock Trial Invitational Tournament and for Invest-Write, the national investment strategy writing competition sponsored by the Securities Industry & Financial Markets Association (SIFMA) Foundation.

Among the publications that Mr. Caruso has authored are *An Introduction to FINRA’s National Arbitration and Mediation Committee*, The Neutral Corner, FINRA Dispute Resolution, Vol. No. 1 (2018); *Post-Settlement Expungements: An Investor Protection Problem that Continues to Wait for a FINRA Solution*, Practising Law Institute, Securities Arbitration (September 2017); *Non-Attorney Representatives – Do They Present a Clear & Present Danger to the Integrity of FINRA Arbitration*, Association of the Bar of the City of New York, New York, N.Y. (May 2017); *Arbitrator Disclosures: Requests for Additional Information*, The Neutral Corner, FINRA Dispute Resolution, Vol. No. 4 (December 2016); *Ethical Implications of the Phantom Designation of Expert Witnesses in FINRA Securities Arbitration Proceedings*, Practising Law Institute, Securities Arbitration (September 2016); *Definition of a FINRA Customer: To Be or Not To Be – That Is the Ultimate Question*, Practising Law Institute, Securities Arbitration (July 2015); *Discovery in FINRA Arbitration*, The Neutral Corner, FINRA Dispute Resolution, Vol. No. 2 (2015); *FINRA Six-Year Eligibility Rule 12206: The Purchase Date is Often Not the Triggering Occurrence or Event Giving Rise to the Claim*, PIABA Bar Journal, Volume 20, No. 1 (September 2013); *All Public Arbitrator Panels: A More Level Playing Field*, Practising Law Institute, Securities Arbitration (August 2013); *Arbitrator Challenges Under the FINRA Code of Arbitration Procedure for Customer Disputes*, Practising Law Institute, Securities Arbitration (August 2010); *The Mandatory Industry Arbitrator: An Endangered Species on the Precipice of Extinction*, Practising Law Institute, Securities Arbitration (August 2009); *Sunshine May be the Best Disinfectant for What Ails Securities Arbitration: A Discussion of the 2008 SICA Empirical Study of Fairness*, Practising Law Institute, Securities Arbitration (August 2008); *Effective Closing Statements From the Perspective of Counsel for the Customer-Claimant*, New York State Bar Association, Securities Arbitration 2007 (November 2007); *Essential Principles for Honorable Arbitrators*, Practising Law Institute, Securities Arbitration (August 2007); *Motions to Dismiss: A Predatory Tactic That Must be Extinguished*, Association of the Bar of the City of New York, New York, N.Y. (June 2007); *Ethical Standards for Securities Arbitrators: A Statistical Perspective of Potential Partiality (Bias)*, Practising Law Institute, Securities Arbitration (August 2006); *Arbitrator Training in the Securities Dispute Arena*, The Review of Securities & Commodities Regulation (January 2005); *Discovery Objections Which are Irrelevant, Unduly Burdensome and are Reasonably Calculated to Lead to the Concealment of Admissible Evidence*, New York State Bar Association, Securities Arbitration 2004 (October 2004); *Model Arbitrator Instructions: Luxury or Emerging Necessity*, Practising Law Institute, Securities Arbitration (August 2004); *Ethical Considerations in Settlement Agreements*, Association of the Bar of the City of New York, New York, N.Y. (June 2004); *Examination of the Adverse Broker: Unimpeachable Questions with an Internet Twist*, Practising Law Institute, Securities Arbitration (August 2001); *On-Line Trading: The New Frontier*, Practising Law Institute, Securities Arbitration (July 1999); and *NASD Arbitration Discovery Procedures: Knowing Your Customer From the Securities Professional Perspective*, American Bar Association, Section of Litigation, Committee on Securities Litigation (August 1995).

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**Jason Doss, Esq., Director Emeritus**  
**The Doss Law Firm**  
**Marietta, Georgia**

Jason Doss has represented investors in NASD and FINRA arbitrations for approximately sixteen (16) years. The Doss Firm, LLC, established by Jason Doss in January 2009, is a successful law firm primarily devoted to representing aggrieved consumers across the United States against financial services companies for mismanaging investments and engaging in financial fraud. The

attorneys of the firm have represented almost 1000 clients and have a combined 45 years of experience representing individual retail investors, institutional investors, and businesses in financial fraud litigation, securities arbitrations, and collective and class actions. Jason Doss has represented dozens of investor clients in disputes with broker-dealers involving the unsuitable recommendations of life insurance products including but not limited to fixed-indexed and variable annuities. Since its inception, The Doss Firm has recovered tens of millions of dollars for investors and consumers.

In 2018, Jason Doss was selected by a federal court to serve as one of twelve attorneys to lead the Equifax Data Breach case on behalf of all consumers and small businesses across the country. The case is currently pending in the United States District Court, Northern District of Georgia.

Jason Doss was primarily responsible for originating a nationwide consumer class action consisting of approximately 420,000 policyholders in equity-indexed annuities against Allianz Life Insurance Company, *Linda L. Mooney et. al. v. Allianz Life Insurance Company of North America*, 06-cv-545, United States District Court of Minnesota. His former law firm Page Perry, LLC was co-lead counsel with two other firms.

Jason Doss has co-authored two books, Doss, J. and Frankowski, R., *A Practitioner's Guide To Securities Arbitration* (2013), American Bar Association (225 pages) and Armstrong, F. and Doss, J., *The Retirement Challenge: Will You Sink or Swim?* (Jan. 2009), FT Press, Prentice Hall Publishing (266 pages). *A Practitioner's Guide To Securities Arbitration* is used by law schools and practitioners across the country as a resource to help navigate the FINRA arbitration process. *The Retirement Challenge: Will You Sink or Swim?* is in bookstores across the country and is designed to help consumers avoid the pitfalls of investing and avoid becoming a victim of financial fraud.

Jason Doss is a past-President of the Public Investor Arbitration Bar Association (PIABA), a bar association of attorneys that represent investors in FINRA arbitrations. He also founded The PIABA Foundation, a Foundation devoted to preventing investment abuse, and currently serves as its President. In addition, Jason Doss helped create the Investor Advocacy Clinic at Georgia State University College of Law, a law clinic that represents investors *pro bono* in FINRA arbitration with investment losses too small for them to hire a private attorney.

Over the last ten years, Jason Doss has been quoted many times by major publications and news organizations about topics involving financial fraud including USA Today, The Wall Street Journal, The New York Times, Reuters, The Associated Press, Bloomberg, AARP Magazine, The Street, and The Atlanta Journal Constitution.

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**Michael S. Edmiston, Esq.**  
**2022 PIABA President**  
**Jonathan W. Evans & Associates**  
**Studio City, California**

Michael S. Edmiston is an attorney at Jonathan W. Evans & Associates in Studio City, California. He has practiced with the firm since 2006. Prior to entering private practice, Michael served as a Senior Staff Attorney with NASD Dispute Resolution (now FINRA) in Los Angeles, California (1997-2001), and as a Business Manager with JAMS in Dallas, Texas and Orange, California (2001-2005).

His practice focuses on representing investors in FINRA arbitration, private commercial arbitration forums, and in state and federal court. His work continues to result in successful recoveries for clients by way direct negotiation, mediation, arbitration, and litigation. Michael volunteers his time to Community Legal Aid SoCal working with senior citizens in a variety of civil and administrative matters. Michael is published in the PIABA Bar Journal, Los Angeles Lawyer, the San Fernando Valley Bar Association, the New York City Bar, and various financial services industry publications.

Michael currently serves as PIABA's President. He joined PIABA in 2007 and was elected to the Board of Directors in 2015. He has served as the organization's Executive Vice-President/President-Elect (2020-2021), Treasurer (2017-2018), Secretary (2016), and as chair and co-chair of various committees. Michael has served and continues to serve on the PIABA Bar Journal, including as its Editor-in-Chief (2014-2015).

Michael is a 1994 graduate of Whittier College, with B.A.s in both Business Administration and Economics. In 1997, he obtained his J.D. from Pepperdine University School of Law, and was admitted to the California Bar later that same year. He received his Master's Degree in Dispute Resolution from Pepperdine in 2001.

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**Samuel B. Edwards, Esq.**  
**Shepherd, Smith & Edwards, LLP**  
**Houston, Texas**

Sam Edwards is a Houston based Securities Litigation and Arbitration attorney with a national practice. Sam and his firm – Shepherd, Smith, Edwards & Kantas – focus primarily on representing investors who have been injured. That has included the representation of individual investors, small hedge funds, community banks, pension plans and municipalities, some as large as entire state governments. Sam received his BA from the University of Texas at Austin and his law degree from the University of Houston Law Center. He began working on investment disputes while still in law school and joined his current firm shortly after graduation. Wanting to become even more specialized in this area of law, Sam made the seemingly insane decision to continue his education while also maintaining a full docket of cases, earning an LL.M. from Georgetown University Law Center in 2015 in Securities Law and Financial Regulation. He received the Thomas Bradbury Chetwood Prize at Georgetown, an award given to the student with the highest grade point average in the LL.M. program.

Sam was previously a member of FINRA's National Arbitration and Mediation Committee (NAMC), where he worked with other attorneys, both claimants counsel and respondents counsel, to help make better rules and procedures for FINRA arbitration participants. He is currently a member of FINRA's Zoom Task force where Sam is again working with both claimants counsel and respondents counsel to help FINRA develop better rules and procedures for arbitrations now that many are going forward via Zoom, rather than in person. In addition, Sam has been a member of PIABA for 20 years. Sam was previously elected as the President of PIABA and before that served on numerous PIABA committees and was the editor-in-chief of the PIABA Bar Journal. Sam has been on the PIABA Board of Directors since 2013 and remains active in the organization.

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**Adam Gana, Esq.**  
**Gana LLP**  
**New York City, New York**

Adam Gana is the managing partner of Gana Weinstein LLP. His practice focuses on all aspects of securities arbitration, complex commercial and business litigation. As a seasoned trial lawyer, Mr. Gana's experience includes litigation in both State and Federal Courts as well as in various alternative dispute resolution venues. As lead counsel, he has tried more than fifty cases to verdict before the state and federal trial and appellate courts, AAA, JAMS, NFA and FINRA and has served as lead counsel in hundreds more cases through mediation and direct negotiation.

Mr. Gana was named in the New York *Super Lawyers Rising Stars*<sup>®</sup> for eight straight years (an honor given to the top 5% of attorneys), ranked AV<sup>®</sup> Preeminent<sup>™</sup> by Martindale - Hubbell<sup>™</sup> (the highest honor offered), and ranked by the National Trial Lawyers as one of the Top 100 attorneys in the state of New York.

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**Robert J. Girard, II, Esq.**  
**Girard Bengali, APC**  
**Los Angeles, California**

A founding partner of Girard Bengali, APC, Robert J. Girard II advocates for institutional and individual investors in arbitration and litigation against unscrupulous brokerage and advisory firms in both court and FINRA Dispute Resolution/Arbitration. For 20 years, he has built a reputation as an effective advocate for his clients and has recovered millions of dollars for investors from most of the major Wall Street brokerage firms. Through negotiated settlements, arbitrations and trials, Mr. Girard has a proven track record of successfully protecting his clients' interests with a results-oriented approach and a zealous commitment to meeting, and exceeding, his clients' expectations. Mr. Girard's representations include victims of financial elder abuse, securities fraud, breach of fiduciary duty, unsuitable investment strategies, misrepresentations, account mismanagement, among others. Mr. Girard also represents securities professionals in employment disputes against broker-dealers and advisory firms, including claims for wrongful discharge, unfair business practices, retaliation, discrimination and Form U5 defamation claims.

From 2015 through 2022, Mr. Girard was named to the Southern California *Super Lawyers* list, and for three consecutive years (2012-2014) he was selected to the Southern California *Rising Stars* list by Super Lawyers Magazine, a rating service of outstanding lawyers who have attained a high-degree of peer recognition and professional achievement. He currently serves as a Director in the Public Investors' Arbitration Bar Association (PIABA), a national organization of attorneys dedicated to the advancement of investors' rights in securities arbitration proceedings.

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**Scott Ilgenfritz, Esq., Director Emeritus**  
**Johnson, Pope, Bokor, Ruppel & Burns, LLP**  
**Tampa, Florida**

Scott C. Ilgenfritz is a partner in the law firm of Johnson, Pope, Bokor, Ruppel & Burns, LLP, and practices in the firm's Tampa, Florida, office. Scott has spent his entire thirty-four year legal career with Johnson, Pope. Over the years, Scott has had a varied commercial and business litigation practice, which has included securities arbitration and litigation, commercial tort litigation, professional malpractice litigation, corporate litigation, real estate-related litigation, and contract litigation. Since 1997, Scott has been Board certified by The Florida Bar as a Business Litigation Lawyer. Since 1997, Scott has been Board certified by The Florida Bar as Business Litigation Lawyer. In 1992, Scott began representing investors in claims against broker/dealers, stockbrokers, investment advisors, and other financial professionals. Since the late 1990's, a primary focus of Scott's practice has been representing investors in securities arbitration and litigation matters. Scott has been a member of the Public Investors Arbitration Bar Association ("PIABA") since 1997. He served on PIABA's Board of Directors from 2008 until 2017. Scott served as President of PIABA from November, 2012, through October, 2013. During his term as President, he authored PIABA's expungement study. In 2017, Scott was recognized by PIABA as a Director Emeritus. Scott has been regularly recognized by his peers through inclusion in such publications as Florida's Super Lawyers (2007-2014) and Best Lawyers in America (2012-2017).

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**Marnie C. Lambert, Esq.**  
**Lambert Law Firm, LLC**  
**Columbus, Ohio**

Marnie C. Lambert is a 1992 graduate of the Pepperdine University School of Law in Malibu, California. Since 2005, she has been representing investors across the country in securities disputes with firms and registered representatives licensed by FINRA, the SEC and various states' securities divisions. She has prevailed and negotiated settlements on behalf of many investors in arbitrations processed by FINRA, JAMS and AAA, as well as in state and federal court cases.

Ms. Lambert has been an active member of the Public Investors Advocate Bar Association ("PIABA") for over 15 years, serving on the Board of Directors since she was elected in 2012 (holding the positions of Treasurer, Executive VP/President Elect and President from 2014-2017). She has participated in multiple panels at PIABA Annual Meetings and at the Practising Law Institute's Securities Arbitration Programs in New York City. She has served on the Ohio State Bar Association ("OSBA") Annual LGBTQ (and Allies) Diversity and Inclusion Conference Planning Committee since she was appointed in 2011 (serving as Co-Chair in 2016) and she was also an appointee to the OSBA's Litigation Section Council from 2005-2012.

Ms. Lambert has a reputation for her no-nonsense approach to cases and she is well-respected by clients, co-counsel, opposing counsel, experts, arbitrators, mediators, and judges alike. She is licensed to practice law in the states of Ohio and California and in all United States District Courts in Ohio and California.

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**Christine Lazaro, Esq.**  
**St. John's University School of Law**  
**Queens, New York**

Christine Lazaro is an Associate Professor of Clinical Legal Education and the Director of the Securities Arbitration Clinic at St. John's University School of Law. The students in the Clinic represent investors in arbitration claims against brokerage firms and brokers on a pro bono basis. Professor Lazaro also teaches Broker-Dealer Regulation and Business Basics at St. John's, and is a faculty advisor for the Moot Court Honor Society and the Corporate and Securities Law Society. She joined St. John's in 2007 as a Supervising Attorney for the Clinic. Professor Lazaro is also currently Of Counsel to the Law Offices of Brent A. Burns, LLC, where she consults on securities arbitration and regulatory matters.

Professor Lazaro has been a member of the Public Investors Advocate Bar Association (PIABA) since 2008. She currently serves on the Board of Directors, co-Chairs the Fiduciary Standard Committee, and is a member of the Legislation Committee, the SRO (Self Regulatory Organization) Committee and the Securities Law Seminar Committee. She also serves on the New York State Bar Association's Securities Litigation and Arbitration Committee.

Professor Lazaro holds a B.A. from New York University and a J.D. from Fordham Law School. After graduating from law school and prior to joining St. John's, she was an associate at Davidson & Grannum, LLP, representing broker-dealers and individual brokers in disputes with clients in both arbitration and mediation, and handling employment law cases and debt collection cases. She also advised broker-dealers regarding investment contracts they had with various municipalities and government entities.

She speaks and writes regularly on the topics of securities arbitration and the duties of brokers and brokerage firms.

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**Seth E. Lipner, Esq., *Director Emeritus***  
**Deutsch & Lipner**  
**Garden City, New York**

Seth E. Lipner is a Professor of Law at the Zicklin School of Business of Bernard M. Baruch College (CUNY) in New York City, and a member of the firm Deutsch & Lipner in Garden City, New York. Professor Lipner is the author of numerous scholarly articles and law books, including SECURITIES ARBITRATION DESK REFERENCE, co-authored with Professors Joe C. Long and William Jacobson, and published each year by West Publishing. As a member of Deutsch & Lipner, Mr. Lipner focuses his practice on representing investors and other individuals with grievances against providers of financial services.

Professor Lipner was a founder of PIABA when it was created in 1990. He served as President in 1994-1995, and again in 2000-2001. He served as Secretary to the organization and on its Board of Directors since the organization's inception until 2006, and now holds the title "Director Emeritus." Professor Lipner has appeared on CNN, NPR, BBC and the Wall Street Journal Report, and is often quoted in publications such as Forbes, The New York Times, Reuters, Business Week, Newsweek, the Wall Street Journal, Newsday, the New York Law Journal and the National Law Journal. Professor Lipner speaks often to bar groups, and in continuing legal education programs, including the New York State Bar Association, Practising Law Institute and PIABA. He served on the National Arbitration and Mediation Committee of the NASD from 1998 to 2002, and was at one time a member of the Board of Editors at Securities Arbitration Commentator. He is now on the Editorial Board of the PIABA Bar Journal, and is a regular contributor to the Journal.

Along with Lisa Catalano, he is the author of "The Tort of Giving Negligent Investment Advice," 39 University of Memphis Law Review 663 (2009). His most recent law review article, "The Expungement of Customer Complaint CRD Information Following the Settlement of a FINRA Arbitration," is at 19 Fordham Journal of Corporate & Financial Law 57 (2013). Professor Lipner's numerous columns and other writings can be found at DeutschLipner.com. and Forbes.com.

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**Mark E. Maddox, Esq., *Director Emeritus***  
**Maddox Hargett & Caruso, P.C.**  
**Fishers, Indiana**

Mark E. Maddox is a founding partner of Maddox Hargett & Caruso, P.C., one of the nation's largest legal practices concentrating on the representation of securities investors. He has concentrated his career representing investors in disputes with stockbrokers and their firms.

From 1989 - 1991, Mr. Maddox served as the Securities Commissioner for the State of Indiana. During his tenure, he also served on the Indiana Governor's Initiative on Economic Development Policy Panel. Mr. Maddox also led the International Enforcement Committee of the North American Securities Administrators Association as its Chairperson. He served on the Board of Directors of the Public Investor Arbitration Bar Association from 1994 - 2002 and was its President from 1998 - 2000. Mr. Maddox was also a public representative on the NASD Regulation's National Arbitration and Mediation Committee from 1996 - 1998 and 2003 - 2005 and was appointed its Chair for the 2004 - 2005 term. He was admitted to practice before the U.S. Supreme Court in February 1995.

In 1991, Mr. Maddox opened his current private practice that concentrates in the representation of investors in securities arbitration, litigation and regulation. He is a member of the Indianapolis Bar Association and the Indiana State Bar Association where he is a Past Chair of the Securities Sub-Committee. He is an adjunct professor at Butler University where he teaches Business Law to undergraduates.

Mr. Maddox is a graduate of Wabash College (magna cum laude), and earned his J.D. from Vanderbilt University in 1986. He has been a speaker and lecturer for various Continuing Legal Education and securities-related seminars and has been published extensively, most notably the book Investor Rights for the 21st Century (2001).

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**Thomas D. Mauriello, Esq.**  
**2022 PIABA Treasurer**  
**Mauriello Law Firm, APC**  
**San Clemente, California**

Tom Mauriello is the principal of the Mauriello Law Firm, APC in San Diego, which he founded after beginning his legal career at a large national plaintiffs' securities class action firm. The firm focuses on investment disputes representing investors in FINRA arbitrations and courts and also has represented registered representatives, broker dealers, institutional investors, and issuers in various contractual, operational, employment, and other matters. Tom is a member of the California, New Jersey and Pennsylvania bars. He received his BA from Brown University in 1983 and his JD from the University of San Diego School of Law in 1988. Prior to law school, he worked as a paralegal at a New York City law firm registering securities offerings with

the SEC and state securities regulators. After law school, Tom served as a judicial clerk to Judge Robert E. Cowen of the U.S. Court of Appeals for the Third Circuit. He is in his second term on the Board of Directors of the Public Investors Advocate Bar Association ("PIABA"), where he has served as secretary and currently serves as treasurer.

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**David P. Meyer, Esq.**  
**Meyer Wilson Co., LPA**  
**Columbus, Ohio**

Attorney David P. Meyer is the managing principal of Meyer Wilson, a national law firm with offices in Ohio, Michigan, California, and Louisiana.

David is a past president of the Public Investors Advocate Bar Association (PIABA). He is also the current president of the Ohio Association for Justice, Ohio's statewide bar of plaintiff trial lawyers.

David is the author of the #1 best-selling book titled "The Investor Protector." He wrote the book to help prevent hard-working retirement savers from becoming victims of investment fraud and to share his experiences of cases he has handled over the past 20 years. The book is available on Amazon.

Since starting the law firm in 1999, David has earned a national reputation for successfully representing investors who are victims of investment fraud. He has represented more than 1,000 individual investors from across the country in securities arbitration and litigation.

Meyer Wilson has also been appointed lead class counsel in numerous consumer class actions across the country. The firm also represents hundreds of clients who suffered serious injuries from dangerous drugs and defective medical devices. His firm has recovered more than \$350,000,000 for its clients.

David can be reached through his firm's website at [www.investorclaims.com](http://www.investorclaims.com) or via email at [dmeyer@meyerwilson.com](mailto:dmeyer@meyerwilson.com).

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**David P. Neuman, Esq.**  
**2022 PIABA Secretary**  
**Israels & Neuman PLC**  
**Seattle, Washington**

David Neuman is an attorney who has been representing the interests of investors and consumers for over a decade. Before co-founding Israels & Neuman in the Summer of 2014, Mr. Neuman worked for over seven years at a law firm in Chicago which focused its practice on representing aggrieved and defrauded investors, mostly in FINRA arbitration. Throughout his years of experience, Mr. Neuman has recovered millions of dollars in hundreds of FINRA and court cases, on behalf of clients from over 40 states, as well as investors from the international community. In addition to representing investors in FINRA Arbitration, Mr. Neuman has represented investors in numerous courts throughout the U.S., as well as represented persons deceived by their insurance brokers and parties in shareholder disputes.

Mr. Neuman is currently on the Board of Directors of PIABA. He has also chaired several committees in PIABA. He is also an arbitrator with FINRA Dispute Resolution. David Neuman is admitted to practice law in Illinois, Washington, and Florida, as well as several federal courts.

Mr. Neuman graduated with Honors from the University of Illinois in December 2001 with a B.S. in Finance. He attended the Northern Illinois University College of Law and graduated Magna Cum Laude in May 2005. While at the NIU College of Law, Mr. Neuman was on Law Review and was an Associate Justice for the Moot Court Society. In addition, during his time at the NIU College of Law, he also was a research assistant for Professor David Gaebler and researched various areas of contract, commercial, and consumer law.

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**Timothy J. O'Connor, Esq.**  
**The Law Offices of Timothy J. O'Connor**  
**Albany, New York**

Timothy J. O'Connor maintains a private practice of law in Albany, New York and is licensed in New York and Florida. He has been representing investors in securities brokerage customer claims since 1985. Mr. O'Connor has been a solo practitioner since 2005, after having been affiliated with Ainsworth Sullivan for 21 years.

A graduate of Middlebury College (A.B. Economics, 1980) and the University of Denver College of Law (J.D. 1984), Mr. O'Connor was nominated in the Fall of 2003 as the Inaugural Visiting Clinical Instructor for the Investor Rights Project Securities Arbitration Clinic of Albany Law School of Union University in Albany, New York, funded through the efforts of New

York State Attorney General, Eliot Spitzer, from the proceeds of a settlement obtained against several national securities brokerage firms involving allegations of analyst fraud and wrongdoing. Mr. O'Connor served in this adjunct position through 2005.

In addition to his private practice, he is currently an Adjunct Lecturer at State University of New York at Albany, teaching courses in Law in Financial Market Regulation and Technology in Financial Market Regulation.

He has also widely written on a number of topics relating to the topic of investors rights. Most recently, "Trends in Supervisory and Clearing Firm Liability"(New York State Bar Association Continuing Legal Education Department – "Securities Arbitration and Mediation 2017: The Courage to Simplify" – April 6, 2017).

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**Darlene Pasieczny, Esq.**  
**Samuels Yoelin Kantor, LLP**  
**Portland, Oregon**

Darlene Pasieczny ("Pah-shetch-nee") is a securities and fiduciary litigator, and leads the Investor Defenders practice group at Samuels Yoelin Kantor LLP, based in Portland, Oregon. Darlene works on all stages of securities litigation and FINRA arbitration, fiduciary litigation in trust and estate disputes, elder financial abuse cases, complex civil litigation, and has a growing appellate practice. She is a frequent speaker on FINRA arbitration, trust and estate litigation matters, and elder financial abuse prevention, recognition, and recovery.

Darlene serves on the Board of Directors of the Public Investors Advocate Bar Association (PIABA) and was the 2021 Chair of the Oregon State Bar's Securities Regulation Section. In June 2021, Darlene was appointed to FINRA's National Adjudication and Mediation Committee (NAMC) for service as a public member. Selected to the 2021 Oregon Rising Stars list, her professional affiliations include the admission to the Oregon State Bar, Washington State Bar, U.S. District Court for the State of Oregon, and Multnomah Bar Association. Darlene earned a B.A. from Reed College, *Phi Beta Kappa*, an M.A. from Columbia University, and J.D. from Lewis & Clark Law School, *magna cum laude*.

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**Joseph C. Peiffer, Esq.**  
**2022 PIABA Vice President**  
**Peiffer Wolf Carr Kane & Conway, APLC**  
**New Orleans, Louisiana**

Mr. Peiffer is a partner at Peiffer Rosca Abdullah & Carr. His practices consists of representing individuals and institutions in FINRA arbitration, prosecuting ERISA class actions, representing victims of labor trafficking and those that have suffered catastrophic injury.

Mr. Peiffer has represented hundreds of individual retirees against their brokers in FINRA arbitration. The highlights of this practice include representing 32 Exxon retirees in a 90-day FINRA arbitration against Securities America that resulted in a \$22 million verdict -- one of the largest ever awarded by a FINRA arbitration panel. He has also represented hundreds of Xerox and Kodak retirees against their broker resulting from the broker's fraudulent advice to retire and subsequent unsuitable investments. He currently represents clients against British Petroleum arising from the oil spill that occurred in the Gulf of Mexico. He was recently part of the legal team that filed a temporary restraining order to stop BP from paying dividends to its shareholders before it could show that it could pay to clean up the Gulf. Also, he currently represents the Louisiana Firefighters Retirement Fund in their case against Northern Trust concerning securities lending. Additionally, he represents the Baylor College of Medicine and about 25 other hospitals and municipalities in cases against their investment banks arising out of their issuance of auction rate securities. He also is on the plaintiffs' steering committee in a nationwide antitrust class action involving the illegal tying of cable set-top boxes to the provision of premium cable services and in the leadership of an ERISA class action arising out of securities lending.

Mr. Peiffer was one of three Louisiana lawyers ranked by Chambers USA for securities litigation. He has been quoted by *USA Today*, *Wall Street Journal*, the Associated Press, *New York Times*, *New York Daily News*, *The Los Angeles Times*, *Business Week*, *Investment News*, and many other publications. Mr. Peiffer has also appeared on CNN. He was named as one of the fifty Leaders in Law by *New Orleans City Business Magazine*.

He has also taught and lectured extensively. He is co-authored a book on Litigating Business Torts for West, a Thomson Reuters Business. He co-created and taught a class entitled Storytelling and Advocacy at Loyola Law School. Also, at Loyola Law School, he has taught a course entitled "The Basics of Arbitration" and he also serves as an adjunct professor teaching Trial Advocacy. He has guest lectured at Tulane Law School in its Securities Regulations class and Syracuse Law School on securities arbitration. He has spoken at many national conventions on a variety of topics including prosecuting large, multi-client claims, broker's deficient advice to retire and FINRA arbitration.

Mr. Peiffer graduated from Tulane School of Law, *cum laude*, in 1999. While at Tulane, he served on the Tulane Law Review and was involved with the Tulane Legal Assistance Program. Prior to attending Tulane, he graduated from Bowling Green State University in 1996 with a major in communications. While at Bowling Green, he worked as the General Manager of the campus radio station and City Editor of the daily newspaper.

Mr. Peiffer has also successfully represented criminal defendants on a pro bono basis. He is a member of the Louisiana State and American Bar Associations. He also is a member of the American Association for Justice where he served as past Chairman for the Business Torts section. He is also a member of the Public Investors Advocate Bar Association where he serves on the Board of Directors and was recently elected Executive Vice President.

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**Rosemary J. Shockman, Esq., *Director Emeritus***  
**Shockman Law Office, P.C.**  
**Scottsdale, Arizona**

Rosemary J. Shockman received her B.A. from the University of Minnesota and J.D., magna cum laude, from California Western University. She practices with the firm of Shockman Law Office, P.C. in Scottsdale, Arizona. The firm's practice is devoted primarily to the representation of public investors in actions with broker/dealers and others. The firm has represented hundreds of investors in claims against broker/dealers or stockbrokers.

Ms. Shockman is a past member of the Board of Directors, past President, and past chair of the Arbitrator Recruiting Committee for Public Investors Arbitration Bar Association ("PIABA").

She served two terms as a member of the FINRA (formerly NASD) National Arbitration and Mediation Committee.

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**Brian N. Smiley, Esq., *Director Emeritus***  
**Smiley Bishop & Porter LLP**  
**Atlanta, Georgia**

Brian Smiley is a partner in the firm of Smiley Bishop & Porter LLP. He was born in Augusta, Georgia, and grew up in Atlanta. He attended Emory College, where he was initiated into Phi Beta Kappa and from which he graduated with highest honors in 1975. Following graduation, he attended Emory University School of Law, where he served on the Board of Editors of the Emory Law Journal and was initiated into the Order of the Coif.

Upon graduation (with distinction) in 1978, Mr. Smiley received an appointment as a Trial Attorney in the United States Department of Justice. While at the Justice Department, Mr. Smiley acted as counsel for the Government in numerous cases that were deemed by the Attorney General to be of unusual importance to the United States, including *Nixon v. United States*, various constitutional cases and litigation involving the NATO treaty.

In 1981, Mr. Smiley returned to Atlanta from Washington, and entered into the private practice of law. As a litigator, Mr. Smiley has handled constitutional and civil rights suits, products liability claims, personal injury litigation, commercial controversies, shareholders' derivative suits, fidelity bond and RICO suits, and securities litigation and arbitration. For over 20 years, Mr. Smiley has concentrated in the securities field, primarily representing investors in FINRA arbitrations.

Mr. Smiley is the author of numerous articles including: "Stockbroker-Customer Disputes-Making a Case for Arbitration," (Georgia State Bar Journal, May 1987); "Spotting Common Forms of Stockbroker Misconduct" (The Verdict, Jan. - Feb. 1991); and, "The Law and Ethics of Witness Preparation" (Practicing Law Institute, 1998). He has spoken at numerous seminars sponsored by the Public Investors Arbitration Bar Association and has been quoted on securities matters in the national press.

Mr. Smiley is a frequent lecturer on the topics of stockbroker misconduct, the handling of litigation and arbitration involving stockbrokers, and legal ethics. He has testified as an expert at special hearings about the "penny stock" industry conducted by the Secretary of State of Georgia. Mr. Smiley testified before the United States Senate Committee on Banking, Housing and Urban Affairs, Securities Subcommittee, on the topics of "penny stock" fraud and securities industry arbitration.

In 2002, Mr. Smiley was appointed to the National Arbitration and Mediation Committee (NAMC). The 13 members of the NAMC advise the Board of Directors of FINRA, which is the world's largest forum for handling arbitration and mediation of disputes between clients and brokerage firms. The NAMC is actively involved in the drafting of arbitration rules and the recruitment, training and evaluation of arbitrators.

He has been elected to serve on the Board of Directors of PIABA for three terms and was honored to act as PIABA's President in 2008-2009.

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**Jeffrey R. Sonn, Esq.**  
**Sonn Law Group, PA**  
**Aventura, Florida**

For the last 34 years, Jeffrey Sonn focuses his practice principally on securities litigation and arbitration, class actions and business litigation. Mr. Sonn is the managing partner of Sonn Law Group, and has handled over 1,000 securities cases in his career. Mr. Sonn has been rated as a "Superlawyer" and is "AV" rated by Martindale Hubbell.

In class actions, Mr. Sonn served as class counsel, executive committee, for In re: Woodbridge Litigation (\$1.2 billion Ponzi Scheme), as class counsel in the Equialt Inc. Ponzi (\$180 million Ponzi Scheme), as class counsel in 1 Global Financial Ponzi (\$280 million Ponzi), as class counsel in the Yieldstreet private placement action (\$90 million in losses), and as class counsel in the MJ Capital litigation (\$200 million Ponzi Scheme).

Mr. Sonn serves as a Director of the Public Investor Arbitration Bar Association (PIABA). Mr. Sonn is the author of many securities related articles, including Top Ten Things to Do During a Final Hearing (PIABA), Top Ten Mistakes to Avoid in a Final Hearing (PIABA), Elder Abuse and the Securities Industry (PIABA), and Ponzi Schemes, Picking up the Pieces from a Fallen House of Cards ("Securities Arbitration in the Meltdown Era" Practicing Law Institute).

During his career, Mr. Sonn has litigated numerous cases to successful resolution, recovering hundreds of millions of dollars for victims of investment fraud. He won a \$50 million final judgment in Katz v. MRT Holdings. Mr. Sonn also served on the Plaintiffs' Steering Committee (with two other PIABA members) that successfully negotiated a \$151 million dollar settlement for hundreds of investors who were the victims of the Medical Capital/Provident Shale Royalties Ponzi Schemes.

Mr. Sonn has acted as trial counsel to verdict in a number of successful cases, including Lacey Keath vs. JP Morgan (\$4 million verdict); First Union vs. the FDIC and Hollywood Associates (a \$16 million dollar verdict); Madhany v. Citigroup (\$11.1 million verdict); Regas v. Painewebber (a \$2.2 million dollar verdict), and Tartell v. Krieger Financial (\$1.7 million dollar verdict). Mr. Sonn has also served as counsel to United States Bankruptcy Trustees, Liquidating Trustees, and Court appointed Receivers.

Mr. Sonn has served as a legal correspondent and commentator on securities fraud and Ponzi schemes for CNBC, CBS, BBC Radio, ABC and MSNBC. Mr. Sonn served as a CNBC legal contributor for the CNBC shows "On the Money" and the documentary "Scam of the Century, Bernie Madoff and the \$50 Billion Dollar Heist."

Mr. Sonn also appeared on the television show "American Greed" on CNBC, covering the \$1 Billion Dollar Ponzi Scheme by convicted Fort Lauderdale attorney Scott Rothstein. Mr. Sonn represented victims in the Rothstein case and pushed the Rothstein law firm into bankruptcy when the fraud was first discovered.

# FINANCIAL ABUSE OF ELDERS AND OTHER VULNERABLE ADULTS Civil and Other Remedies<sup>1</sup>

Robert C. Port

## I. COMMON THEMES, FACT PATTERNS, AND SENARIOS

### Disputes arising from elder abuse/undue influence:

- Coercing parents to make gifts/pay debts/buy things for influencer
- Coercing parents to change wills, trusts, insurance beneficiaries, etc.
- Isolation of parents
- Withholding caregiving/support/access to friends unless the parent agrees to make transfer, change bank account, etc.
- Poor care of parents or elderly relatives; abuser is more worried about money spent on care
- Difficulties of out-of-state children in monitoring caregivers
- Investment “recommendations” by family members
- Family members receiving “gifts” or “borrowing” from the elder
- Guardianships/conservatorships are rightfully hard to secure; if the petitioner (usually a child) fails to secure guardianship/conservatorship, then the petitioner is often cut out of a future inheritance
- “Granny snatching”

### Disputes arising from powers of attorney:

- Poor choice of agent
- Gifting by agent to themselves
- Transfers of property to the agent

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<sup>1</sup> The author wishes to thank Kristen Lewis of the law firm of The Bowden Law Firm LLC, Atlanta, Georgia for her gracious permission allowing the use and incorporation of her extensive written materials on this topic into this presentation.

- Borrowing or using funds to benefit agent (e.g., building addition on house, buying cars, selling/transferring business to agent, changing terms of business agreement)
- Failure to maintain appropriate records, receipts, and bank records
- Changing bank account ownership or beneficiary designations
- Withholding money from the principal (e.g., to have more for later inheritance)

Disputes arising from trusts:

- Poor choice of fiduciary – the oldest child, or the one with a professional degree (even an accountant or attorney), might not be the best choice.
- Fiduciary “borrowing” from trust
- Naming co-fiduciaries is often a problem – unless otherwise provided, all decisions by co-fiduciaries must be unanimous
- No accounting to beneficiaries
- Failure to maintain appropriate records, receipts, and bank records
- No impasse resolution set forth in trust document
- Failure to provide for a workable trustee succession plan
- Bad choice of assets to be held in trust
- Failure to transfer assets into trust
- Co-mingling of assets
- No direction on the management of business assets
- Poor investment of assets

## **II. REMEDIES FOR ELDER FINANCIAL ABUSE**

### **1. Criminal prosecution**

Although the APS statutes and programs in all 50 states and the District of Columbia recognize elder financial abuse as a reportable action, not all states specifically recognize elder financial abuse or exploitation as a distinct crime. However, some jurisdictions have prosecutors specifically tasked with investigating and prosecuting elder financial abuse or exploitation.

Basic criminal laws against **theft, fraud, deception, larceny, forgery, and embezzlement** can be invoked to prosecute elder financial abuse and seek restitution for the elder. The burden of proof for a conviction under such statutes is typically “beyond a reasonable doubt.”

Frequently, however, **prosecutors refuse to pursue** elder financial abuse actions for a variety of reasons:

- a.** Insufficient support of APS investigations by law enforcement personnel.
- b.** Limited budget resources.
- c.** The effect of the incapacity or death of the victim on the ability to marshal sufficient probative evidence.

### **2. Civil remedies**

Private civil actions for elder financial abuse under state law could include a complaint for **restitution, compensatory damages, and punitive damages** under one or more of the following.

### **3. Specific causes of action for elder financial abuse or exploitation.**

- a)** Fraud
- b)** Breach of fiduciary duty
- c)** Aiding and abetting a breach of fiduciary duty
- d)** Negligence, breach of contract
- e)** Conversion
- f)** Rescission
- g)** Money had an received
- h)** Imposition of constructive trust
- i)** Removal of executor

- j) Removal of trustee
- k) Attorneys' fees
- l) Punitive damages

#### **4. Disinheritance statutes**

Several states (including Arizona, California, Illinois, Maryland, Oregon, and Washington) have enacted so-called “disinheritance statutes,” modeled after the more commonly encountered “slayer statutes.” These laws **preclude a convicted perpetrator** of elder financial abuse from receiving benefits as a consequence of the death of the elder victim. The abuser is deemed to predecease the victim for purposes of some or all of the following.

- a) Inheritance under a Will or probate avoidance Living Trust.
- b) Inheritance under intestate statutes.
- c) Receipt of life insurance proceeds as a designated beneficiary.
- d) Elective share, statutory share, or homestead rights.
- e) Fiduciary appointments in the elder victim’s estate documents.
- f) Benefitting as a permissible appointee of a power of appointment.

#### **5. Registries of persons convicted of elder abuse**

Increasingly, APS agencies are creating and maintaining a registry of convicted elder abuse offenders that can be used to ascertain whether a prospective in-home caregiver (or other person with access to the elder) might have a history of, or propensity for, elder abuse.

#### **6. Probate Court remedies**

The Probate Court (or other state court with jurisdiction over alleged incapacitated adults) generally has the power to order any one or more of the following actions and remedies for elder financial abuse, each of which typically has its own procedural and evidentiary requirements.

- a. **Appointment of a limited or full conservator for the elder, with court-supervised responsibility for managing the elder’s assets, as a “defensive” protective measure.**
  - 1. During the pendency of a conservatorship proceeding, which can be a time-consuming proposition, consideration should be given to obtaining one or more of the following temporary remedies.

- a) Temporary restraining order to prevent irreparable harm to the elder and her assets.
- b) Preliminary injunction to preserve the elder's assets while the conservatorship action is pending, coupled with court-ordered disbursements for the elder's benefit during the pendency of the action.
- c) Recordation of a *lis pendens* (Latin for "litigation pending") in the deed records of any county in which the elder owns real property, putting third parties on notice of possible claims against, or title issues with respect to, the elder's real estate assets.

- 2. **"Offensive" or "attack" conservatorship proceedings.** These suits are offensive in that they are being used as a sword rather than a shield, using court processes designed to protect elderly persons into a tool for depriving elderly persons of control of their own property.
- 3. **"Granny snatching"** (*i.e.* removing an elder from her home state to another jurisdiction for the sole purpose of filing a guardianship or conservatorship proceeding there based on the elder's physical presence in that jurisdiction). This tactic has been curtailed in recent years as the vast majority of states have enacted the **Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA")** in some form, promulgated in 2007.

**b. In the context of a conservatorship, the revocation, suspension, or modification of the elder's previously executed Powers of Attorney.**

- 1. In jurisdictions which have adopted the **Uniform Durable Power of Attorney Act ("UDPOAA")**, originally promulgated in 1979, the appointment of a conservator or guardian of the property for the Principal vests in that person the same power to revoke or amend a Power of Attorney as the Principal would have had if not incapacitated.
- 2. The law in many states (*e.g.* Georgia) provides that a statutory Durable Power of Attorney will be **revoked automatically** in the event a conservator is subsequently appointed, unless otherwise ordered by the court appointing the conservator.
- 3. The law in some states provides that the **mere initiation of judicial proceedings** to determine the Principal's incapacity or for the appointment of a guardian results in the **"suspension"** of the authority granted under a Power of Attorney until the petition is dismissed or withdrawn, or the court enters an order authorizing

the Agent to continue to exercise one or more powers granted under the Power of Attorney.

- c. The posting of **bond and surety** for persons handling the elder's financial affairs.
- d. Specific **court-supervised financial budgets** to govern the costs of the elder's care.
- e. **Constructive trust** imposed upon assets of the elder that have been improperly taken.
- f. **Invalidation of deeds or contracts** executed by the elder while laboring under a proven incapacity.
- g. **Invalidation of post-incapacity Wills** executed by the elder, especially if procured in contravention of a court order appointing a conservator for the elder.
- h. Creation of revocable trusts or "Will substitutes" for the elder under the authority of the conservatorship statute or under the doctrine of "**substituted judgment.**"
- i. **Invalidation of post-incapacity gifts**, or prior gifts induced by fraud, coercion or abuse.

## 7. Defensive use of the General Durable Power of Attorney

- a) The **General Durable Power of Attorney ("GDPOA")** has often been described as "**the most effective burglary tool since the crowbar.**" The GDPOA is a technique whereby the Principal authorizes an Agent to act on her behalf until that authority is revoked by the Principal during her lifetime or upon her death. The authority granted under a GDPOA is "durable" (*i.e.* it survives the Principal's subsequent incapacity or disability). See, *e.g.*, Uniform Probate Code (U.L.A.) § 5-501. While clients appreciate the simplicity and privacy afforded by this non-court-supervised alternative to a conservatorship, this lack of formal oversight and accountability can facilitate hard-to-detect abuse of the broad authority typically embodied in a GDPOA.
  - 1. Some clients are alarmed by the prospect of a GDPOA that vests immediate authority in the Agent, preferring instead the concept of "**springing**" authority which vests in the Agent only upon a written determination of designated persons that the Principal cannot manage her financial affairs. The persons charged with rendering the triggering disability determination often include one or more physicians. The "springing" GDPOA can be **problematic** for several reasons.

- a) If the Principal is not comfortable vesting immediate authority in her Agent, she should probably reconsider her choice of Agent. An insistence on springing authority often manifests an **inherent mistrust** in the person designated as Agent, calling into question the appropriateness of the appointment.
  - b) If one or more physicians are charged with responsibility for rendering the necessary disability determination, they may feel constrained by the provisions of **HIPAA prohibiting the release** of the Principal's protected health care information and may refuse to participate in the triggering event. A broad HIPAA waiver may assuage such concerns, but anecdotal reports of physician non-compliance still persist.
  - c) The law of some states **prohibits** "springing" GDPOAs entirely.
- b) Many commonly granted powers under a GDPOA can be used by an unscrupulous Agent to completely defeat the Principal's estate plan (often referred to as "**hot powers**"), including the following.
1. Tax-motivated transfers.
  2. Gifts.
  3. Exercise of powers of appointment vested in the Principal.
  4. Sale of assets subject to a specific bequest or devise in the Principal's estate planning documents.
  5. Change of beneficiary designations for the Principal's non-probate assets (e.g. life insurance, retirement plans and accounts, or investment accounts with "Transfer on Death" or "Pay on Death" designations).
  6. Creation of joint interests embodying a "right of survivorship."
  7. Transfer of assets to a trust that avoids the probate process.

## **8. Use of Revocable Living Trusts instead of Powers of Attorney**

In many jurisdictions, estate planners recommend the use of a "**revocable living trust**" ("**RLT**"). A RLT is typically established *and funded* during the elder's lifetime as a "Will substitute" to avoid the cumbersome or expensive state probate process attendant to using a Will as the primary means of disposing of assets at death.

- a) There are numerous benefits to **utilizing a funded RLT to combat elder financial abuse** during her lifetime.

1. The RLT will **never fail for lack of a Trustee**. See, e.g., GA. CODE ANN. § 53-12-201(b).

a) Using a RLT can also minimize the adverse impact of **serially executed GDPOAs** (e.g. whereby the elder's competing relatives bring her to a series of different lawyers for the purpose of revoking prior GDPOAs in favor of others and executing a new GDPOA in favor of the person accompanying the elder to the attorney's office).

2. The Trustee of a RLT can serve as the **gatekeeper** with respect to the elder's assets, restricting the access of those persons who would be tempted to engage in financial abuse or exploitation of the elder. Ideally, then, the elder should not serve as the sole initial Trustee of the RLT, lest a perpetrator gain inappropriate access to the assets of the RLT before her diminished capacity is suspected or verified.

a) If the RLT is essentially unfunded unless and until the elder's incapacity is verified, as described below, the prospect of Co-Trustees does not alarm most clients. However, even if the RLT is a fully-funded probate avoidance Will substitute, the **benefits of Co-Trustees** from inception are significant, including the following:

3. The Co-Trustee provides a "**second set of eyes**" to assist the elder in evaluating any financial proposals from third parties and making the necessary follow-up decisions while the elder is able and inclined to participate in these determinations. As the elder's inclination or capacity to be involved in such matters declines (whether because of age, infirmity, or general disinterest), **the Co-Trustee can gradually take more responsibility as the elder cedes it**. Many elders are unwilling to cede total responsibility for financial matters upon the initial funding of a RLT, but are willing to gradually relinquish daily involvement with RLT affairs on their own timetable, thus preserving their independence and self-determination for as long as possible.

a) The Co-Trustee who succeeds the elder upon a finding of incapacity is already knowledgeable about the elder's financial affairs and needs, thus **facilitating the transition** when the elder steps down as a Co-Trustee.

b) There is no need to re-title the elder's assets in the name of the remaining Co-Trustee as successor-in-interest when the elder steps down as Co-Trustee, avoiding the delay attendant to that often time-consuming process, again enhancing the seamless nature of the transition.

4. The provisions of a funded RLT that apply during the client's lifetime can be customized and detailed to **address the client's most significant personal concerns**, including that her assets be used to support her in her accustomed standard of living (and not a lesser standard envisioned by those who would inherit what is left upon the elder's demise).
- a) hire a professional **Geriatric Care Manager ("GCM")** to develop and implement a care plan that allows the elder to "age in place" at home with the necessary private in-home caregivers.
  - b) **hiring and monitoring of in-home caregivers**, including arranging for multiple background checks and reference follow-ups, and to provide relevant input to the Trustee on appropriate compensation for same.
  - c) Direct the Trustee to retain a **payroll service or agent** to assure proper tax withholding, procure appropriate workers compensation coverage, and address similar administrative issues for the elder's paid caregivers.
  - d) Instruct the Trustee on tangential considerations designed to **assure a quality of care** as close as possible to what the elder would experience if she lived with a loving and responsible adult child in the community.
  - e) Where the elder wishes to **age in place at her home** (which is typically held as an asset of the RLT), the Trustee could be directed to retain the services of a **management company** to handle both routine maintenance and emergency service calls, as well as domestic services such as housekeeping, landscaping, and weather-related seasonal services (e.g. snow removal), at the expense of the RLT.
  - f) If the elder is still responsible for caring for an **incapacitated adult child with special needs**, provisions for that child's care should also be included in the RLT. "Special Needs Trust" provisions embedded in the RLT are designed to maximize governmental funding sources while the RLT supplements those needs not fully provided for by such programs.
  - g) The RLT could also include provisions allowing the Trustee to make **gifts from the assets of the RLT** during the elder's life to continue her prior gifting program without jeopardizing the funding of her care for the balance of her lifetime.

- h) In order for the foregoing RLT provisions to be effectuated as the elder intends (*i.e.* full use of the elder's assets to fund a comfortable and fulfilling lifestyle), it is imperative that a line-up of **disinterested Trustees** be identified at the outset (*i.e.* persons who have no interest (as a remainder beneficiary of the RLT or otherwise) in the assets which remain in the RLT upon the elder's death). Human nature being what it is, even the best-intentioned remainder beneficiary or heir could be tempted to skim on distributions for the elder during her lifetime to help assure a larger benefit for himself upon the death of the elder.
- i) The RLT should provide for very specific events that will trigger the appointment of a successor trustee in the event of the **elder's incapacity**.
- j) The RLT could provide that **any court-appointed conservator** becomes vested with the **same power to alter, amend, or revoke** the RLT previously vested in the elder while competent, provided that any such alteration, amendment or revocation is for the *sole benefit* of the elder (and those dependent upon her for support, such as an adult child with special needs).

#### **9. Adoption of Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act**

The UAGPPJA has been enacted in a vast majority of states and the District of Columbia. Only the States of Florida, Kansas, Michigan, and Texas have not yet enacted the UAGPPJA in some form. See Appendix for a full list of the adopters and statutory citations. The UAGPPJA addresses three **primary jurisdictional difficulties** that arise in the context of multi-state or international guardianship and conservatorship cases or proceedings: (i) determining which state has jurisdiction to appoint a guardian or conservator, (ii) transferring an existing guardianship or conservatorship from one state or county to another, and (iii) recognizing and giving full faith and credit to a guardianship or conservatorship order from another state.

- a) The UAGPPJA could **reduce incidents of "granny snatching"** by eliminating an elder's mere physical presence as the determining factor for jurisdiction in a guardianship, conservatorship or protective proceedings matter. See § 201.
- b) The UAGPPJA enables a court to decline to exercise jurisdiction because of "**unjustifiable conduct**" (*e.g.* "granny snatching") and to penalize such conduct. See § 207.
- c) The UAGPPJA **facilitates the monitoring** of guardianships and conservatorships. Section 206 of the UAGPPJA requires a court to realistically assess "the court's ability to monitor the conduct of

the guardian or conservator” if jurisdiction were accepted and a guardian or conservator were appointed by that court.

- d) The UAGPPJA could **heighten awareness of elder abuse** in a state in which the elder was physically present for at least six consecutive months immediately preceding the filing of an action in another. See § 208.
- e) The UAGPPJA **facilitates cross-border communication** between and among courts, designed to reveal evidence of abusive conduct by interested parties (*e.g.* persons seeking to be appointed as a guardian or conservator for the elder). See § 104.
- f) The UAGPPJA **enhances information gathering and release** among courts making critical decisions in the context of a guardianship or conservatorship. Section 105 of the UAGPPJA authorizes appropriate investigations and the release of information gleaned by such investigators (*e.g.* criminal, financial, and medical).
- g) The UAGPPJA creates **expedited transfer procedures** designed to remove an elder from abusive situations. Section 301 of the UAGPPJA requires a court to consider whether “plans for the care and services” for the elder are “reasonable and sufficient,” and whether “adequate arrangements will be made for the management” of the elder’s property, in its determination to transfer a guardianship or conservatorship to another jurisdiction.
- h) The UAGPPJA establishes **multi-state registration procedures** that could aid in the detection and monitoring of abuse. Sections 401 and 402 of the UAGPPJA permit a guardian and conservator to register the court order appointing him in another state, allowing him to act on the elder’s behalf in that state. The person seeking to register the order must notify the court that appointed him, allowing the appointing court to inquire into the reason for the requested actions in the other state and the opportunity to share any concerns with the court in the other state.

April 2022 PIABA Mid-Year Meeting

Additional resources re: financial exploitation of seniors and other vulnerable persons

### **United States Department of Justice**

#### ***State Elder Abuse Statutes (Civil and Criminal)***

<https://www.justice.gov/elderjustice/elder-justice-statutes-0>

#### **Department of Justice's 2021 Elder Justice Report to Congress (October 18, 2021)**

[https://lnks.gd/l/eyJhbGciOiJIUzI1NiJ9.eyJidWxsZXRpbl9saW5rX2lkIjoxMDIsInVyaSI6ImJwMjppbGJjayIsImJ1bGxldGluX2lkIjoimjAyMTEwMTkuNDc1NjU4NTEiLCJ1cmwiOiJodHRwczovL3d3dy5qdXN0aWNlLmdvdi9maWxllzE0NDMwOTYvZG93bmxvYWQ\\_dXRtX21lZGl1bT1lbWFpbCZ1dG1fc291cmNIPWdvdmRlbGl2ZXJ5In0.lh8-exB6oTBI7Eo5LLjo\\_UHEBFnsLzwp3W3GxW9ba2Y/s/1440288711/br/114238556101-l](https://lnks.gd/l/eyJhbGciOiJIUzI1NiJ9.eyJidWxsZXRpbl9saW5rX2lkIjoxMDIsInVyaSI6ImJwMjppbGJjayIsImJ1bGxldGluX2lkIjoimjAyMTEwMTkuNDc1NjU4NTEiLCJ1cmwiOiJodHRwczovL3d3dy5qdXN0aWNlLmdvdi9maWxllzE0NDMwOTYvZG93bmxvYWQ_dXRtX21lZGl1bT1lbWFpbCZ1dG1fc291cmNIPWdvdmRlbGl2ZXJ5In0.lh8-exB6oTBI7Eo5LLjo_UHEBFnsLzwp3W3GxW9ba2Y/s/1440288711/br/114238556101-l)

#### **FBI's Internet Crime Complaint Center's 2020 Report**

<https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-the-internet-crime-complaint-center-2020-internet-crime-report-including-covid-19-scam-statistics>

### **SEC, FINRA, and NASAA Joint Materials**

#### ***Training for the Securities Industry: Addressing and Reporting Financial Exploitation of Senior and Vulnerable Adult Investors***

<https://www.finra.org/rules-guidance/key-topics/senior-investors/elder-abuse-prevention-training>

#### ***Trusted Contact Video and Fact Sheet***

<https://www.finra.org/investors/learn-to-invest/brokerage-accounts/establish-trusted-contact>

### **SEC Materials**

#### ***Digital Asset and "Crypto" Investment Scams – Investor Alert***

<https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/digital-asset>

#### ***Fraudsters Posing as Brokers or Investment Advisers – Investor Alert***

<https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/fraudsters>

### **FINRA Materials**

#### ***FINRA Senior Helpline***

<https://www.finra.org/investors/have-problem/helpline-seniors>

#### ***Testimony of Gerri Walsh, Senior Vice President of Investor Education and President of the FINRA Investor Education Foundation, Testimony Before the Senate Special Committee on Aging, January 13, 2022*** (includes numerous resource citations)

<https://www.finra.org/media-center/speeches-testimony/statement-committee-aging-011322>

***Compilation of FINRA Rules, Notices, Guidance, Etc. re: Senior Investors:***

<https://www.finra.org/rules-guidance/key-topics/senior-investors>

***5 Year FINRA Senior Helpline Anniversary Report***

<https://www.finra.org/rules-guidance/key-topics/senior-investors/protecting-senior-investors-2015-2020>

**Regulatory Notice 07-43** (Firm Obligations re: Senior Investors)

**Regulatory Notice 09-42** (FINRA Reminds Firms of Their Obligations with Variable Life Settlement Activities)

**Regulatory Notice 11-52** (FINRA Reminds Firms of Their Obligations Regarding the Supervision of Registered Persons Using Senior Designations)

**Regulatory Notice 16-12** (FINRA Provides Guidance on Firm Responsibilities for Sales of Pension Income Stream Products)

**Regulatory Notice 17-11** (SEC Approves Rules Relating to Financial Exploitation of Seniors)

**Regulatory Notice 19-27** (Retrospective Review: FINRA Requests Comment on Rules and Issues Relating to Senior Investors)

**Regulatory Notice 19-36** (FINRA Requests Comment on a Proposed Rule to Limit a Registered Person From Being Named a Customer's Beneficiary or Holding a Position of Trust for or on Behalf of a Customer)

**Regulatory Notice 20-34** (Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report)

**Regulatory Notice 20-38** (Rule to Limit a Registered Person From Being Named a Customer's Beneficiary or Holding a Position of Trust for or on Behalf of a Customer)

**Regulatory Notice 22-05** (Senior Investors; FINRA Adopts Amendments to FINRA Rule 2165)

**FINRA Rule 3241** (Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for or on Behalf of a Customer) – effective February 15, 2021

**FINRA Rule 2165** (Financial Exploitation of Specified Adults; Temporary Hold on Disbursements or Transactions) – eff. February 5, 2018; amended March 17, 2022

**FINRA Rule 4512** (Customer Account Information)

Supp. Material .06 Trusted Contact Person – eff. February 5, 2018; amended May 6 and 8, 2019

***FINRA Investor Education Foundation Resources on Aging and Financial Decision Making***

<https://www.finrafoundation.org/knowledge-we-gain-share/aging-and-financial-decision-making>

***Virtual Panel: Communication Between Adult Protective Services (APS) and Professional Reporters of Financial Exploitation***

<https://www.finra.org/events-training/virtual-conference-panels/communication-between-adult-protective-services-aps-and-professional>

**NASAA Materials**

***NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation***

***[serveourseniors.org]***

***2021-2022 Legislative Text and Commentary to the NASAA Model Act [nasaa.org]***

<https://www.nasaa.org/industry-resources/senior-issues/model-act-to-protect-vulnerable-adults-from-financial-exploitation/>

***NASAA Talks Podcast on Trusted Contacts [nasaa.org]***

<https://www.nasaa.org/newsroom/nasaa-talks-podcast/>

***NASAA 2021 Enforcement Report [nasaa.org]***

<https://www.nasaa.org/59063/nasaa-releases-annual-enforcement-report-7/?qoid=current-headlines>

***NASAA 2021 Examination Sweep Report [nasaa.org]***

<https://www.nasaa.org/58802/state-investment-adviser-examinations-sweeps-uncover-deficiencies-in-policies-to-protect-seniors-and-vulnerable-persons/?qoid=current-headlines>

***NASAA Guide For Developing Practices and Procedures for Protecting Senior Investors and Vulnerable Adults from Financial Exploitation***

<http://serveourseniors.org/wp-content/uploads/2016/09/NASAA-Guide-For-Developing-Practices-and-Procedures-For-Protecting-Senior-Investors-and-Vulnerable-Adults-From-Financial-Exploitation.pdf>

**NAPSA Materials**

***NAMRS - 2020 Adult Maltreatment Report (acl.gov) [namrs.acl.gov]***

<https://namrs.acl.gov/Learning-Resources/Adult-Maltreatment-Reports/2020-Adult-Maltreatment-Report.aspx>

***Financial Services | National Adult Protective Services Association (napsa-now.org) [napsa-now.org]***

<https://www.napsa-now.org/get-informed/what-is-financial-exploitation/financial-services/>

## 3241. Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer

### (a) Obligations of the Registered Person

(1) A registered person shall decline being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate upon learning of such status unless one of the following conditions is satisfied:

(A) The customer is a member of the registered person's immediate family; or

(B) Upon learning of such status, the registered person provides written notice describing the proposed status to the member with which the registered person is associated, in such form as specified by the member, and receives written approval from that member of such status prior to being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate. If the member disapproves the status or places conditions or limitations on it, the registered person shall not assume such status or shall comply with such conditions or limitations.

(2) A registered person shall decline being named as an executor or trustee or holding a power of attorney or similar position for or on behalf of a customer upon learning of such status unless one of the following conditions is satisfied:

(A) The customer is a member of the registered person's immediate family; or

(B) Upon learning of such status, the registered person provides written notice describing the position and the person's proposed role to the member with which the registered person is associated, in such form as specified by the member, and receives written approval from that member of such status prior to acting in such capacity or receiving any fees, assets or other benefit in relation to acting in such capacity; and

(i) The registered person does not derive financial gain from acting in such capacity other than from fees or other charges that are reasonable and customary for acting in such capacity; and

(ii) If the member disapproves the position or places conditions or limitations on it, the registered person shall not act in such capacity or shall comply with such conditions or limitations.

### (b) Obligations of a Member Receiving Notice

(1) Upon receipt of a written notice as described in Rule 3241(a), a member shall:

(A) Perform a reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity, including, but not limited to, an evaluation of whether it will interfere with or otherwise compromise the registered person's responsibilities to the customer; and

(B) Make a reasonable determination of whether to approve the registered person's assuming such status or acting in such capacity, to approve it subject to specific conditions or limitations, or to disapprove it.

(2) Upon completion of the member's assessment, a member shall advise the registered person in writing whether the member:

(A) Approves the person's assuming such status or acting in such capacity and imposes any conditions or limitations on the person's holding the position; or

(B) Disapproves the person's assuming such status or acting in such capacity.

(3) If the member imposes conditions or limitations on its approval of the person's assuming such status or acting in such capacity, the member shall reasonably supervise the registered person's compliance with such conditions or limitations.

(4) A member shall establish and maintain written procedures to comply with the requirements of paragraph (b) of this Rule.

### (c) Definition of Immediate Family

The term "immediate family" means parents, grandparents, mother-in-law or father-in-law, spouse or domestic partner, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, children, grandchildren, cousin, aunt or uncle, or niece or nephew, and any other

person who resides in the same household as the registered person and the registered person financially supports, directly or indirectly, to a material extent. The term includes step and adoptive relationships.

• • • **Supplementary Material:** -----

**.01 Customer.** For purposes of this Rule, a "customer" would include any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member.

**.02 Estate.** For purposes of this Rule, a customer's estate would include any cash and securities, real estate, insurance, trusts, annuities, business interests and other assets that the customer owns or has an interest in at the time of death.

**.03 Record Retention.** For purposes of paragraph (b) of this Rule, members shall preserve the written notice and approval for at least three years after the date that the beneficiary status or position of trust has terminated or the bequest received or for at least three years, whichever is earlier, after the registered person's association with the member has terminated.

**.04 Position Prior to Association With Member.** If a registered person was named as a beneficiary or to a position of trust prior to the registered person's association with the member, the registered person, within 30 calendar days of becoming so associated, shall provide notice to and receive approval from the member consistent with this Rule to maintain the beneficiary status or position of trust.

**.05 Pre-Existing Positions.** With respect to agreements to assume such status or act in such capacity that were entered into prior to the existence of a broker-customer relationship, such as where the customer was not a customer of the registered person at the time at which the registered person was named beneficiary or to a position of trust, these agreements raise similar conflict of interest concerns as agreements to assume such status or act in such capacity entered into subsequent to the existence of a broker-customer relationship. Therefore, the registered person must act consistent with paragraph (a) of this Rule for any existing beneficiary status or position of trust prior to the initiation of the broker-customer relationship. Moreover, upon receipt of notice of such a position, the member should evaluate the beneficiary status or position of trust consistent with paragraph (b) of this Rule.

**.06 Naming Other Persons.** A registered person instructing or asking a customer to name another person to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would present similar conflict of interest concerns as the registered person being so named. Accordingly, a registered person instructing or asking a customer to name another person, such as the registered person's spouse or child, to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would not be consistent with paragraph (a)(1) of the Rule.

Adopted by SR-FINRA-2020-020 eff. Feb. 15, 2021.

**Selected Notices:** [20-38](#).

## Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer

### FINRA Adopts Rule to Limit a Registered Person From Being Named a Customer's Beneficiary or Holding a Position of Trust for or on Behalf of a Customer

#### Summary

FINRA adopted a new rule to limit any associated person of a member firm who is registered with FINRA (each a "registered person") from being named a beneficiary, executor or trustee, or to have a power of attorney or similar position of trust for or on behalf of a customer.<sup>1</sup> New FINRA Rule 3241 (Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer) protects investors by requiring all member firms to affirmatively address registered persons being named beneficiaries or holding positions of trusts for customers. The rule requires the member firm with which the registered person is associated, upon receiving required written notice from the registered person, to review and approve or disapprove the registered person assuming such status or acting in such capacity. The rule does not apply where the customer is a member of the registered person's "immediate family."<sup>2</sup> Rule 3241 becomes effective February 15, 2021.

The rule text is available in Attachment A.

Questions regarding this *Notice* should be directed to:

- ▶ James S. Wrona, Vice President and Associate General Counsel, Office of General Counsel (OGC), at (202) 728-8270 or [Jim.Wrona@finra.org](mailto:Jim.Wrona@finra.org); or
- ▶ Jeanette Wingler, Associate General Counsel, OGC, at (202) 728-8013 or [Jeanette.Wingler@finra.org](mailto:Jeanette.Wingler@finra.org).

October 29, 2020

#### Notice Type

- ▶ Approval

#### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Registered Representatives
- ▶ Senior Management

#### Key Topics

- ▶ Beneficiaries
- ▶ Conflicts of Interest
- ▶ Customer Accounts
- ▶ Positions of Trust
- ▶ Senior and Vulnerable Adult Investors

#### Referenced Rules

- ▶ FINRA Rule 2010
- ▶ FINRA Rule 2150
- ▶ FINRA Rule 2165
- ▶ FINRA Rule 3110
- ▶ FINRA Rule 3240
- ▶ FINRA Rule 3241
- ▶ FINRA Rule 3270
- ▶ FINRA Rule 4530

## Background & Discussion

Investment professionals, including registered persons of member firms, face potential conflicts of interest when they are named a customer's beneficiary, executor or trustee, or hold a power of attorney or similar position for or on behalf of their customer. These conflicts of interest can take many forms and can include a registered person benefiting from the use of undue and inappropriate influence over important financial decisions to the detriment of a customer. Moreover, problematic arrangements may not become known to the member firm or customer's other beneficiaries or surviving family members for years. Senior investors who are isolated or suffering from cognitive decline are particularly vulnerable to harm.<sup>3</sup>

Many, but not all, member firms addressed these potential conflicts by prohibiting or imposing limitations on being named as a beneficiary or to a position of trust when there is not a familial relationship.<sup>4</sup> Nonetheless, FINRA observed situations where registered representatives tried to circumvent firm policies, such as resigning as a customer's registered representative, transferring the customer to another registered representative, or having the customer name the registered representative's spouse or child as the customer's beneficiary.<sup>5</sup>

Prior to the adoption of Rule 3241, FINRA took steps to address misconduct in this area, including:

- (1) identifying effective practices for member firms;<sup>6</sup>
- (2) setting as an examination priority member firms' supervision of accounts where a registered representative is named a beneficiary, executor or trustee, or holds a power of attorney or similar position for or on behalf of a customer who is not a family member;<sup>7</sup>
- (3) reviewing customer complaints received directly by FINRA and those reported by member firms pursuant to FINRA Rule 4530 (Reporting Requirements) or Form U4 (Uniform Application for Securities Industry Registration or Transfer);
- (4) reviewing regulatory filings made by firms on Form U5 (Uniform Termination Notice for Securities Industry Registration related to terminations for cause) disclosing related issues;
- (5) reviewing matters referred by an arbitrator to FINRA for disciplinary investigation; and
- (6) depending on the facts and circumstances of the conduct at issue, bringing actions for violations of FINRA rules, such as FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers' Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts), 3240 (Borrowing From or Lending to Customers) or 3270 (Outside Business Activities of Registered Persons).<sup>8</sup>

### New Rule 3241

To further address potential conflicts of interest that can result in registered persons exploiting or taking advantage of being named beneficiaries or holding positions of trust for personal monetary gain, FINRA has adopted new Rule 3241 to create a uniform, national standard to govern registered persons holding positions of trust.<sup>9</sup> This new national standard better protects investors and provides consistency across member firms' policies and procedures. Rule 3241 provides that a registered person must decline:

- (1) being named a beneficiary of a customer's estate<sup>10</sup> or receiving a bequest from a customer's estate upon learning of such status unless the registered person provides written notice upon learning of such status and receives written approval from the member firm prior to being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate; and
- (2) being named as an executor or trustee or holding a power of attorney or similar position for or on behalf of a customer<sup>11</sup> unless:
  - a. upon learning of such status, the registered person provides written notice and receives written approval from the member firm prior to acting in such capacity or receiving any fees, assets or other benefit in relation to acting in such capacity; and
  - b. the registered person does not derive financial gain from acting in such capacity other than from fees or other charges that are reasonable and customary for acting in such capacity.<sup>12</sup>

The rule does not apply where the customer is a member of the registered person's immediate family. The rule also does not affect the applicability of other rules (*e.g.*, FINRA Rule 2150 regarding improper use of customer securities or funds). FINRA will assess registered persons' and firms' conduct pursuant to Rule 3241 to determine the effectiveness of the rule in addressing potential conflicts of interest and evaluate whether additional rulemaking or other action is appropriate.

### Knowledge

A registered person being named as a beneficiary or to a position of trust without his or her knowledge would not violate the rule; however, the registered person must act consistent with the rule upon learning that he or she was named as a beneficiary or to a position of trust. The rule applies when the registered person learns of his or her status as a customer's beneficiary or a position of trust for or on behalf of a customer.

A registered person may decline being named as a beneficiary or to a position of trust and decline receipt of any assets or other benefit from the customer's estate so as not to violate the rule. For example, if a customer named her registered person as her beneficiary without the beneficiary's knowledge, the rule would not apply and the registered person would not

be in violation of the rule. However, when the registered person becomes aware of being so named (*e.g.*, when the registered person is notified that he or she is to receive a bequest from the customer's estate), the requirements of the rule would apply and the registered person must act consistent with the rule (*i.e.*, by declining the bequest unless he or she provides written notice to and receives written approval from the member firm).

### Firm Notice and Approval

To provide flexibility to member firms, the rule does not prescribe any specific form of written notice and instead permits a member firm to specify the required form of written notice for its registered persons.<sup>13</sup> Upon receipt of the written notice, the rule requires the member firm to:

- (1) perform a reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity, including, but not limited to, an evaluation of whether it will interfere with or otherwise compromise the registered person's responsibilities to the customer;<sup>14</sup> and
- (2) make a reasonable determination of whether to approve the registered person's assuming such status or acting in such capacity, to approve it subject to specific conditions or limitations, or to disapprove it.<sup>15</sup>

If the member firm imposes conditions or limitations on its approval, the member firm is required to reasonably supervise the registered person's compliance with the conditions or limitations.<sup>16</sup> Moreover, where a registered person is knowingly named a beneficiary, executor or trustee, or holds a power of attorney or a similar position for or on behalf of a customer account *at the member firm* with which the registered person is associated and the member firm has approved the registered person assuming such status or position, the member firm must supervise the account in accordance with FINRA Rule 3110 (Supervision), including the longstanding obligation to follow up on "red flags" indicating problematic activity. As to this latter point, with the notification and assessment of a registered person being named as a beneficiary or to a position of trust in relation to a customer account *at the member firm*, there is inherently more information from which red flags may surface. If a registered person is approved to hold (and receive compensation for) a position of trust for a customer *away from the member firm*, the requirements of both Rule 3241 and Rule 3270 regarding outside business activities would apply to the activities away from the firm.<sup>17</sup>

The rule requires a member firm to establish and maintain written procedures to comply with the rule's requirements.<sup>18</sup> The rule also requires member firms to preserve the written notice and approval for at least three years after the date that the beneficiary status or position of trust has terminated or the bequest received or for at least three years, whichever is earlier, after the registered person's association with the firm has terminated.<sup>19</sup>

### Reasonable Assessment and Determination

FINRA expects that a member firm's reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity would take into consideration several factors, such as:

- (1) any potential conflicts of interest in the registered person being named a beneficiary or holding the position of trust;
- (2) the length and type of relationship between the customer and registered person;
- (3) the customer's age;
- (4) the size of any bequest relative to the size of a customer's estate;
- (5) whether the registered representative has received other bequests or been named a beneficiary on other customer accounts;
- (6) whether, based on the facts and circumstances observed in the member's business relationship with the customer, the customer has a mental or physical impairment that renders the customer unable to protect his or her own interests;
- (7) any indicia of improper activity or conduct with respect to the customer or the customer's account (*e.g.*, excessive trading); and
- (8) any indicia of customer vulnerability or undue influence of the registered person over the customer.

This list is not intended to be an exhaustive list of factors that a member firm may consider as part of its assessment. Moreover, while a listed factor may not be applicable to a particular situation, the factors that a member firm considers should allow for a reasonable assessment of the associated risks so that the member firm can make a reasonable determination of whether to approve or disapprove the registered person assuming a status or acting in a capacity.

For example, a registered person's request to hold a position of trust for an elderly customer who had no relationship with the representative prior to the initiation of the broker-customer relationship is likely to present different risks than a registered person's request to hold a position of trust for a longstanding friend. FINRA does not expect a registered person's assertion that a customer has no viable alternative person to be named a beneficiary or to serve in a position of trust to be dispositive in the member firm's assessment.

The rule does not prohibit a registered person being named a beneficiary of or receiving a bequest from a customer's estate. However, given the potential conflicts of interest, under the rule a member firm would need to carefully assess a registered person's request to be named a beneficiary of or receive a bequest from a customer's estate, and reasonably determine that the registered person assuming such status does not present a risk of financial exploitation (*e.g.*, a registered person receiving a bequest from a customer who has been a godparent since childhood or a customer who has been a friend since childhood) that the rule is designed to address.

If possible, as part of the reasonable assessment of the risks, FINRA expects a member firm to discuss the potential beneficiary status or position of trust with the customer as part of its reasonable determination of whether to approve the registered person assuming the status or acting in the capacity.

### Scope of Rule

To address attempted circumvention of the restrictions (*e.g.*, by closing or transferring a customer's account), the rule defines "customer" to include any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member firm.<sup>20</sup> Member firms have flexibility to reasonably design their supervisory systems to achieve compliance with the rule (*e.g.*, by using training, certifications or other measures). In addition, as discussed below, the rule applies where a registered person associates with a new member firm even though the registered person had been named as a beneficiary or to a position of trust prior to joining the firm.<sup>21</sup>

A registered person who does not have customer accounts assigned to him or her is not subject to the rule. In addition, a registered person instructing or asking a customer to name another person to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate presents similar conflict of interest concerns as the registered person being so named. Accordingly, the rule does not allow a registered person to instruct or ask a customer to name another person, such as the registered person's spouse or child, to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate.<sup>22</sup>

### Beneficiary Status and Positions of Trust Prior to Association With Member Firm

As is true of many professions, registered persons occasionally move between member firms. If a registered person was named as a beneficiary or to a position of trust prior to the registered person's association with the member firm, the rule requires the registered person, within 30 calendar days of becoming so associated, to provide notice to and receive approval from the member consistent with the rule to maintain the beneficiary status or position of trust.<sup>23</sup>

**Pre-Existing Beneficiary Status and Positions of Trust**

Potential conflicts of interest also exist when the beneficiary status or position of trust was entered into prior to the existence of a broker-customer relationship, such as where the customer was not a customer of the registered person at the time at which the registered person was named beneficiary or to a position of trust. These situations also have the potential that investment and other financial decisions will benefit the registered person as the customer's beneficiary or holder of a position of trust rather than the customer. Therefore, the rule requires the registered person and member firm to act consistent with the rule for any existing beneficiary status or position of trust prior to the initiation of the broker-customer relationship.<sup>24</sup>

## Endnotes

1. See Securities Exchange Act Release No. 90116 (October 7, 2020), 85 FR 65095 (October 14, 2020) (Order Approving File No. SR-FINRA-2020-020).
2. The rule defines “immediate family” to mean parents, grandparents, mother-in-law or father-in-law, spouse or domestic partner, brother or sister, brother-in-law or sister-in-law, son-in law or daughter-in-law, children, grandchildren, cousin, aunt or uncle, or niece or nephew, and any other person who resides in the same household as the registered person and the registered person financially supports, directly or indirectly, to a material extent. The term includes step and adoptive relationships. See Rule 3241(c). FINRA interprets cousin in the “immediate family” definition to mean first cousins and not second or more distant cousins.
3. See, e.g., SEC Office of the Investor Advocate, Elder Financial Exploitation White Paper (June 2018) and International Organization of Securities Commissions (IOSCO) Senior Investor Vulnerability Final Report (March 2018) (noting that senior investors are more vulnerable to financial exploitation due to social isolation, cognitive decline and other factors).
4. See [Report on the FINRA Securities Helpline for Seniors](#) (December 2015) and [Report on FINRA Examination Findings](#) (December 2018) (both discussing member firm policies observed by FINRA staff).
5. *Id.*
6. *Id.*
7. See [FINRA 2018 Regulatory and Examination Priorities Letter](#) (January 2018), [FINRA 2019 Risk Monitoring and Examination Priorities Letter](#) (January 2019) and [FINRA Risk Monitoring and Examination Priorities Letter](#) (January 2020).
8. See, e.g., Robert Torcivia, Letter of Acceptance, Waiver and Consent, Case ID 2015044686701 (September 26, 2018) (finding, under the facts of the case, that the registered representative violated FINRA Rule 2010 in relation to accepting beneficiary designations and holding powers of attorney for senior customers and failing to inform the member firm of these positions).
9. A member firm may choose to go beyond the rule’s requirements, for example to: (1) require notification and approval when a registered person is named a beneficiary or named to a position of trust for immediate family members; or (2) further limit or prohibit registered persons from being named a customer’s beneficiary or to a position of trust for a customer.
10. For purposes of the rule, a customer’s estate includes any cash and securities, real estate, insurance, trusts, annuities, business interests and other assets that the customer owns or has an interest in at the time of death. See Supplementary Material .02 to Rule 3241. The scope is consistent with includable property in a decedent’s gross estate for federal tax purposes. See, e.g., [IRS FAQs on Estate Taxes](#).
11. A registered person may have a role or provide assistance where a member firm or affiliated entity offers a trust line of business. However, FINRA understands that a customer typically names the member firm or an affiliated entity—not a registered person—as trustee when the member firm or its affiliated entity offers a trust line of business. The rule does not apply where the customer names either the member firm or an affiliated entity as his or her trustee. However, the rule does apply where the customer names the individual registered person as his or her trustee. In addition, a dually-registered representative

- may hold a power of attorney for a customer's discretionary investment advisory account. This power of attorney is intended to allow the investment adviser representative to manage the investment advisory account. The rule is not intended to address or impact a dually-registered representative holding a power of attorney or other similar instrument in order to manage a customer's investment advisory account.
12. See Rule 3241(a). For example, receipt of a gift from a customer for acting as an executor or trustee, or holding a power of attorney or similar position for or on behalf of the customer is considered deriving financial gain from acting in such capacity.
  13. Because the rule requires each member firm to perform a reasonable assessment and make a determination of whether to approve or disapprove the status or arrangement, a member firm should obtain through the written notice or subsequent communications with the registered person or customer information sufficient upon which to perform the required assessment and make the related determination.
  14. In the event that the customer is deceased when the registered person becomes aware that he or she was named the customer's beneficiary, FINRA expects the member firm's reasonable assessment to include an evaluation of the registered person's relationship with the customer prior to the customer's death (*e.g.*, any red flags of improper conduct by the registered person).
  15. See Rule 3241(b).
  16. See Rule 3241(b)(3).
  17. There may be arrangements where a registered person holds a position of trust for a customer away from the firm but the requirements of Rule 3270 do not apply because the arrangement is not one of the listed positions in Rule 3270 (*i.e.*, an employee, independent contractor, sole proprietor, officer, director or partner of another person) or the registered person is not compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his member firm.
  18. See Rule 3241(b)(4).
  19. See Supplementary Material .03 to Rule 3241.
  20. See Supplementary Material .01 to Rule 3241. A securities account includes, for example, a brokerage account, mutual fund account or variable insurance product account. For purposes of the rule, therefore, a registered person who is listed as the broker of record on a customer's account application for an account held directly at a mutual fund or variable insurance product issuer would be subject to the rule's obligations (this is sometimes referred to as "check and application," "application way," or "direct application" business).
  21. See Supplementary Material .04 to Rule 3241.
  22. See Supplementary Material .06 to Rule 3241.
  23. See Supplementary Material .04 to Rule 3241. For example, a registered representative was named a trustee by a customer who is not an immediate family member in 2018 (*i.e.*, prior to the effective date of Rule 3241) consistent with Member Firm A's procedures. Notice to and approval by Member Firm A is not required for the registered representative to continue serving

as the customer's trustee after the rule becomes effective. However, if the registered representative left Member Firm A to become associated with Member Firm B after the rule became effective, Supplementary Material .04 applies and the registered representative would need to provide notice to and receive approval from Member Firm B in order to continue serving in the position.

24. See Supplementary Material .05 to Rule 3241.

The rule applies if the registered person is named a beneficiary or receives a bequest from a customer's estate after the effective date of the rule. For example, a registered representative was named a beneficiary of a customer who is not an immediate family member in 2018 (*i.e.*, prior to the effective date of Rule 3241), consistent with the firm's procedures, and the customer passes away after the rule became effective.

The registered representative is notified by the executor that he is to receive a bequest of \$5,000 from the customer's estate. Because the bequest would be received after the rule is effective, the registered representative would be required to provide written notice to the member firm and the member firm would be required to perform a reasonable assessment and determination of whether to approve or disapprove the registered representative receiving the bequest.

For the non-beneficiary positions, the rule applies to positions that the registered person was named to prior to the rule becoming effective only if the initiation of the broker-customer relationship was after the effective date of the rule.

## Attachment A

### New Rule Text

New language is underlined.

\* \* \* \* \*

### 3000. SUPERVISION AND RESPONSIBILITIES RELATING TO ASSOCIATED PERSONS

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### 3200. RESPONSIBILITIES RELATING TO ASSOCIATED PERSONS

\* \* \* \* \*

#### 3241. Registered Person Being Named a Customer's Beneficiary or Holding a Position of Trust for a Customer

##### (a) Obligations of the Registered Person

(1) A registered person shall decline being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate upon learning of such status unless one of the following conditions is satisfied:

(A) The customer is a member of the registered person's immediate family; or

(B) Upon learning of such status, the registered person provides written notice describing the proposed status to the member with which the registered person is associated, in such form as specified by the member, and receives written approval from that member of such status prior to being named a beneficiary of a customer's estate or receiving a bequest from a customer's estate. If the member disapproves the status or places conditions or limitations on it, the registered person shall not assume such status or shall comply with such conditions or limitations.

(2) A registered person shall decline being named as an executor or trustee or holding a power of attorney or similar position for or on behalf of a customer upon learning of such status unless one of the following conditions is satisfied:

(A) The customer is a member of the registered person's immediate family; or

(B) Upon learning of such status, the registered person provides written notice describing the position and the person's proposed role to the member with which the registered person is associated, in such form as specified by the member, and receives written approval from that member of such status prior to acting in such capacity or receiving any fees, assets or other benefit in relation to acting in such capacity; and

(i) The registered person does not derive financial gain from acting in such capacity other than from fees or other charges that are reasonable and customary for acting in such capacity; and

(ii) If the member disapproves the position or places conditions or limitations on it, the registered person shall not act in such capacity or shall comply with such conditions or limitations.

**(b) Obligations of a Member Receiving Notice**

(1) Upon receipt of a written notice as described in Rule 3241(a), a member shall:

(A) Perform a reasonable assessment of the risks created by the registered person's assuming such status or acting in such capacity, including, but not limited to, an evaluation of whether it will interfere with or otherwise compromise the registered person's responsibilities to the customer; and

(B) Make a reasonable determination of whether to approve the registered person's assuming such status or acting in such capacity, to approve it subject to specific conditions or limitations, or to disapprove it.

(2) Upon completion of the member's assessment, a member shall advise the registered person in writing whether the member:

(A) Approves the person's assuming such status or acting in such capacity and imposes any conditions or limitations on the person's holding the position; or

(B) Disapproves the person's assuming such status or acting in such capacity.

(3) If the member imposes conditions or limitations on its approval of the person's assuming such status or acting in such capacity, the member shall reasonably supervise the registered person's compliance with such conditions or limitations.

(4) A member shall establish and maintain written procedures to comply with the requirements of paragraph (b) of this Rule.

**(c) Definition of Immediate Family**

The term “immediate family” means parents, grandparents, mother-in-law or father-in-law, spouse or domestic partner, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, children, grandchildren, cousin, aunt or uncle, or niece or nephew, and any other person who resides in the same household as the registered person and the registered person financially supports, directly or indirectly, to a material extent. The term includes step and adoptive relationships.

**• • • Supplementary Material: -----**

**.01 Customer.** For purposes of this Rule, a “customer” would include any customer that has, or in the previous six months had, a securities account assigned to the registered person at any member.

**.02 Estate.** For purposes of this Rule, a customer’s estate would include any cash and securities, real estate, insurance, trusts, annuities, business interests and other assets that the customer owns or has an interest in at the time of death.

**.03 Record Retention.** For purposes of paragraph (b) of this Rule, members shall preserve the written notice and approval for at least three years after the date that the beneficiary status or position of trust has terminated or the bequest received or for at least three years, whichever is earlier, after the registered person’s association with the member has terminated.

**.04 Position Prior to Association With Member.** If a registered person was named as a beneficiary or to a position of trust prior to the registered person’s association with the member, the registered person, within 30 calendar days of becoming so associated, shall provide notice to and receive approval from the member consistent with this Rule to maintain the beneficiary status or position of trust.

**.05 Pre-Existing Positions.** With respect to agreements to assume such status or act in such capacity that were entered into prior to the existence of a broker-customer relationship, such as where the customer was not a customer of the registered person at the time at which the registered person was named beneficiary or to a position of trust, these agreements raise similar conflict of interest concerns as agreements to assume such status or act in such capacity entered into subsequent to the existence of a broker-customer relationship. Therefore, the registered person must act consistent with paragraph (a) of this Rule for any existing beneficiary status or position of trust prior to the

initiation of the broker-customer relationship. Moreover, upon receipt of notice of such a position, the member should evaluate the beneficiary status or position of trust consistent with paragraph (b) of this Rule.

**.06 Naming Other Persons.** A registered person instructing or asking a customer to name another person to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would present similar conflict of interest concerns as the registered person being so named. Accordingly, a registered person instructing or asking a customer to name another person, such as the registered person's spouse or child, to be a beneficiary of the customer's estate or to receive a bequest from the customer's estate would not be consistent with paragraph (a)(1) of the Rule.

\* \* \* \* \*

## 2165. Financial Exploitation of Specified Adults

[The Rule](#)[Notices](#)

### (a) Definitions

(1) For purposes of this Rule, the term “Specified Adult” shall mean: (A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

(2) For purposes of this Rule, the term “Account” shall mean any account of a member for which a Specified Adult has the authority to transact business.

(3) For purposes of this Rule, the term “Trusted Contact Person” shall mean the person who may be contacted about the Specified Adult's Account in accordance with Rule 4512.

(4) For purposes of this Rule, the term “financial exploitation” means:

(A) the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult's funds or securities; or

(B) any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a Specified Adult, to:

(i) obtain control, through deception, intimidation or undue influence, over the Specified Adult's money, assets or property; or

(ii) convert the Specified Adult's money, assets or property.

### (b) Temporary Hold on Disbursements or Transactions

(1) A member may place a temporary hold on a disbursement of funds or securities from the Account of a Specified Adult or a transaction in securities in the Account of a Specified Adult if:

(A) The member reasonably believes that financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted; and

(B) The member, not later than two business days after the date that the member first placed the temporary hold on the disbursement of funds or securities or the transaction in securities, provides notification orally or in writing, which may be electronic, of the temporary hold and the reason for the temporary hold to:

(i) all parties authorized to transact business on the Account, unless a party is unavailable or the member reasonably believes that the party has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(ii) the Trusted Contact Person(s), unless the Trusted Contact Person is unavailable or the member reasonably believes that the Trusted Contact Person(s) has engaged, is engaged, or will engage in the financial exploitation of the Specified Adult; and

(C) The member immediately initiates an internal review of the facts and circumstances that caused the member to reasonably believe that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted.

(2) The temporary hold authorized by this Rule will expire not later than 15 business days after the date that the member first placed the temporary hold on the disbursement of funds or securities or the transaction in securities, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, or extended pursuant to paragraph (b)(3) of this Rule.

(3) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the member's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted, the temporary hold authorized by this Rule may be extended by the member for no longer than 10 business days following the date authorized by paragraph (b)(2) of this Rule, unless otherwise terminated or extended by a state regulator or agency of

competent jurisdiction or a court of competent jurisdiction, or extended pursuant to paragraph (b)(4) of this Rule.

(4) Provided that the member's internal review of the facts and circumstances under paragraph (b)(1)(C) of this Rule supports the member's reasonable belief that the financial exploitation of the Specified Adult has occurred, is occurring, has been attempted, or will be attempted and the member has reported or provided notification of the member's reasonable belief to a state regulator or agency of competent jurisdiction or a court of competent jurisdiction, the temporary hold authorized by this Rule may be extended by the member for no longer than 30 business days following the date authorized by paragraph (b)(3) of this Rule, unless otherwise terminated or extended by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.

### (c) Supervision

(1) In addition to the general supervisory and recordkeeping requirements of Rules 3110, 3120, 3130, 3150, and Rule 4510 Series, a member relying on this Rule shall establish and maintain written supervisory procedures reasonably designed to achieve compliance with this Rule, including, but not limited to, procedures related to the identification, escalation and reporting of matters related to the financial exploitation of Specified Adults.

(2) A member's written supervisory procedures also shall identify the title of each person authorized to place, terminate or extend a temporary hold on behalf of the member pursuant to this Rule. Any such person shall be an associated person of the member who serves in a supervisory, compliance or legal capacity for the member.

### (d) Record Retention

Members shall retain records related to compliance with this Rule, which shall be readily available to FINRA, upon request. The retained records shall include records of: (1) request(s) for disbursement or transaction that may constitute financial exploitation of a Specified Adult and the resulting temporary hold; (2) the finding of a reasonable belief that financial exploitation has occurred, is occurring, has been attempted, or will be attempted underlying the decision to place a temporary hold on a disbursement or transaction; (3) the name and title of the associated person that authorized the temporary hold on a disbursement or transaction; (4) notification(s) to the relevant parties pursuant to paragraph (b)(1)(B) of this Rule; (5) the internal review of the facts and circumstances pursuant to paragraph (b)(1)(C) of this Rule; and (6) the reason and support for any extension of a temporary hold, including information regarding any communications with or by a state regulator or agency of competent jurisdiction or a court of competent jurisdiction.

### ••• Supplementary Material: -----

**.01 Applicability of Rule.** This Rule provides members and their associated persons with a safe harbor from FINRA Rules 2010, 2150 and 11870 when members exercise discretion in placing temporary holds on disbursements of funds or securities from the Accounts of Specified Adults or transactions in securities in the Accounts of Specified Adults consistent with the requirements of this Rule. This Rule does not require members to place temporary holds on disbursements of funds or securities from the Accounts of Specified Adults or transactions in securities in the Accounts of Specified Adults.

**.02 Training.** A member relying on this Rule must develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of this Rule.

**.03 Reasonable Belief of Mental or Physical Impairment.** A member's reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member's business relationship with the natural person.

Amended by SR-FINRA-2021-016 eff. March 17, 2022.

Adopted by SR-FINRA-2016-039 eff. Feb. 5, 2018.

**Selected Notice:** [17-11](#), [22-05](#).

### VERSIONS

Mar 17, 2022 onwards

## Senior Investors

### FINRA Adopts Amendments to FINRA Rule 2165

Effective Date: March 17, 2022

#### Summary

FINRA has adopted amendments to Rule 2165 (Financial Exploitation of Specified Adults) to permit member firms to: (1) place a hold on a securities transaction (in addition to the already-permitted hold on a disbursement of funds or securities) where there is a reasonable belief of financial exploitation; and (2) extend a temporary hold on a disbursement or transaction for an additional 30 business days, beyond the current maximum of 25 business days (for a total of 55 business days), if the member firm has reported the matter to a state regulator or agency, or a court of competent jurisdiction. The amendments to Rule 2165 become effective March 17, 2022.

The rule text is available in [Attachment A](#).

Questions regarding this *Notice* should be directed to:

- ▶ James S. Wrona, Vice President and Associate General Counsel, Office of General Counsel (OGC), at (202) 728-8270; or
- ▶ Jeanette Wingler, Associate General Counsel, OGC, at (202) 728-8013.

#### Background and Discussion

##### Rule 2165

Rule 2165 is the first uniform national standard for placing temporary holds to address suspected financial exploitation.<sup>1</sup> Rule 2165 permits a member firm to place a temporary hold on a disbursement of funds or securities from the account of a “specified adult”<sup>2</sup> customer when the firm reasonably believes that financial exploitation of that adult has occurred, is occurring, has been attempted or will be attempted. The amendments to Rule 2165 permit member firms to place temporary holds on securities transactions as well.<sup>3</sup>

Rule 2165 provides member firms and their associated persons with a safe harbor from FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade), 2150 (Improper Use of Customers’ Securities or Funds; Prohibition Against Guarantees and Sharing in Accounts)

February 15, 2022

#### Notice Type

- ▶ Approval

#### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Registered Representatives
- ▶ Senior Management

#### Key Topics

- ▶ Customer Accounts
- ▶ Financial Exploitation
- ▶ Senior Investors
- ▶ Temporary Holds

#### Referenced Rules & Notices

- ▶ FINRA Rule 2010
- ▶ FINRA Rule 2150
- ▶ FINRA Rule 2165
- ▶ FINRA Rule 11870
- ▶ Regulatory Notice 20-34

and 11870 (Customer Account Transfer Contracts) when member firms exercise discretion in placing temporary holds consistent with the requirements of Rule 2165. FINRA encourages member firms to take advantage of the Rule 2165 safe harbor where there is a reasonable belief of customer financial exploitation.

Since Rule 2165 became effective in 2018, temporary holds have provided member firms a way to quickly respond to suspicions of financial exploitation before potentially ruinous losses occur for the customer. FINRA's report for the five-year anniversary of the FINRA Securities Helpline for Seniors® highlights several matters that illustrate the positive impact of placing temporary holds on disbursements to address financial exploitation.<sup>4</sup> For example, the matters include temporary holds placed by member firms to prevent senior investors from losing:

- ▶ \$200,000 (representing approximately two-thirds of the investor's account) related to a Central Intelligence Agency lawsuit scam;
- ▶ \$10,000 in a lottery scam;
- ▶ \$60,000 in a romance scam; and
- ▶ \$50,000 to financial exploitation by a brother-in-law.

### Rule Safeguards

Rule 2165 also includes important safeguards that apply equally to holds on disbursements and transactions that are designed to ensure that there is not a misapplication of the rule, including the requirements that:

- ▶ a member firm must have a reasonable belief that financial exploitation of a specified adult has occurred, is occurring, has been attempted, or will be attempted;
- ▶ a member firm provide notification of the hold and the reason for the hold to all parties authorized to transact business on the account (including the customer) and the customer's trusted contact person no later than two business days after the date that the member firm first placed the hold;<sup>5</sup>
- ▶ a member firm that places a hold pursuant to the rule immediately initiate an internal review of the facts and circumstances that caused the member to reasonably believe that the financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted;<sup>6</sup>
- ▶ in addition to the general supervisory and recordkeeping requirements of FINRA rules, a member firm relying on Rule 2165 establish and maintain written supervisory procedures reasonably designed to achieve compliance with the specific requirements of the rule, including, but not limited to, procedures related to the identification, escalation and reporting of matters related to the financial exploitation of specified adults;<sup>7</sup>

- ▶ any request for a hold be escalated to a supervisor, compliance department or legal department rather than allowing an associated person handling an account to independently place a hold;<sup>8</sup>
- ▶ a member firm relying on the rule develop and document training policies or programs reasonably designed to ensure that associated persons comply with the requirements of the rule;<sup>9</sup> and
- ▶ a member firm relying on the rule retain records related to compliance with the rule, which shall be readily available to FINRA, upon request.<sup>10</sup>

### Retrospective Review

In August 2019, FINRA launched a retrospective review to assess the effectiveness and efficiency of its rules and administrative processes that help protect senior investors from financial exploitation. The review indicated that FINRA's steps to protect seniors have provided helpful and effective tools in the fight against financial exploitation, but it also suggested some additional tools, guidance and rule changes. In October 2020, FINRA published [Regulatory Notice 20-34](#): (1) summarizing the retrospective rule review process, including the predominant themes that emerged from retrospective review comment feedback; (2) seeking comment on proposed amendments to Rule 2165 to further address suspected financial exploitation of senior investors and other specified adults; and (3) providing guidance to aid member firms and senior investors and other specified adults.

### Amendments to Rule 2165

#### Transactions in Securities

While placing a hold pursuant to Rule 2165 stops funds or securities from leaving a customer's account, prior to the amendments, the rule did not apply to transactions in securities.<sup>11</sup> Commenters to [Regulatory Notice 20-34](#) supported extending Rule 2165 to permit a member firm to place a temporary hold on a transaction in securities when the firm has a reasonable belief that the customer is being financially exploited. Even if a temporary hold is placed on a disbursement out of the customer's account, these commenters noted that executing a related transaction may result in significant financial consequences for the customer (*e.g.*, adverse tax consequences, surrender charges, the inability to regain access to a sold investment that has been closed to new investors or trading by a perpetrator in inappropriate high risk or illiquid securities).

While some state laws permit placing holds on transactions,<sup>12</sup> FINRA amended Rule 2165 to create the first uniform national standard for placing holds on securities transactions related to suspected financial exploitation. Under the safe harbor approach, a member firm is permitted, but not required, to place a temporary hold on a transaction when there is a reasonable belief that the customer is being financially exploited.<sup>13</sup>

### Hold Period

FINRA recognizes that placing or extending a temporary hold is a serious step for a member and the affected customer. Prior to the amendments, Rule 2165 allowed a member firm to place a temporary hold on a specified adult customer's account for up to 25 business days if the criteria in the rule are satisfied. More specifically, the temporary hold authorized by Rule 2165 would expire not later than 15 business days after the date that the member first placed the temporary hold, unless otherwise terminated or extended by a state regulator or agency or a court of competent jurisdiction (state authority).<sup>14</sup> In addition, provided that the member firm's internal review of the facts and circumstances supports its reasonable belief that the financial exploitation of the specified adult has occurred, is occurring, has been attempted or will be attempted, the rule permits the member to extend the temporary hold for an additional 10 business days, unless otherwise terminated or extended by a state authority.<sup>15</sup>

Commenters to *Regulatory Notice 20-34* generally indicated that the period originally provided in Rule 2165 may not be sufficient when a matter is under consideration by a state authority. These commenters supported extending the current 25-business day hold period to provide member firms with a longer period to resolve matters.<sup>16</sup> The costs of financial exploitation can be devastating to customers, particularly older customers who rely on their savings and investments to pay their living expenses and who may not have the ability to offset a significant loss over time. Furthermore, the rule's safeguards are designed to ensure that there is not a misapplication of the rule.

To provide member firms with additional time to resolve matters and for state authorities to conduct thorough investigations, FINRA amended Rule 2165 to permit extending a temporary hold on a disbursement of funds or securities or a transaction in securities for an additional 30 business days if the member firm has reported the matter to a state authority.<sup>17</sup> As a result, member firms would be able to maintain a disbursement or transaction hold up to a maximum of 55 business days where the rule's criteria are satisfied (including the external reporting to a state authority), unless otherwise terminated or extended by a state authority.

In addition, Rule 2165(d) requires members to retain records related to compliance with the rule, which shall be readily available to FINRA, upon request. To evidence compliance with Rule 2165 in placing or extending a temporary hold, a member firm is required to retain records of the reason and support for any extension of a temporary hold, including information regarding any communications with or by a state authority.<sup>18</sup>

## Endnotes

1. See Securities Exchange Act Release No. 79964 (Feb. 3, 2017), 82 FR 10059 (Feb. 9, 2017) (Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval of File No. SR-FINRA-2016-039).
2. The definition of “specified adult” in Rule 2165 covers those investors who are particularly susceptible to financial exploitation. A “specified adult” is (A) a natural person age 65 and older or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests. See Rule 2165(a)(1). Supplementary Material .03 to Rule 2165 provides that a member firm’s reasonable belief that a natural person age 18 and older has a mental or physical impairment that renders the individual unable to protect his or her own interests may be based on the facts and circumstances observed in the member firm’s business relationship with the person.
3. See Securities Exchange Act Release No. 94061 (Jan. 25, 2022), 87 FR 4974 (Jan. 31, 2022) (Notice of Order Approving a Proposed Rule Change to Amend Rule 2165 (Financial Exploitation of Specified Adults)).
4. See [Protecting Senior Investors 2015–2020: An Update on the FINRA Securities Helpline for Seniors, Other FINRA Initiatives and Member Firm Practices \(Apr. 2020\) \(Senior Helpline Anniversary Report\)](#).
5. See Rule 2165(b)(1)(B). A trusted contact does not have authority to transact business in an account by virtue of being designated as a trusted contact. For a discussion of the role of a trusted contact, see, e.g., [Establishing a Trusted Contact](#).
6. See Rule 2165(b)(1)(C).
7. See Rule 2165(c)(1).
8. See Rule 2165(c)(2).
9. See Supplementary Material .02 to Rule 2165.
10. See Rule 2165(d).
11. For example, prior to the amendments, Rule 2165 did not apply to a customer’s order to sell his shares of a stock. However, if a customer requested that the proceeds of a sale of shares of a stock be disbursed out of his account at the member firm, then the rule could apply to the disbursement of the proceeds where the customer is a “specified adult” and there is reasonable belief of financial exploitation.
12. Currently 22 states (with over half of the U.S. population) have enacted laws permitting investment advisers and broker-dealers to place temporary holds on disbursements and transactions. As of February 2022, the following states permit holds on disbursement and transactions: Arkansas, Arizona, California, Florida, Hawaii, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia, Washington and West Virginia.
13. Regarding whether the best execution obligation applies to a member firm’s decision to place a temporary hold on a securities transaction where there is a reasonable belief of customer financial exploitation, “[b]roker-dealers are reminded that nothing under the federal securities laws or FINRA rules obligates them to accept an order where they believe that the associated compliance or legal risks are unacceptable.” See [SEC Staff Bulletin: Risks Associated with Omnibus Accounts Transacting in Low-Priced Securities](#) (Nov. 12, 2020).



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14. See Rule 2165(b)(2). Rule 2165 allows a member firm to extend a temporary hold upon a state authority's request to do so. The state authority would not have to issue a formal order. However, the member firm would need to maintain a record of the state authority's request.
15. See Rule 2165(b)(3).
16. For example, according to a comment letter submitted by National Adult Protective Services Association (NAPSA), representing adult protective services programs that play a critical role in investigating suspicions of financial exploitation, the average duration of an investigation for matters reported to the federal National Adult Maltreatment Reporting System is 52.6 days.
17. The 30-business day hold period in Rule 2165(b)(4) is in addition to the 15-business day hold in Rule 2165(b)(2) and the 10-business day hold in Rule 2165(b)(3). Rule 2165 permits maintaining a hold or extending the hold only if the member firm's internal review of the facts and circumstances supports the firm's reasonable belief that financial exploitation of the specified adult has occurred, is occurring, has been attempted, or will be attempted.
18. See Rule 2165(d)(6).

# States Adopting NASAA'S Model Act to Protect Vulnerable Adults from Financial Exploitation (Mandatory and Permissive Conduct by Financial Advisors)

Darlene Pasieczny <sup>1</sup>

## Introduction

It's not hard to imagine the scenarios: A financial advisor gets an unexpected call from an elderly long-time client asking for an unusual withdrawal or transfer from a brokerage account. A family member comes to the advisor's office with a power of attorney document and two-sentence doctor's note that the client has cognitive issues and instructs the advisor to initiate withdrawals or transfers. Something just doesn't feel right.... the request doesn't fit into the client's established financial plan, the explanation doesn't quite make sense, or something about the conversation makes the advisor concerned about the client's well-being.

Financial advisors are in a unique position to recognize potential financial elder abuse. The advisor's gut feeling regarding a suspicious request could be a critical first line of defense in preventing irreparable harm. Once money or securities are withdrawn or transferred out of an account, it can be extremely expensive and time consuming to recover from the wrongdoer through civil litigation or law enforcement. It may be impossible to collect from a wrongdoer who has already spent the funds or transferred assets to an overseas account. Loss of retirement savings is an immediate threat to the health, safety, and financial independence of our elderly clients, friends, and family members.

Financial advisors are generally not mandatory reporters of suspected financial abuse under state statutes creating civil private rights of action. A complex framework of state and federal laws and regulations, aimed at protecting the privacy of financial information and an individual's control over their own assets, creates a tricky situation for professionals trying to stay in compliance, but worried about potential exploitation of their client.

Recently enacted state statutes, and new rules implemented by the Financial Industry Regulatory Authority ("FINRA"), now empower financial professionals to take critical actions, including short temporary holds on suspicious *disbursement* requests and allowing time for investigation, without costly court orders. New state laws also enhance the state's ability to get involved, by *requiring* certain financial professionals to report suspected financial exploitation to designated agencies.

Where did these changes come from? Many states have some form of civil private right of action and compensatory recovery for financial exploitation of vulnerable individuals, as well as criminal law prohibitions of the same. But those laws focus on after-the-fact claims. Recognizing the increasing problem of financial exploitation of investors over the age of 65, and potential prevention by financial advisors, the North American Securities Administrators Association

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<sup>1</sup> Darlene Pasieczny is a fiduciary and securities litigation attorney at Samuels Yoelin Kantor LLP in Portland, Oregon. Darlene represents clients in trust and estate disputes, elder financial abuse claims, securities litigation, and investor claims in FINRA arbitration. Darlene serves on PIABA's Board of Directors, however, statements and opinions expressed herein reflect the views of the contributor, and do not necessarily reflect those of the Public Investors Arbitration Bar Association (PIABA). Special thank you to Colleen Muñoz, SYK law clerk and law student at Lewis & Clark Law School, for her valuable research assistance. Portions of this article were originally published in the Oregon State Bar's Elder Law Newsletter, vol. 22, no.1, Jan. 2019.

(“NASAA”)<sup>2</sup> formed its Committee on Senior Issues and Diminished Capacity in 2014. In September 2015, NASAA released its draft Model Act to Protect Vulnerable Adults from Financial Exploitation (“Model Act”). Correspondingly, FINRA proposed similar changes to its SRO rules in Regulatory Notice 15-37, issued in October 2015.<sup>3</sup>

This article supplements a prior PIABA Bar Journal survey of state civil causes of action for financial exploitation,<sup>4</sup> and provides a survey of the twenty-two states<sup>5</sup> that have enacted *preventative* statutes or regulations based on the Model Act. It also reviews corresponding FINRA Rules 2165 and 4512, adopted in conjunction with the promulgation of the Model Act, and considers potential ramifications to financial advisors who fail to comply with the new laws.

### **Financial exploitation of elders is a recognized national problem**

The National Adult Protective Services Association reports that 90% of financial abusers are family members or trusted others and abuse is vastly underreported – only an estimated one out of 44 cases.<sup>6</sup> A 2010 survey conducted for the Investor Protection Trust estimated that one in every five Americans over the age of 65 has been a victim of financial fraud.<sup>7</sup> Common forms of financial abuse by family members include misuse of a power of attorney or joint bank account, and threats to abandon the vulnerable person.

Elder investors, and their retirement accounts, are a particular target for bad actors. In its 2018 Enforcement Report, NASAA identified sales of unregistered securities as the prominent scheme targeting elder investors.<sup>8</sup> The most often reported of these were promissory notes, real estate investment programs, affinity fraud (sales scams targeting a particular community or group), and Regulation D offerings (private placements exempt from SEC registration, certain disclosure and reporting requirements). Common Regulation D offerings are hedge funds, LP interests or LLC interests. Especially during a low interest rate market, professional fraudsters may target elder investors to withdraw their well-managed funds with the promise of higher returns in such “alternative” investments, that might actually be inappropriately risky, illiquid, or an outright scam.

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<sup>2</sup> NASAA’s members consist of the securities administrators of the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada and Mexico. See NASAA, <http://www.nasaa.org>.

<sup>3</sup> For the full text of Regulatory Notice 15-37 and access to public comment letters responding to the same, see FINRA, <http://www.finra.org/industry/notices/15-37>.

<sup>4</sup> See Jeff Aidikoff and Ashley Rivkin, *States with a Civil Right of Action for Financial Elder Abuse and Exploitation*, 24 PIABA B.J. 29(2017).

<sup>5</sup> For updates on states enacting legislation or regulations based on NASAA’s Model Act see, *NASAA Model Act to Protect Vulnerable Adults From Financial Exploitation Update Center*, SERVEOURSENIORS.ORG, <http://serveourseniors.org/about/policy-makers/nasaa-model-act/update/>.

<sup>6</sup> *Elder Financial Exploitation*, NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION, <http://www.napsa-now.org/policy-advocacy/exploitation/>.

<sup>7</sup> The 2010 Elder Investment Fraud and Financial Exploitation report available at INVESTOR PROTECTION TRUST, [http://investorprotection.org/downloads/EIFFE\\_Survey\\_Report.pdf](http://investorprotection.org/downloads/EIFFE_Survey_Report.pdf).

<sup>8</sup> 2018 NASAA Enforcement Report available at NASAA, <http://www.nasaa.org/46133/nasaa-releases-annual-enforcement-report-4/>.

## Mechanics of the Model Act

The key components of the Model Act are to (1) make financial advisors mandatory reporters of suspected financial exploitation of eligible adults to their designated state agency; (2) permit financial advisors to temporarily delay disbursements requests where there is a suspicion of potential abuse; (3) provide financial advisors certain safe harbor immunities from administrative or civil liability when reporting / delaying disbursements in good faith; and (4) require record keeping and state access to records relating to suspected or attempted financial abuse. Some states adopting the Model Act changed the mandatory reporting to state agencies into permissive conduct, or vice-versa, and some dropped the express record keeping requirement from inclusion in the statutory scheme. FINRA's rule changes mirror the permissive delay of disbursements authorized by the Model Act, but do not have a corresponding mandatory reporting requirement.

Of particular note: the mandatory reporting and permissive conduct authorized by the Model Act apply more broadly to FINRA-registered brokers, brokerage firms, SEC-registered investment advisory firms and registered investment advisors, as *well* as to any "person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser."

The key definitions of the Model Act cross reference state statutory definitions, and include:<sup>9</sup>

**"Eligible adult"** means a person age 65 or older<sup>10</sup>, or a person subject to [insert state Adult Protective Services statute]

**"Financial exploitation"** means:

(a) the wrongful or unauthorized taking, withholding, appropriation, or use of money, assets or property of an eligible adult; or

(b) any act or omission taken by a person, including through the use of a power of attorney, guardianship, or conservatorship of an eligible adult, to:

i. Obtain control, through deception, intimidation or undue influence, over the eligible adult's money, assets or property to deprive the eligible adult of the ownership, use, benefit or possession of his or her money, assets or property; or

ii. Convert money, assets or property of the eligible adult to deprive such eligible adult of the ownership, use, benefit or possession of his or her money, assets or property

**"Qualified Individual"** means any agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser

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<sup>9</sup> States adopting the Model Act have clarified definitions, and mirrored existing definitions in respective state civil causes of action. See generally *NASAA Model Act to Protect Vulnerable Adults From Financial Exploitation Update Center*, SERVEOURSENIORS.ORG, <http://serveourseniors.org/about/policy-makers/nasaa-model-act/update/>.

<sup>10</sup> For the states adopting the Model Act, this age tends to be 65, but some states vary, for example 60 years of age (Alaska, Louisiana, Montana, and Virginia), 62 years of age (Delaware), and 70 years of age (Colorado). See *id.* Simply being the threshold age, regardless of physical or mental health, qualifies the person as an "eligible" adult and thus triggers mandatory / permissive conduct. See following chart of the states.

FINRA Rule 2165 (effective February 5, 2018), applicable to FINRA-registered member firms (e.g. broker-dealers) and associated persons (e.g. brokers) provides corresponding definitions:

**“Specified Adult”** means: (A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.

**“Financial exploitation”** means:

(a) the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult's funds or securities; or

(b) any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a Specified Adult, to:

(i) obtain control, through deception, intimidation or undue influence, over the Specified Adult's money, assets or property; or

(ii) convert the Specified Adult's money, assets or property.

#### *A. Mandatory Reporting and Permissive Disclosure*

**Mandatory.** Section 3 of the Model Act requires “qualified individuals” to “promptly” notify state Adult Protective Services and the commissioner of securities (e.g. the state securities regulator), if the qualified individual “reasonable believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted.”

**Permissive.** Under the same triggering standard of “reasonable believes. . .”, Section 5 of the Model Act permits a qualified individual to also notify any third party previously designated by the eligible adult. However, disclosure may not be made to any designated third party that is suspected of financial exploitation or other abuse of the eligible adult.

**Mandatory.** Section 9 of the Model Act requires broker-dealers and investment advisors to provide access to or copies of relevant documents “relevant to the suspected or attempted financial exploitation of an eligible adult to agencies charged with administering state adult protective services laws and to law enforcement, either as part of a referral to the agency or to law enforcement, or upon request of the agency or law enforcement pursuant to an investigation.”

**Mandatory.** Specific to FINRA-licensed brokers and broker-dealer firms, amended FINRA Rule 4512 (Customer Account Information) mandates taking reasonable efforts to obtain the name and contact information of at least one Trusted Contact Person (“TCP”), who is at least 18 years of age. The customer must be informed about the purpose of identifying a TCP, which includes allowing the broker or firm to contact the TCP about possible financial exploitation, information about the customer’s account, or to inquire about the customer’s health status or confirm contact information.

#### *B. Delay of Disbursements*

**Permissive.** Section 7 of the Model Act permits a broker-dealer or investment advisor to “delay a disbursement from an account of an eligible adult or an account on which an eligible adult is a beneficiary” if the following criteria are met: (1) if, after initiating an initial review, there is a reasonable belief that the requested disbursement may result in financial exploitation; (2) within two business days after the requested disbursement, written notification of the delay and its

reasons are provided to all parties authorized to transact business on the account (unless a party is the suspected abuser); (3) within two business days the designated state agencies are notified; and (4) within seven business days after the requested disbursements, a report of the internal review and its results are provided to the designated state agencies.

The disbursement delay under the Model Act expires upon the sooner of: (1) determination by the broker-dealer or investment advisor that the disbursement will not result in financial exploitation; (2) fifteen business days after the date of first delaying disbursement, unless extended up to a maximum of twenty-five business days on request of the state agencies; or (3) termination of the delay by the state agencies or by a court of competent jurisdiction. A court may also indefinitely extend the delay.

Permissive. New FINRA Rule 2165 also allows permissive delays in disbursements<sup>11</sup> of funds or securities from the account of a Specified Adult, so long as (1) the broker or brokerage firm has a “reasonable belief” that financial exploitation has occurred or been attempted, or may or will occur or be attempted; (2) within two business days, notice of the delay is given to account holders and identified TCP (but not given to suspected abusers); and (3) an internal review is immediately initiated. The temporary hold may not be longer than 15 business days, although the hold can be extended further or terminated by court order or state securities regulator. FINRA has explained that where a questionable disbursement involves less than all the assets in an account, the hold should not be a blanket “freeze” on the entire account. Rather, each disbursement should be examined separately, and disbursements that are not suspicious, e.g. regular bill payments, not delayed.<sup>12</sup>

### *C. Record keeping*

Mandatory. Section 9 of the Model Act requires broker-dealers and investment advisors provide access to or copies of records “relevant to the suspected or attempted financial exploitation of an eligible adult” to the designated state agencies and to law enforcement. The records so provided are not considered public records for purposes of state public records laws. This provision specifically does not limit or impede the authority of state securities regulators to access or examine records as otherwise provided by law.

Mandatory. FINRA-licensed firms must have and follow written supervisory procedures reasonably designed to achieve compliance with new Rule 2165, must develop and document training about the new rule, and must retain records regarding disbursement delays in compliance with existing record retention rules.

### *D. Safe Harbor Immunity*

Sections 4, 6, and 8 of the Model Act provide immunity from administrative or civil liability “that might otherwise arise” from notification to state agencies or disclosure of information to third-

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<sup>11</sup> FINRA is clear that permissive delays are limited to disbursements of funds or securities from an account. FINRA Rule 2165 does not apply to an order to sell or buy securities held within the account, so long as the funds or securities are kept within the account.

See Frequently Asked Questions Regarding FINRA Rules Relating to Financial Exploitation of Senior Investors, FINRA, <http://www.finra.org/industry/frequently-asked-questions-regarding-finra-rules-relating-financial-exploitation-seniors>.

<sup>12</sup> *Id.*

parties, or delay in disbursement requests in accordance with the respective sections, so long as the qualified individual acts in good faith and exercising reasonable care and/or has a reasonable belief of the potential financial exploitation.

### *E. Penalties*

The Model Act does not include penalties for violation of mandatory and/or permissive provisions. Penalties may exist in other areas of respective state securities law for violations. For example, Oregon specifically extended civil penalties to violation of the new reporting requirements, and Mississippi made it a potential criminal violation to knowingly fail to report to the designated state agencies under certain circumstances.<sup>13</sup> Violation of the FINRA Rules may result in enforcement action, as well as grounds for negligence and other claims where the Rules provide a standard of care in the industry.<sup>14</sup>

Unless the respective state safe harbor provision provides immunity for the conduct, securities professionals may also be found liable for significantly more damages under other state common law civil claims for failing to report where there is reasonable cause to suspect financial abuse. For example, if a securities professional does not act in good faith or with reasonable care in failing to report potential abuse, or allows a suspicious disbursement of funds from an account, thus effectively enabling financial exploitation, then common law negligence, breach of fiduciary duty, civil claims under state Blue Sky laws, or even state elder financial abuse civil statute, which may provide enhanced remedies such as treble damages and attorney fees, for otherwise permitting another person to engage in financial abuse.<sup>15</sup>

Potential violations of these mandatory requirements or permissive conduct, including failure of a firm to properly train and supervise their employees about the new laws, may be additional claims for investor representatives against the firms that supervise these securities professionals.

### **Conclusion**

Financial professionals truly are in important positions to help protect vulnerable adults from financial abuse. The states enacting statutes based on the Model Act provide affirmative tools to financial advisors that could help save a client from a devastating financial loss. For financial advisors and firms that fail to implement the new requirements, or who ignore the red flags of potential financial abuse of investors and fail to act in “good faith or with reasonable care,” harmed investors may now have additional grounds for recovery.

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<sup>13</sup> OR. REV. STAT. § 59.995; MISS. CODE ANN. § 75-71-413(f) (referencing Section 43-47-7(1)(c) of the Mississippi Vulnerable Persons Act).

<sup>14</sup> This article does not provide a survey of potential applicable civil penalties found in other areas of respective state statutes and/or regulations.

<sup>15</sup> See Aidikoff, *supra* note 4.

## States Adopting the Model Act<sup>16</sup>

### Financial Exploitation of Vulnerable Adults Statutes | State by State

STATE	STATUTES
Alabama	ALA. CODE §§ 8-6-170 through 179 (Eff. July 1, 2016) Protection of Vulnerable Adults from Financial Exploitation Act ACT 2016-141 (2016)
Alaska	ALASKA STAT. § 45.56.430 (Eff. Jan. 1, 2019) Alaska Securities Act House Bill 170 (2018)
Arizona	ARIZ. REV. STAT. §§ 46-471 through 474 (Approved May 13, 2019) Arizona Financial Exploitation Act Senate Bill 1483 (2019)
Arkansas	ARK. CODE ANN. § 23-42-309 (Eff. Aug. 1, 2017) Arkansas Securities Act Act 668 (2017)
Colorado	COLO. REV. STAT. §§ 11-51-1001 through 1008 (Eff. July 1, 2017) Colorado Protect Vulnerable Adults from Financial Exploitation Act House Bill 17-1253 (2017)
Delaware	DEL. CODE ANN. tit. 6, § 73-307 (Eff. Nov. 27, 2018) Delaware Securities Act House Bill 332 (2018)
Indiana	IND. CODE §§ 23-19-4.1-1 through 11 (Eff. July 1, 2017) Indiana Securities Act ACT 221 (broker-dealers, 2016); Act 1526 (investment advisers, 2017)
Kentucky	KY. REV. STAT. ANN. § 365.245 (Eff. July 14, 2018) Protection from Financial Exploitation Act House Bill 93 (2018)
Louisiana	LA. REV. STAT. ANN. §§ 51:731 through 738 (Eff. Jan. 1, 2017) Louisiana Protection of Vulnerable Adults from Financial Exploitation Law Act 580 (2016)
Maine	ME. REV. STAT. ANN. tit. 32, §§ 16801 through 16806 (Approved Apr. 2, 2019) Act to Protect Vulnerable Adults from Financial Exploitation LD 566 (2019)
Maryland	MD. CODE ANN., CORPS. & ASS'NS. § 11-307 (Eff. Oct. 1, 2017) Maryland Securities Act House Bill 1149 & Senate Bill 951 (2017)
Minnesota	MINN. STAT. §§ 45A.01 through 07 (Eff. Aug. 1, 2018) Financial Exploitation Protection for Older or Vulnerable Adults Act HF3833 (2018)
Mississippi	MISS. CODE ANN. § 75-71-413 (Eff. July 1, 2017) Mississippi Vulnerable Persons Act

<sup>16</sup> Additionally, some states enacted statutes prior to the Model Act that incorporate some of its elements. See e.g. WASH. REV. CODE § 74.34.215 (Financial Exploitation of Vulnerable Adults) (allowing permissive temporary holds on disbursement of funds).

	Senate Bill 2911 (2017)
Montana	MONT. CODE ANN. §§ 30-10-103, 119, 340, 341, 342 (Eff. Mar. 22, 2017) Act Providing Vulnerable Persons Protection from Financial Exploitation Senate Bill 0024 (2017)
New Mexico	N.M. STAT. ANN. §§ 58-13d-1 through 8 (Eff. July 1, 2017) Protecting of Vulnerable Adults from Financial Exploitation Act House Bill 0326 (2017)
North Dakota	N.D. CENT. CODE § 10-04-08.5 (Eff. Aug. 1, 2017) North Dakota Securities Act Senate Bill 2322 (2017)
Oregon	OR. REV. STAT. §§ 59.480 through 505 (Eff. Jan. 1, 2018) Oregon Securities Law Senate Bill 0095 (2017)
Tennessee	TENN. CODE ANN. §§ 48-1-127 (Eff. May 18, 2017) Tennessee Securities Act Senate Bill 1192 (2017) and House Bill 0304 (2017)
Texas	TEX. REV. CIV. STAT. ART. § 581-45 (Eff. Sept. 1, 2017) Blue Sky Law – Securities Act House Bill 3291 (2017)
Utah	UTAH CODE ANN. §§ 61-1-201 through 206 (Eff. May 8, 2018) Protection of Vulnerable Adults from Financial Exploitation Act Senate Bill 88 (2018)
Vermont	VT. ADMIN. CODE R. 4-4-8:8-5 (Adopted July 1, 2016) Protection of Vulnerable Adults from Financial Exploitation Act Regulation S-2016-01 V.S.R. § 8-5 (2016)
Virginia	VA. CODE ANN. § 63.2-1606 (Eff. July 1, 2019) Protection of Aged or Incapacitated Adults; Mandated and Voluntary Reporting Act Senate Bill 1490 and House Bill 1987 (2019)

**Key Provisions | State by State**

Financial Exploitation of Vulnerable Adults Statutes | State by State

**Alabama:**

“**Vulnerable adult**” means “[a] person 65 years of age or older” or “[a] protected person.”<sup>17</sup>  
“Protected person” means “[a]ny person over 18 years of age subject to protection under this chapter or any person, including, but not limited to, persons with a neurodegenerative disease, persons with intellectual disabilities and developmental disabilities, or any person over 18 years of age that is mentally or physically incapable of adequately caring for himself or herself and his or her interests without serious consequences to himself or herself or others.”<sup>18</sup>

“**Financial exploitation**” includes any of the following:

<sup>17</sup> ALA. CODE § 8-6-171(10).

<sup>18</sup> *Id.* § 38-9-2(18).

- a. The wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of a vulnerable adult.
- b. Any act or omission taken by a person, including through the use of a power of attorney, guardianship, or conservatorship of a vulnerable adult, to either of the following:
  1. Obtain control through deception, intimidation, or undue influence over the vulnerable adult's money, assets, or property to deprive the vulnerable adult of the ownership, use, benefit, or possession of his or her money, assets, or property.
  2. Convert money, assets, or property of the vulnerable adult to deprive the vulnerable adult of the ownership, use, benefit, or possession of his or her money, assets, or property.<sup>19</sup>

**Mandatory Conduct:** A qualified individual who “reasonably believes that financial exploitation of a vulnerable adult may have occurred, may have been attempted, or is being attempted” shall “promptly notify” the Department of Human Resources and the Alabama Securities Commission.<sup>20</sup> A “**qualified individual**” means “[a]ny agent, investment adviser representative, or person who serves in a supervisory, compliance, legal, or associated member capacity of a broker-dealer or investment adviser.”<sup>21</sup>

**Permissive Conduct:** A qualified individual may also “notify a reasonably associated individual, legal guardian, any third party previously designated by the vulnerable adult, conservator, co-trustee, successor trustee, or agent under a power of attorney of the vulnerable adult of such belief.”<sup>22</sup> However, the qualified individual is prohibited from notifying “a designated third party that is suspected of financial exploitation or other abuse of the vulnerable adult.”<sup>23</sup>

A broker-dealer or investment adviser may *delay disbursement* from an account on which the vulnerable adult is a beneficiary so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>24</sup>

**Records:** A broker-dealer or investment adviser “shall provide” records relevant to the suspected or attempted exploitation to agencies administering adult protective services laws and law enforcement, either as part of a referral, or on request of those agencies.<sup>25</sup>

**Safe Harbor:** A qualified person, broker-dealer, or investment adviser acting in “good faith and exercising reasonable care” is immune from administrative or civil liability that might otherwise

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<sup>19</sup> *Id.* § 8-6-171(5).

<sup>20</sup> *Id.* § 8-6-172.

<sup>21</sup> *Id.* § 8-6-171(8).

<sup>22</sup> *Id.* § 8-6-174.

<sup>23</sup> *Id.*

<sup>24</sup> *See id.* § 8-6-176.

<sup>25</sup> *Id.* § 8-6-178.

arise from disclosure or for any failure to notify the state agencies, disclosure to the allowed third parties, or delay of disbursement in accordance with the respective statutes.<sup>26</sup>

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### **Alaska:**

A “**covered adult**” means a natural person who is “60 years of age or older; or a vulnerable adult.”<sup>27</sup> A “vulnerable adult” includes “a person 18 years of age or older who, because of incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance, is unable to meet the person's own needs or to seek help without assistance.”<sup>28</sup>

“**Financial exploitation**” of a covered adult means:

- (1) the wrongful or unauthorized taking, withholding, appropriation, or use of the money, assets, or other property of a covered adult; or
- (2) an act or omission of a person, including an act or omission made through the use of a power of attorney, guardianship, or conservatorship of a covered adult, to
  - (A) obtain control, through deception, intimidation, or undue influence, over the covered adult's money, assets, or other property to deprive the covered adult of the ownership, use, benefit, or possession of the covered adult's money, assets, or other property; or
  - (B) convert the ownership, use, benefit, or possession of the covered adult's money, assets, or other property to another person.<sup>29</sup>

**Mandatory Conduct:** A broker-dealer, investment adviser, or qualified individuals who reasonably believe that the financial exploitation of a covered adult may have occurred, or was attempted, “shall notify” adult protective services and the administrator within five days from recognizing the exploitation.<sup>30</sup> For purposes of mandatory reporting, a “**qualified individual**” means “an agent, investment adviser representative, or other person who is acting in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.”<sup>31</sup>

**Permissive Conduct:** A broker-dealer, investment adviser, or qualified individual may also “notify a person whom the covered adult previously designated to be notified about financial matters of the covered adult, as well as any other person allowed under state or federal law or regulation, or the rules of a self-regulatory organization[.]”<sup>32</sup> However, they are prohibited from

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<sup>26</sup> *Id.* §§ 8-6-173, 175, 177.

<sup>27</sup> ALASKA STAT. § 45.56.430(j)(2).

<sup>28</sup> *Id.* § 47.24.900(21).

<sup>29</sup> *Id.* § 45.56.430(i).

<sup>30</sup> *Id.* § 45.56.430(a).

<sup>31</sup> *Id.* § 45.56.430(j)(3).

<sup>32</sup> *Id.* § 45.56.430(c).

notifying “a person that is suspected of engaging in financial exploitation or other abuse of the covered adult.”<sup>33</sup>

A broker-dealer or investment adviser may *delay disbursement* from an account on which the covered adult is a beneficiary so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>34</sup>

**Records:** A broker-dealer or investment adviser “shall provide” records relevant to the suspected or attempted exploitation to agencies administering adult protective services laws and law enforcement as part of a referral to those agencies or an investigation.<sup>35</sup>

**Safe Harbor:** A broker-dealer, investment adviser, or qualified individual acting in “good faith and exercising reasonable care” are immune from administrative or civil liability for a notification, disclosure, disbursement delay, or record sharing under this section.<sup>36</sup>

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### **Arizona:**

“**Eligible adult**” includes a person who is either: (a) sixty-five (65) years of age or older; or (b) a vulnerable adult.<sup>37</sup> A “vulnerable adult” is defined as “an individual who is eighteen years of age or older and who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment. Vulnerable adult includes an incapacitated person as defined in § 14-5101.”<sup>38</sup>

“**Financial exploitation**” of an eligible adult includes either:

- (a) The wrongful or unauthorized taking, withholding, appropriating, or use of money, assets or property of an eligible adult; or
- (b) Any act or omission taken by a person, including through the use of a power of attorney, guardianship, or conservatorship of an eligible adult, to either:
  - (i) Obtain control, through deception, intimidation, or undue influence over the eligible adult’s money, assets or property to deprive the ownership, use, benefit or possession of the eligible adult’s money, assets or property.
  - (ii) Convert money, assets or property of the eligible adult to deprive the eligible adult of the rightful ownership, use, benefit or possession of the eligible adult’s money, assets or property.<sup>39</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *See id.* § 45.56.430(e).

<sup>35</sup> *Id.* § 45.56.430(g).

<sup>36</sup> *Id.* § 45.56.430(h).

<sup>37</sup> ARIZ. REV. STAT. § 46-471(2).

<sup>38</sup> *Id.* § 46-451(A)(9).

<sup>39</sup> *Id.* at (3).

**Permissive Conduct: (Not Mandatory)** For purposes of reporting, a “qualified individual” means “broker-dealer, investment adviser or person who serves in a supervisory, compliance, legal or senior investor protection capacity for a broker-dealer or investment adviser.”<sup>40</sup>

If a qualified individual “reasonably believes that the financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted,” the qualified individual “**may** notify adult protective services and the corporation commission.”<sup>41</sup> An individual may also “notify any third party previously designated by or reasonably associated with the eligible adult.”<sup>42</sup> However, the individual is prohibited from notifying “any designated third party that is suspected of financial exploitation or other abuse of the eligible adult.”<sup>43</sup>

A broker-dealer or investment adviser may *delay disbursement* from an account of an eligible adult, or an account on which an eligible adult is a beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>44</sup>

**Records:** A broker-dealer or investment adviser “shall provide” records relevant to the suspected or attempted exploitation to APS and law enforcement, either as part of a referral to APS or law enforcement, or on request of the same.<sup>45</sup>

**Safe Harbor:** A qualified individual acting in “good faith and exercising reasonable care . . . is immune from administrative or civil liability that might otherwise arise from the disclosure or for any failure to notify the customer of the disclosure.”<sup>46</sup>; immunity re: disclosure to previously designated third parties not otherwise suspected of the exploitation<sup>47</sup>; immunity re: delay in disbursements.<sup>48</sup>

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### **Arkansas:**

An “eligible adult” includes a person who is: “(A) Sixty-five (65) years of age or older; or (B) Subject to supervision by the Arkansas Adult Protective Services Unit of the Department of Human Services[.]”<sup>49</sup>

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<sup>40</sup> *Id.* § 46-471(6).

<sup>41</sup> *Id.* § 46-472(A).

<sup>42</sup> *Id.* § 46-472(C).

<sup>43</sup> *Id.*

<sup>44</sup> *See id.* § 46-473.

<sup>45</sup> *Id.* § 46-474.

<sup>46</sup> *Id.* § 46-472(B)

<sup>47</sup> *Id.* § 46-472(D)

<sup>48</sup> *Id.* § 46-473(D).

<sup>49</sup> *Id.* § 23-42-309(a)(2).

**“Financial exploitation”** means:

- (A) The wrongful or unauthorized taking, withholding, appropriation, or use of funds, assets, or property of an eligible adult; or
- (B) Any act or omission made by a person, including through the use of an eligible adult's power of attorney, guardianship, or conservatorship, to:
  - (i) Obtain control, through deception, intimidation, or undue influence, over the eligible adult's funds, assets, or property that results in depriving the eligible adult of rightful ownership, use, benefit, access to, or possession of his or her money, assets, or property; or
  - (ii) Convert funds, assets, or property of an eligible adult to deprive the eligible adult of the rightful ownership, use, benefit, access to, or possession of his or her funds, assets, or property.<sup>50</sup>

**Mandatory Conduct:** An individual, who “reasonably believes that the financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted,” “should promptly disclose this information to [APS and the securities commissioner]”<sup>51</sup>

**Permissive Conduct:** An individual may also “notify a third party previously designated by the eligible adult.”<sup>52</sup> However, the individual is prohibited from notifying “any designated third party that is suspected of financial exploitation or other abuse of the eligible adult.”<sup>53</sup>

A broker-dealer or investment adviser is authorized to *delay disbursement* from an account of an eligible adult or an account on which an eligible adult is a current beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>54</sup>

**Records:** A broker-dealer or investment adviser “shall provide” access to or copies of records relevant to the suspected or attempted financial exploitation, either as part of a referral or pursuant to an investigation, to: (A) An agency charged with administering state adult protective services law; and (B) A law enforcement agency or entity.<sup>55</sup>

**Safe Harbor:** If the individual who makes the disclosure is acting in “good faith and exercising reasonable care[.]” they “shall be immune from administrative or civil liability that might otherwise arise from the disclosure or for any failure to notify the eligible adult of the disclosure[.]”<sup>56</sup>; also immunity for disclosing to previously designated third parties,<sup>57</sup> and immunity for broker-dealers

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<sup>50</sup> *Id.* § 23-42-309(a)(3).

<sup>51</sup> *Id.* § 23-42-309(b).

<sup>52</sup> *Id.* § 23-42-309(b)(3)(A).

<sup>53</sup> *Id.* § 23-42-309(b)(3)(B).

<sup>54</sup> *See id.* § 23-42-309(c).

<sup>55</sup> *Id.* § 23-42-309(d)(1).

<sup>56</sup> *Id.* § 23-42-309(b)(2).

<sup>57</sup> *Id.* § 23-42-309(b)(3)(C).

or investment advisers who “in good faith and exercising reasonable care” comply with the section re: delay in disbursement.<sup>58</sup>

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### **Colorado:**

An “**eligible adult**” means adults who are either “(a) [a] person seventy years of age or older; or (b) [a]n individual eighteen years of age or older who is susceptible to mistreatment or self-neglect because the individual is unable to perform or obtain services necessary for his or her health, safety, or welfare, or lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his or her person or affairs.”<sup>59</sup>

“**Financial exploitation**” means an act or omission committed by a person who:

- (a) Uses deception, harassment, intimidation, or undue influence to permanently or temporarily deprive an eligible adult of the use, benefit, or possession of any thing of value;
- (b) Employs the services of a third party for the profit or advantage of the person or another person to the detriment of the eligible adult;
- (c) Forces, compels, coerces, or entices an eligible adult to perform services for the profit or advantage of the person or another person against the will of the eligible adult; or
- (d) Misuses the property of an eligible adult in a manner that adversely affects the eligible adult's ability to receive health care or health care benefits or to pay bills for basic needs or obligations.<sup>60</sup>

**Mandatory Conduct:** If a qualified individual, “*while acting within the scope of employment*, reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or may be or is being attempted, the broker-dealer or investment adviser shall promptly notify the commissioner of securities appointed[.]”<sup>61</sup>. For purposes of mandatory reporting, a “**qualified individual**” means “any sales representative, investment adviser representative, or person who serves in a supervisory, compliance, or senior investor protection capacity for a broker-dealer or investment adviser.”<sup>62</sup>

**Permissive Conduct:** A qualified individual, “*while acting within the scope of employment*,” may also “notify any third party previously designated by or reasonably associated with the eligible

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<sup>58</sup> *Id.* § 23-42-309(c)(4).

<sup>59</sup> COLO. REV. STAT. § 11-51-1002(2).

<sup>60</sup> *Id.* § 11-51-1002(3).

<sup>61</sup> *Id.* § 11-51-1003(1) (emphasis added).

<sup>62</sup> *Id.* § 11-51-1002(6).

adult.”<sup>63</sup> However, the qualified individual is prohibited from notifying “any designated third party that is suspected of financial exploitation or other abuse of the eligible adult.”<sup>64</sup>

A broker-dealer or investment adviser is authorized to *delay disbursement* from an account of an eligible adult, or an account on which an eligible adult is a beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>65</sup>

**Records:** A broker-dealer or investment adviser “shall provide” access to or copies of records relevant to the suspected or attempted financial exploitation to agencies charged with administering state adult protective services laws and to law enforcement, either as part of a referral, or upon request.<sup>66</sup>

**Safe Harbor:** If the qualified individual or broker-dealer or investment advisor acts in “good faith and exercising reasonable care[]” complies with the sections for mandatory reporting, permissive reporting to third parties, or delaying disbursements, they are “immune from administrative or civil liability that might otherwise arise” from the conduct.<sup>67</sup> Furthermore, “A qualified individual who, in good faith and exercising reasonable care, fails to report pursuant to this part 10 is immune from any administrative, criminal, or civil liability for his or her failure to report.”<sup>68</sup>

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### **Delaware:**

An “**eligible adult**” means an “elderly person” defined in § 222 of Title 11, or a “vulnerable adult” as defined in § 1105 of Title 11.<sup>69</sup> An “elderly person” is “any person who is 62 years of age or older.”<sup>70</sup> A “vulnerable person” is “a person 18 years of age or older who, by reason of isolation, sickness, debilitation, mental illness or physical, mental or cognitive disability, is easily susceptible to abuse, neglect, mistreatment, intimidation, manipulation, coercion or exploitation.”<sup>71</sup>

“**Financial exploitation**” means “the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the eligible adult by any person or entity for any person's or entity's profit or advantage other than for the eligible adult's profit or advantage” and includes, but is not limited to:

- a. The use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence with an eligible adult to obtain or use the property, income,

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<sup>63</sup> *Id.* § 11-51-1004(1) (emphasis added).

<sup>64</sup> *Id.*

<sup>65</sup> *See id.* § 11-51-1005.

<sup>66</sup> *Id.* § 11-51-1007.

<sup>67</sup> *Id.* § 11-51-1003(2); 1004(3); 1005(4).

<sup>68</sup> *Id.* § 11-51-1006.

<sup>69</sup> DEL. CODE ANN. tit. 6, § 73-103(a)(5).

<sup>70</sup> *Id.* tit. 11, § 222(9).

<sup>71</sup> *Id.* § 1105(c).

resources, or trust funds of the eligible adult for the benefit of a person or entity other than the eligible adult;

b. The breach of a fiduciary duty, including but not limited to, the misuse of a power of attorney, trust, or a guardianship appointment, that results in the unauthorized appropriation, sale, or transfer of the property, income, resources, or trust funds of the eligible adult for the benefit of a person or entity other than the eligible adult; and

c. Obtaining or using an eligible adult's property, income, resources, or trust funds without lawful authority, by a person or entity who knows or clearly should know that the eligible adult lacks the capacity to consent to the release or use of his or her property, income, resources or trust funds.<sup>72</sup>

**Mandatory Conduct:** If a qualified individual “reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or may be or is being attempted, the qualified individual shall promptly, *but in no event more than 5 business days after the suspicion of financial exploitation*, notify both the Director and the Department of Health and Social Services[.]”<sup>73</sup>A “**qualified individual**” means “any agent, broker-dealer, investment adviser, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.”<sup>74</sup>

**Permissive Conduct:** A qualified individual may also “notify any third party previously designated by the eligible adult, or otherwise permitted under existing law, rule, or regulation.”<sup>75</sup> However, the qualified individual is prohibited from notifying “any designated third party that is suspected of financial exploitation or other abuse of the eligible adult.”<sup>76</sup>

A broker-dealer or investment adviser may *delay disbursement* from an account of an eligible adult or an account on which an eligible adult is a beneficiary so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>77</sup>

**Records:** A broker-dealer or investment adviser “shall provide” access to or copies of records that are relevant to the suspected or attempted financial exploitation of an eligible adult to agencies charged with administering state adult protective services laws and to law enforcement, either as part of a referral to, or upon request from, the agency or law enforcement pursuant to an investigation.<sup>78</sup>

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<sup>72</sup> *Id.* tit. 6, § 73-103(8).

<sup>73</sup> *Id.* § 73-307(a) (emphasis added).

<sup>74</sup> *Id.* § 73-103(19).

<sup>75</sup> *Id.* § 73-307(b).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* § 73-307(c).

<sup>78</sup> *Id.* § 73-307(d).

**Safe Harbor:** A qualified individual acting in “good faith and exercising reasonable care” and in compliance with the statutory requirements, “shall be immune from administrative or civil liability that might otherwise arise from such action.”<sup>79</sup>

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**Indiana:**

A “**financially vulnerable adult**” means an individual to whom one (1) or more of the following apply:

- (1) The individual is at least sixty-five (65) years of age.
  - (2) The individual is:
    - (A) at least eighteen (18) years of age; and
    - (B) incapable, by reason of:
      - (i) mental illness;
      - (ii) intellectual disability;
      - (iii) dementia; or
      - (iv) other physical or mental incapacity;
- of managing or directing the management of the individual's property.<sup>80</sup>

“**Financial exploitation**” means “the wrongful or unauthorized taking, withholding, appropriation, or use of money, real property, or personal property of a financially vulnerable adult.”<sup>81</sup>

**Mandatory Conduct:** If a qualified individual “has reason to believe that financial exploitation of a financially vulnerable adult has occurred, has been attempted, or is being attempted, the qualified individual shall . . . (1) make a report to an entity listed in IC 12-10-3-10(a); and (2) notify the commissioner.”<sup>82</sup> “**Qualified individual**” means “an individual associated with a broker-dealer or investment adviser who serves in a supervisory, compliance, or legal capacity as part of the individual's job.”<sup>83</sup>

**Permissive Conduct:** A qualified individual may, “to the extent permitted under federal law,” also notify any of the following “concerning the qualified individual's belief:”

- (1) An immediate family member [spouse, child, parent, or sibling] of the financially vulnerable adult. [IC § 23-19-4.1-3]
- (2) A legal guardian of the financially vulnerable adult.
- (3) A conservator of the financially vulnerable adult.
- (4) A trustee, cotrustee, or successor trustee of the account of the financially vulnerable adult.
- (5) An agent under a power of attorney of the financially vulnerable adult.

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<sup>79</sup> *Id.* § 73-307(e).

<sup>80</sup> IND. CODE § 23-19-4.1-2.1.

<sup>81</sup> *Id.* § 23-19-4.1-1.

<sup>82</sup> *Id.* § 23-19-4.1-6.

<sup>83</sup> *Id.* § 23-19-4.1-5.

(6) Any other person permitted under existing laws, rules, regulations, or customer agreement.<sup>84</sup>

A qualified individual may “*refuse a request for disbursement of funds*” from an account owned by the financially vulnerable adult, or of which the financially vulnerable adult is a beneficiary or beneficial owner, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>85</sup>

**Records:** A broker-dealer or investment advisor “*may provide*” access to or copies of records relevant to the suspected financial exploitation to protective agencies or law enforcement.<sup>86</sup>

**Safe Harbor:** If a broker-dealer, investment adviser, or qualified individual acts in “good faith” and complies with the statutory requirements, they are “immune from any administrative or civil liability for actions taken in accordance with those sections.”<sup>87</sup>

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**Kentucky:**

A “**specified adult**” means a natural person who is either sixty-five (65) years or older, or eighteen (18) years or older “who a qualified person reasonably believes has a mental or physical impairment that renders that natural person unable to protect his or her own interests. A qualified person's reasonable belief may be based on facts and circumstances observed in the qualified person's business relationship with the natural person.”<sup>88</sup>

“**Financial exploitation**” means:

1. The wrongful or unauthorized taking, withholding, appropriation, or use of a specified adult's funds or securities; or
2. Any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a specified adult, to:
  - a. Obtain control, through deception, intimidation, or undue influence, over a specified adult's money, assets, or property; or
  - b. Convert a specified adult's money, assets, or property.<sup>89</sup>

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<sup>84</sup> *Id.* § 23-19-4.1-6(b).

<sup>85</sup> *See id.* § 23-19-4.1-7.

<sup>86</sup> *Id.* § 23-19-4.1-9.

<sup>87</sup> *Id.* § 23-19-4.1-8.

<sup>88</sup> KY. REV. STAT. ANN. § 365.245(1)(e).

<sup>89</sup> *Id.* § 365.245(1)(b).

**Permissive Conduct (Not Mandatory):** A “qualified individual” means a broker-dealer, an investment adviser, or a financial institution.<sup>90</sup> If a “qualified individual reasonably believes that financial exploitation has occurred, is occurring, or has been attempted, or will be attempted, the qualified person *may* notify” authorized agencies and third party that is: “a. [r]easonably associated with the specified adult; or b. [o]therwise permitted by law.”<sup>91</sup>

A qualified person may place a temporary hold on a transaction on or a disbursement from an account of a specified adult, or an account on which a specified adult is a beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>92</sup> The qualified person may not provide notice to any person suspected of the financial abuse.<sup>93</sup>

**Records:** A qualified person “shall provide” access to or copies of records relevant to the suspected financial exploitation to agencies charged with administering state adult protective services laws and to law enforcement, either as part of a referral to or upon request from, the agency or law enforcement pursuant to an investigation.<sup>94</sup> “Notwithstanding any provision of law to the contrary,” the authorized agencies “may disclose” the status or final disposition of any resulting investigation to the notifying person.<sup>95</sup>

**Safe Harbor:** If the qualified person “exercises good faith” in making disclosures, placing temporary holds, or providing access to records pursuant to the statutes, then they “shall be immune from any administrative or civil liability that might otherwise arise from the disclosure of such activities.”<sup>96</sup>

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## **Louisiana:**

**“Eligible adult”** means a person sixty years of age or older, or a person “subject to the Adult Protective Services Act.”<sup>97</sup>

**“Financial exploitation”** means:

- (a) The wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of an eligible adult.
- (b) Any act or omission taken by a person, including through the use of a power of attorney, act of procuracy, contract of mandate, or letters of curatorship, guardianship, or conservatorship of an eligible adult, to do any of the following:

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<sup>90</sup> *Id.* § 365.245(1)(d).

<sup>91</sup> *Id.* § 365.245(2)(a).

<sup>92</sup> *See id.* § 365.245(3).

<sup>93</sup> *Id.* § 365.245(4).

<sup>94</sup> *Id.* § 365.245(5).

<sup>95</sup> *Id.* § 365.245(6).

<sup>96</sup> *Id.* § 365.245(7).

<sup>97</sup> LA. REV. STAT. ANN. § 51:732(3).

(i) Obtain control, through deception, intimidation, or undue influence over an eligible adult's assets or property to deprive the eligible adult of the ownership, use, benefit, or possession of the eligible adult's money, assets, or property.

(ii) Convert money, assets, or property of the eligible adult to deprive such eligible adult of the ownership, use, benefit, or possession of the eligible adult's money, assets, or property.<sup>98</sup>

**Permissive Conduct (Not Mandatory):** A “qualified individual” means “any salesman, investment advisor representative, or person who serves in a supervisory, compliance, or other legal capacity for a dealer or investment advisor.”<sup>99</sup> A qualified individual who “reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted,” may “notify the appropriate adult protection agency and the commissioner of securities.”<sup>100</sup>

A qualified individual may also “notify any third party previously designated in writing by the eligible adult or any other person permitted under existing law, rules, regulations, or customer agreement.”<sup>101</sup> However, the qualified individual is prohibited from notifying “any designated third party who is suspected of financial exploitation or other abuse of the eligible adult.”<sup>102</sup>

A dealer or investment advisor may *delay disbursement* from an account of an eligible adult or an account on which an eligible adult is a beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>103</sup>

**Records:** A dealer or investment advisor “shall provide” access to or copies of records relevant to the suspected financial exploitation to an adult protection agency, commissioner of securities, and to law enforcement, either as part of a referral to, or upon request from the agency or law enforcement pursuant to an investigation.<sup>104</sup>

**Safe Harbor:** A qualified person acting in “good faith and exercising reasonable care” shall be immune from administrative or civil liability that might otherwise arise from disclosure or delaying disbursements under the terms of the statutes.<sup>105</sup> Furthermore, “[n]o claim may be brought against the adult protection agency, commissioner of securities, office of financial institutions, or

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<sup>98</sup> *Id.* § 51:732(4).

<sup>99</sup> *Id.* § 51:732(7).

<sup>100</sup> *Id.* § 51:733(A).

<sup>101</sup> *Id.* § 51:734(A).

<sup>102</sup> *Id.* § 51:734(B).

<sup>103</sup> *See id.* § 51:735.

<sup>104</sup> *Id.* § 51:737.

<sup>105</sup> *Id.* § 51:733(B), § 51:734(C), § 51:735.

the state of Louisiana in connection with receipt or response to any notice of financial exploitation.”<sup>106</sup>

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**Maine:**

“**Eligible adult**” means an individual 65 years of age or older or “[a]n protected under the Adult Protective Services Act.”<sup>107</sup>

“**Financial exploitation**” of an eligible adult includes any of the following acts:

- A. The wrongful or unauthorized taking, withholding, appropriation or use of money, assets or property of an eligible adult; or
- B. Any act or omission made by a person, including through the use of a power of attorney, guardianship or conservatorship of an eligible adult, to:
  - (1) Obtain control, through deception, intimidation or undue influence, over the eligible adult's money, assets or property to deprive the eligible adult of the ownership, use, benefit or possession of the eligible adult's money, assets or property; or
  - (2) Convert money, assets or property of the eligible adult to deprive the eligible adult of the ownership, use, benefit or possession of the eligible adult's money, assets or property.<sup>108</sup>

**Mandatory Conduct:** A qualified individual who “reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted or is being attempted” shall “promptly notify the Department of Health and Human Services and the administrator.”<sup>109</sup> A “**qualified individual**” means “an agent, investment adviser representative or individual who serves in a supervisory, compliance or legal capacity for a broker-dealer or investment adviser.”<sup>110</sup>

**Permissive Conduct:** A qualified individual also “may notify any 3rd party previously designated by the eligible adult.”<sup>111</sup> However, the qualified individual is prohibited from notifying “any designated 3rd party that is suspected of financial exploitation or other abuse of the eligible adult.”<sup>112</sup>

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<sup>106</sup> *Id.* § 51:736.

<sup>107</sup> ME. REV. STAT. ANN. tit. 32, § 16801(1).

<sup>108</sup> *Id.* § 16801(2).

<sup>109</sup> *Id.* § 16802.

<sup>110</sup> *Id.* § 16801(3).

<sup>111</sup> *Id.* § 16804.

<sup>112</sup> *Id.*

A broker-dealer or investment adviser may *delay disbursement* from an account of an eligible adult, or an account on which an eligible adult is a beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>113</sup>

**Records:** A broker-dealer or investment adviser “shall provide” access to or copies of records relevant to the suspected financial exploitation as part of a referral to, or on request from, the Department of Health and Human Services and law enforcement.<sup>114</sup>

**Safe Harbor:** A qualified person acting in “good faith and exercising reasonable care” is immune from “administrative or civil liability that might otherwise arise from” disclosures to the state agencies or to designated third parties, so long as they follow the statutory requirements.<sup>115</sup> A broker-dealer or investment adviser acting “in good faith an exercising reasonable care” that complies with the statutory requirements is also immune from administrative or civil liability.<sup>116</sup>

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### **Maryland:**

An “**eligible adult**” includes a resident of the state of Maryland who is at least 65 years older, or vulnerable adult.<sup>117</sup> A “vulnerable adult” is “an adult who lacks the physical or mental capacity to provide for the adult’s daily needs.”<sup>118</sup>

“**Financial exploitation**” means:

- (i) The wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of an eligible adult; or
- (ii) An act or omission by a person, including through the use of a power of attorney, guardianship, or conservatorship of an eligible adult, to:
  - 1. Obtain control, through deception, intimidation, or undue influence, over the eligible adult’s money, assets, or property in order to deprive the eligible adult of the ownership, use, benefit, or possession of the money, assets, or property; or
  - 2. Convert money, assets, or property of the eligible adult in order to deprive the eligible adult of the ownership, use, benefit, or possession of the money, assets, or property.<sup>119</sup>

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<sup>113</sup> *Id.* § 16806.

<sup>114</sup> *Id.* § 16808.

<sup>115</sup> *Id.* §§ 16803, 16805.

<sup>116</sup> *Id.* § 16807.

<sup>117</sup> MD. CODE ANN., CORPS. & ASS’NS. § 11-307(a)(2).

<sup>118</sup> *Id.*, FAM. LAW § 14-101(q).

<sup>119</sup> *Id.* CORPS. & ASS’NS. § 11-307(a)(3).

**Mandatory Conduct:** A qualified individual who “reasonably believes that an eligible adult has been, is currently, or will be the subject of financial exploitation or attempted financial exploitation” “shall notify” the Commissioner and a local department under § 14-302 of the Family Law Article.<sup>120</sup> A “**qualified individual**” means “an agent, an investment adviser representative, or a person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or an investment adviser.”<sup>121</sup>

**Permissive Conduct:** A qualified individual may also “notify a third party designated by the eligible adult and any other third party permitted under State or federal laws or regulations, or the rules of a self-regulatory organization, if the third party is not suspected of financial exploitation, abuse, neglect, or other exploitation of the eligible adult.”<sup>122</sup>

A broker-dealer or investment adviser may *delay disbursement* from an account of an eligible adult or an account on which an eligible adult is a beneficiary, so long as so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>123</sup>

**Records:** A broker-dealer or investment adviser “shall provide” access to or copies of records relevant to the suspected financial exploitation as part of a referral to, or on request from, the Commissioner or local department or law enforcement agency.<sup>124</sup>

**Safe Harbor:** A broker-dealer, investment adviser, or qualified individual acting in “good faith and exercising reasonable care” who provides notice under the statute “shall have immunity from any administrative or civil liability that might otherwise arise from the notice.”<sup>125</sup> A broker-dealer or investment adviser acting in “good faith and exercising reasonable care” who delays a disbursement in accordance with the statute is likewise immune “from any administrative or civil liability that might otherwise arise from the delay.”<sup>126</sup>

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## **Minnesota:**

“**Eligible adult**” means person 65 years of age or older or a person subject to section 626.5572, subdivision 21 [a vulnerable adult].<sup>127</sup> A “vulnerable adult” is a person 18 years of age or older who:

- (1) is a resident or inpatient of a facility;
- (2) receives services required to be licensed under chapter 245A, except that a person receiving outpatient services for treatment of chemical dependency or

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<sup>120</sup> *Id.* § 11-307(b)(1).

<sup>121</sup> *Id.* § 11-307(a)(6).

<sup>122</sup> *Id.* § 11-307(b)(1)(ii).

<sup>123</sup> *Id.* § 11-307(c) and (d).

<sup>124</sup> *Id.* § 11-307(f).

<sup>125</sup> *Id.* § 11-307 (e)(1).

<sup>126</sup> *Id.* § 11-307 (e)(2).

<sup>127</sup> MINN. STAT. § 45A.01(5).

mental illness, or one who is served in the Minnesota sex offender program on a court-hold order for commitment, or is committed as a sexual psychopathic personality or as a sexually dangerous person under chapter 253B, is not considered a vulnerable adult unless the person meets the requirements of clause (4);

(3) receives services from a home care provider required to be licensed under sections 144A.43 to 144A.482; or from a person or organization that offers, provides, or arranges for personal care assistance services under the medical assistance program as authorized under section 256B.0625, subdivision 19a, 256B.0651, 256B.0653, 256B.0654, 256B.0659, or 256B.85; or

(4) regardless of residence or whether any type of service is received, possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction:

(i) that impairs the individual's ability to provide adequately for the individual's own care without assistance, including the provision of food, shelter, clothing, health care, or supervision; and

(ii) because of the dysfunction or infirmity and the need for care or services, the individual has an impaired ability to protect the individual's self from maltreatment.<sup>128</sup>

**“Financial exploitation” means:**

(1) the wrongful or unauthorized taking, withholding, appropriation, expenditure, or use of money, assets, or property of an eligible adult; or

(2) an act or omission taken by a person, including through the use of a power of attorney, guardianship, trustee, or conservatorship of an eligible adult, to:

(i) obtain control, through deception, intimidation, or undue influence, over the eligible adult's money, assets, or property to deprive the eligible adult of the ownership, use, benefit, or possession of the eligible adult's money, assets, or property; or

(ii) convert money, assets, or property of the eligible adult to deprive the eligible adult of the ownership, use, benefit, or possession of the eligible adult's money, assets, or property.<sup>129</sup>

**Mandatory Conduct:** A broker-dealer or investment adviser “*shall delay a disbursement from or place a hold on a transaction involving an account of an eligible adult or an account on which an eligible adult is a beneficiary if the commissioner of commerce, law enforcement agency, or prosecuting attorney's office provides information to the broker-dealer or investment adviser demonstrating that it is reasonable to believe that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted.*”<sup>130</sup>

**Permissive Conduct:** A broker-dealer or investment adviser that “reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted” *may* “promptly notify the commissioner and the common entry point.”<sup>131</sup>

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<sup>128</sup> *Id.* § 626.5572(21)(a).

<sup>129</sup> *Id.* § 45A.01(6).

<sup>130</sup> *Id.* § 45A.06 (emphasis added).

<sup>131</sup> *Id.* § 45A.02.

A broker-dealer or investment adviser may also “notify a third party reasonably associated with the eligible adult or any other person permitted under state or federal law or rule, rules of a self-regulating organization, or customer agreement.”<sup>132</sup> However, the broker-dealer or investment adviser is prohibited from notifying “a third party that is suspected of financial exploitation or other abuse of the eligible adult.”<sup>133</sup>

Separate from the *mandatory* delay or hold on transactions after receipt of relevant information from the state agencies, a broker-dealer or investment adviser *may* delay a disbursement from or place a hold on transactions, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>134</sup>

**Safe Harbor:** A broker-dealer or investment adviser who, in good faith, complies with the statute regarding disclosure to state agencies or to allowed third parties, is immune from administrative or civil liability that might otherwise arise from the disclosure.<sup>135</sup> Furthermore, a broker-dealer or investment adviser who “cooperates with a civil or criminal investigation of financial exploitation of an eligible adult, or testifies about alleged financial exploitation of an eligible adult in a judicial or administrative proceeding” is likewise immune.<sup>136</sup> And, a broker-dealer or investment adviser that, “in good faith, complies with section 45A.06 or the commissioner of commerce, law enforcement agency, or prosecuting attorney's office is immune from administrative or civil liability that might otherwise arise from the delay in a disbursement or placing a hold on a transaction in accordance with this chapter.”<sup>137</sup>

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### **Mississippi:**

A “**vulnerable adult**” means a “person, whether a minor or adult, whose ability to perform the normal activities of daily living or to provide for his or her own care or protection from abuse, neglect, exploitation or improper sexual contact is impaired due to a mental, emotional, physical or developmental disability or dysfunction, or brain damage or the infirmities of aging.”<sup>138</sup> “Financial exploitation” is not defined, but “**exploitation**” means “the illegal or improper use of a vulnerable person or his resources for another's profit, advantage or unjust enrichment, with or without the consent of the vulnerable person, and may include actions taken pursuant to a power of attorney. “Exploitation” includes, but is not limited to, a single incident.”<sup>139</sup>

**Mandatory Conduct:** A broker-dealer or an investment adviser “registered or required to be registered under this chapter” who is required to file a report with the Department of Human

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<sup>132</sup> *Id.* § 45A.04.

<sup>133</sup> *Id.*

<sup>134</sup> *See id.* § 45A.06.

<sup>135</sup> *Id.* §§ 45A.03; 45A.05.

<sup>136</sup> *Id.* §§ 45A.03.

<sup>137</sup> *Id.* § 45A.03.

<sup>138</sup> MISS. CODE ANN. § 43-47-5(q).

<sup>139</sup> *Id.* § 43-47-5(i).

Services under the Mississippi Vulnerable Persons Act, Section 43-47-1 et seq., “shall immediately forward a copy of the report to the administrator[.]”<sup>140</sup>

Under Section 43-47-7(1)(vii), any “[a]ccountant, stockbroker, financial advisor or consultant, insurance agent or consultant, investment advisor or consultant, financial planner, or any officer or employee of a bank, savings and loan, credit union or any other financial service provider” who “who knows or suspects that a vulnerable person has been or is being abused, neglected or exploited” must report to the Department of Human Services or to the county department where the vulnerable person is located.<sup>141</sup>

**Permissive Conduct:** A broker-dealer or investment adviser “registered or required to be registered under this chapter” may also “notify any third party reasonably associated with the customer of the suspected financial exploitation or any other party permitted by state or federal laws or regulations, the rules of a self-regulatory organization or by customer agreement.”<sup>142</sup> However, the broker-dealer or investment adviser is prohibited from notifying “any third party who is suspected of financial exploitation or other abuse.”<sup>143</sup>

The broker-dealer or investment adviser may *delay a transaction* that they “reasonably believe . . . may result in financial exploitation of its customer”, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>144</sup>

**Safe Harbor:** “A person that makes disclosures or delays transactions under this section shall be immune from any administrative or civil liability that might otherwise arise from compliance with this section or activity authorized by this section.”<sup>145</sup>

**Criminal Penalties:** A person who fails to make a report to state agencies as required under Section 75-71-413(a), “shall be subject to Section 43-47-7(1)(c) of the Mississippi Vulnerable Persons Act.”<sup>146</sup> Under that section, a person who “*should have known or suspected beyond a reasonable doubt* that a vulnerable person suffers from exploitation, abuse, neglect or self-neglect but who *knowingly fails* to comply with this section shall, upon conviction, be guilty of a misdemeanor and shall be punished by a fine not exceeding Five Thousand Dollars (\$5,000.00), or by imprisonment in the county jail for not more than six (6) months, or both such fine and imprisonment.”<sup>147</sup>

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<sup>140</sup> *Id.* § 75-71-413(a).

<sup>141</sup> *Id.* § 43-47-7(1)(vii).

<sup>142</sup> *Id.* § 75-71-413(a).

<sup>143</sup> *Id.* § 75-71-413(d).

<sup>144</sup> *See id.* § 75-71-413(b) and (c).

<sup>145</sup> *Id.* § 75-71-413(e).

<sup>146</sup> *Id.* § 75-71-413(f).

<sup>147</sup> *Id.* § 43-47-7(1)(c) (emphasis added).

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**Montana:**

A “**vulnerable person**” includes a person who: (a) is at least 60 years of age; (b) suffers from mental impairment due to “frailties or dependencies typically related to advanced age, such as dementia or memory loss;” (c) has a developmental disability; or (d) has a mental disorder.<sup>148</sup>

“**Financial exploitation**” means:

- (a) the wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of a vulnerable person; or
- (b) an act or omission taken by a person, including through the use of a power of attorney, guardianship, or conservatorship of a vulnerable person, to:
  - (i) obtain control through deception, intimidation, fraud, menace, or undue influence over the vulnerable person's money, assets, or property to deprive the vulnerable person of the ownership, use, benefit, or possession of the vulnerable person's money, assets, or property; or
  - (ii) convert money, assets, or property of the vulnerable person to deprive the vulnerable person of the ownership, use, benefit, or possession of the vulnerable person's money, assets, or property.<sup>149</sup>

**Permissive Conduct (Not Mandatory):** A qualified individual, investment adviser, investment adviser representative, or salesperson who reasonably believes that financial exploitation of a vulnerable person “may have occurred, may have been attempted, or is being attempted,” *may* “promptly report the suspected exploitation to the commissioner “in the manner outlined in the broker-dealer’s or investment adviser’s policies and procedures for reporting suspected exploitation,” or, if no such policies exist, then directly to the commissioner.<sup>150</sup> Likewise, those parties may notify “any third party closely connected to the vulnerable person. Disclosure may not be made to a third party who is suspected of financial exploitation or other abuse of the vulnerable person.”<sup>151</sup>

A “**qualified individual**” means a “person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.”<sup>152</sup>

A broker-dealer or investment adviser may *delay disbursement* from an account of a vulnerable person or an account on which a vulnerable person is a beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>153</sup>

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<sup>148</sup> MONT. CODE ANN. § 30-10-103(27).

<sup>149</sup> *Id.* § 30-10-103(10).

<sup>150</sup> *Id.* § 30-10-340.

<sup>151</sup> *Id.* § 30-10-341.

<sup>152</sup> *Id.* § 30-10-103(19).

<sup>153</sup> *See id.* § 30-10-342.

**Records:** A broker-dealer or investment adviser “shall provide” access to or copies of records relevant to suspected or attempted financial exploitation to the department of public health and human services, and to law enforcement, either as part of a referral to or on request from those agencies.<sup>154</sup>

**Safe Harbor:** Any of the designated parties acting “in good faith and exercising reasonable care” and acting in compliance with the reporting or delaying conduct permitted by the statute “is immune from administrative or civil liability that might otherwise arise” from the disclosure or delay.<sup>155</sup>

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### **New Mexico:**

An “**eligible adult**” means a person 65 years of age or older, or an incapacitated person who is eighteen years of age or older.<sup>156</sup> “Incapacitated person” means “a person with a mental, physical or developmental condition that substantially impairs the person's ability to provide adequately for the person's own care or protection.”<sup>157</sup>

“**Financial exploitation**” means:

- (1) the wrongful or unauthorized taking, withholding, appropriation or use of money, assets or property of an eligible adult; or
- (2) any act or omission taken by a person, including through the use of a power of attorney, guardianship or conservatorship of an eligible adult, to:
  - (a) obtain control, through deception, intimidation or undue influence, over the eligible adult's money, assets or property to deprive the eligible adult of the ownership, use, benefit or possession of the eligible adult's money, assets or property; or
  - (b) convert money, assets or property of the eligible adult to deprive such eligible adult of the ownership, use, benefit or possession of the eligible adult's money, assets or property[.]<sup>158</sup>

**Mandatory Conduct:** A broker-dealer, investment adviser, or qualified individual who “reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted or is being attempted” shall “promptly notify the agencies,” and shall “attempt to notify a third-party previously designated by the eligible adult[.]”<sup>159</sup> A “**qualified individual**” means

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<sup>154</sup> *Id.* § 30-10-119.

<sup>155</sup> *Id.* § 30-10-340(2), § 30-10-341(2), § 30-10-342(4).

<sup>156</sup> N.M. STAT. ANN. § 58-13D-2(D).

<sup>157</sup> *Id.* § 58-13D-2(F).

<sup>158</sup> *Id.* § 58-13D-2(E).

<sup>159</sup> *Id.* § 58-13D-3(A)(1) and (2).

an “agent, investment adviser representative or person who serves in a supervisory, compliance or legal capacity for a broker-dealer or investment adviser.”<sup>160</sup>

A broker-dealer or investment adviser “shall provide training concerning the financial exploitation of eligible adults to its employees who are required to be registered in New Mexico as agents or investment adviser representatives and who have contact with eligible adults and access to account information on a regular basis and as part of their job.”<sup>161</sup>

**Permissive Conduct:** A broker-dealer, investment adviser, or qualified individual may also “attempt to notify a third-party that is not designated but is reasonably associated with the eligible adult.”<sup>162</sup> However, the qualified individual is prohibited from notifying “a designated third-party that is at the time of disclosure suspected of financial exploitation or other abuse of the eligible adult.”<sup>163</sup>

A broker-dealer or investment adviser may *delay disbursement or transaction* from an account of an eligible adult or an account on which an eligible adult is a beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>164</sup>

**Records:** A broker-dealer or investment adviser “shall provide” access to or copies of records relevant to the suspected or attempted financial exploitation either on referral to, or on request from, state agencies and law enforcement.<sup>165</sup>

**Safe Harbor:** A broker-dealer, investment adviser, or qualified individual exercising reasonable care, who complies with the statutory requirements under Section 3 (disclosures) and *including the mandatory training requirement* under Section 7, is “immune from any administrative or civil liability that might otherwise arise from such disclosure.”<sup>166</sup>

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### **North Dakota:**

An “**eligible adult**” is a person who is sixty-five years old or older, or a vulnerable adult.<sup>167</sup> A “vulnerable adult” means “an adult who has a substantial mental or functional impairment.”<sup>168</sup>

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<sup>160</sup> *Id.* § 58-13D-2(J).

<sup>161</sup> *Id.* § 58-13D-7.

<sup>162</sup> *Id.* § 58-13D-3(A)(3).

<sup>163</sup> *Id.* § 58-13D-3(B).

<sup>164</sup> *See id.* § 58-13D-5.

<sup>165</sup> *Id.* § 58-13D-8.

<sup>166</sup> *Id.* § 58-13D-4.

<sup>167</sup> N.D. CENT. CODE § 10-04-08.5(1)(a).

<sup>168</sup> *Id.* § 50-25.2-01(17).

“Financial exploitation” means:

- (1) The wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of an eligible adult; or
- (2) Any act or omission taken by a person, including through the use of a power of attorney, guardianship, or conservatorship of an eligible adult, to:
  - (a) Obtain control, through deception, intimidation, or undue influence, over the eligible adult's money, assets, or property, to deprive the eligible adult of the ownership, use, benefit, or possession of the eligible adult's money, assets, or property; or
  - (b) Convert money, assets, or property of the eligible adult to deprive the eligible adult of the ownership, use, benefit, or possession of the eligible adult's money, assets, or property.<sup>169</sup>

**Mandatory Conduct:** A qualified individual who “reasonably believes financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted . . . shall notify the department of human services and the commissioner.”<sup>170</sup> A “**qualified individual**” means “any agent, investment adviser representative, or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.”<sup>171</sup>

**Permissive Conduct:** A qualified individual may also “notify a third party reasonably associated with the eligible adult or any other person permitted under state or federal law or rule, rules of a self-regulating organization, or customer agreement.”<sup>172</sup> However, the qualified individual is prohibited from notifying “a designated third party who is suspected of financial exploitation or other abuse of the eligible adult.”<sup>173</sup>

A broker-dealer or investment adviser may *delay* disbursement of funds or securities from an account of an eligible adult or an account on which an eligible adult is a beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>174</sup>

**Records:** A broker-dealer or investment adviser “shall provide” access to or copies of records relevant to the suspected or attempted financial exploitation, either as part of referral to or on request from, the department of human services and law enforcement.<sup>175</sup>

**Safe Harbor:** “A broker-dealer or investment adviser who in good faith and exercising reasonable care complies with this section is immune from any administrative or civil liability that

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<sup>169</sup> *Id.* § 10-04-08.5(1)(b).

<sup>170</sup> *Id.* § 10-04-08.5(2).

<sup>171</sup> *Id.* § 10-04-08.5(1)(c).

<sup>172</sup> *Id.* § 10-04-08.5(3).

<sup>173</sup> *Id.*

<sup>174</sup> *See id.* § 10-04-08.5(5).

<sup>175</sup> *Id.* § 10-04-08.5(7).

may otherwise arise from a delay in the transaction or disbursement in accordance with this section.”<sup>176</sup>

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**Oregon:**

A “**vulnerable person**” includes an elderly person (age 65 or older), a financially incapable person, an incapacitated person, or a person with a physical or mental impairment causing them to be susceptible to force, threats, duress, coercion, persuasion, or physical or emotional injury.<sup>177</sup>

“**Financial exploitation**” means:

- (A) Wrongfully taking assets, funds or property belonging to or intended for the use of another person;
- (B) Alarming another person by conveying a threat to wrongfully take or appropriate money or property of the person if the person would reasonably believe that the threat conveyed would be carried out;
- (C) Misappropriating, misusing or transferring without authorization any money from any account held jointly or singly by another person; or
- (D) Using the income or assets of another person for purposes other than the support and maintenance of the person without the person's consent.<sup>178</sup>

**Mandatory Conduct:** A qualified individual who has “reasonable cause to believe that financial exploitation of a vulnerable person with whom the qualified individual comes into contact has occurred, has been attempted or is being attempted” shall “as soon as is practicable, notify the Department of Consumer and Business Services, either orally or in writing.”<sup>179</sup> A “**qualified individual**” means an individual who is a salesperson, an investment advisor representative, or “[a] person who serves in a supervisory, compliance or legal capacity for a broker-dealer or state investment adviser, or who is otherwise identified in the written supervisory procedures of a broker-dealer or state investment adviser.”<sup>180</sup>

**Permissive Conduct:** A qualified individual may also “notify any third party who was previously designated by the vulnerable person to receive information from the qualified individual regarding the vulnerable person, or whom the qualified individual is otherwise permitted to notify under state or federal law or customer agreement.”<sup>181</sup> However, the qualified individual is prohibited from

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<sup>176</sup> *Id.* § 10-04-08.5(4).

<sup>177</sup> OR. REV. STAT. § 59.480(5) (citing *id.* § 124.100(1)(e)).

<sup>178</sup> *Id.* § 59.480(1)(a).

<sup>179</sup> *Id.* § 59.485(1).

<sup>180</sup> *Id.* § 59.480(5).

<sup>181</sup> *Id.* § 59.490(1).

notifying “any third party that is suspected of actual or attempted financial exploitation or other abuse of the vulnerable person.”<sup>182</sup>

A broker-dealer or state investment adviser may *delay disbursement* from an account of a vulnerable person or an account on which a vulnerable person is a beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>183</sup>

**Records:** “Upon request of the Department of Consumer and Business Services, the Department of Human Services or a law enforcement agency, a broker-dealer or state investment adviser shall provide copies of records related to any suspected financial exploitation of a vulnerable person to the requester.”<sup>184</sup>

**Safe Harbor:** Qualified individuals, broker-dealers, and state investment advisers acting in “good faith, with reasonable cause and with the exercise of reasonable care” are not liable for disclosures or delays under the statute.<sup>185</sup>

**Civil Penalty:** Any person who “violates or who procures, aids or abets the violation of” the new statutes is subject to civil penalties up to \$1,000.00 per violation of the mandatory reporting under ORS 59.485, and up to \$20,000.00 per violation of the permissive delay of disbursements requirements or reporting to identified third parties.<sup>186</sup>

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### **Tennessee:**

A “**designated adult**” means a person sixty-five (65) years of age or older, or a person “who is eighteen (18) years of age or older and who, because of mental or physical dysfunction, is unable to manage such person's own resources, carry out activities of daily living, or protect against neglect or hazardous or abusive situations, without assistance from others.”<sup>187</sup>

“**Financial exploitation**” means:

- (A) The wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or property of a designated adult; or
- (B) Any act or omission by a person, including through the use of a power of attorney, guardianship, or conservatorship of a designated adult, to:
  - (i) Obtain control, through deception, intimidation, or undue influence, over the designated adult's money, assets, or property to deprive the designated

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<sup>182</sup> *Id.*

<sup>183</sup> *See id.* § 59.495.

<sup>184</sup> *Id.* § 59.505.

<sup>185</sup> *Id.* § 59.500.

<sup>186</sup> *Id.* § 59.995.

<sup>187</sup> TENN. CODE ANN. § 48-1-102(9).

adult of the ownership, use, benefit, or possession of his or her money, assets, or property; or  
(ii) Convert money, assets, or property of the designated adult to deprive such designated adult of the ownership, use, benefit, or possession of his or her money, assets, or property[.]<sup>188</sup>

**Permissive Conduct (Not Mandatory):** A qualified individual who “reasonably believes that financial exploitation of a designated adult has occurred, has been attempted or may have been attempted, or is being attempted” may, “in cooperation with the qualified individual’s broker-dealer or investment adviser. . . notify the commissioner.”<sup>189</sup> A “**qualified individual**” means “any agent, investment adviser representative, or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.”<sup>190</sup>

A qualified individual may also notify any of the following individuals “concerning the qualified individual’s belief that financial exploitation may have occurred”:

- (A) A relative of the designated adult as defined in § 71-6-102(12);
- (B) A legal guardian of the designated adult;
- (C) A trustee, co-trustee, or successor trustee of the account of the designated adult;
- (D) An agent under a power of attorney of the designated adult; or
- (E) Any other person permitted under existing laws, rules, regulations, or customer agreement.<sup>191</sup>

A broker-dealer or investment adviser may *delay disbursement* from an account of a designated adult or an account on which a designated adult is a beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>192</sup>

**Records:** A broker-dealer or investment adviser “shall provide” access to or copies of records relevant to the suspected financial exploitation to the commissioner [of commerce and insurance].<sup>193</sup>

**Safe Harbor:** A broker-dealer, investment adviser, or qualified person acting in “good faith and exercising reasonable care” who complies with the statute is “immune from liability for such conduct.”<sup>194</sup>

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<sup>188</sup> *Id.* § 48-1-102(10).

<sup>189</sup> *Id.* § 48-1-127(a)(1).

<sup>190</sup> *Id.* § 48-1-102(18).

<sup>191</sup> *Id.* § 48-1-127(a)(2)(A)-(E).

<sup>192</sup> *See id.* § 48-1-127(b).

<sup>193</sup> *Id.* § 48-1-127(d).

<sup>194</sup> *Id.* § 48-1-127(c).

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**Texas:**

**“Vulnerable adult”** has the same meaning as in Section 280.001, Finance Code, and means an elderly person, a person with a disability, or “an individual receiving services as that term is defined by rule by the executive commissioner of the Health and Human Services Commission.”<sup>195</sup>

**“Financial exploitation”** of a covered adult includes any of the following acts:

- (A) the wrongful or unauthorized taking, withholding, appropriation, or use of the money, assets, or other property or the identifying information of a person; or
- (B) an act or omission by a person, including through the use of a power of attorney on behalf of, or as the conservator or guardian of, another person, to:
  - (i) obtain control, through deception, intimidation, fraud, or undue influence, over the other person's money, assets, or other property to deprive the other person of the ownership, use, benefit, or possession of the property; or
  - (ii) convert the money, assets, or other property of the other person to deprive the other person of the ownership, use, benefit, or possession of the property.<sup>196</sup>

**Mandatory Conduct:** “If a securities professional or a person serving in a legal capacity for a dealer or investment adviser has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the dealer or investment adviser has occurred, is occurring, or has been attempted, [then they] shall notify the dealer or investment adviser of the suspected financial exploitation.”<sup>197</sup> **“Securities professional”** means an agent, an investment adviser representative, or a person who serves in a supervisory or compliance capacity for a dealer or investment adviser.<sup>198</sup>

A dealer or investment adviser that is “notified of suspected financial exploitation under Subsection B of this section or otherwise has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the dealer or investment adviser has occurred, is occurring, or has been attempted,” shall “assess the suspected financial exploitation and submit a report to the Securities Commissioner [in accordance with the statute].”<sup>199</sup>

If a dealer or investment adviser submits a report of suspected financial exploitation under the statute, it “must place a hold on any transaction involving an account of the vulnerable adult if the

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<sup>195</sup> TEX. REV. CIV. STAT. ANN. Art. 581-45(A)(2); TEX. FIN. CODE § 280.001(5).

<sup>196</sup> *Id.*

<sup>197</sup> TEX. REV. CIV. STAT. ANN. Art. 581-45(B).

<sup>198</sup> *Id.* 581-45(A)(3).

<sup>199</sup> *Id.* 581-45(C).

hold is requested by the Securities Commissioner, the department, or a law enforcement agency.”<sup>200</sup> The hold is limited in time pursuant to statute.<sup>201</sup>

Each dealer and investment adviser “shall adopt internal policies, programs, plans, or procedures for the securities professionals or persons serving in a legal capacity for the dealer or investment adviser to make the notification required under Subsection B of this section and for the dealer or investment adviser to conduct the assessment and submit the reports required under Subsection C of this section.”<sup>202</sup> Each dealer and investment adviser “shall adopt internal policies, programs, plans, or procedures for placing a hold on a transaction involving an account of a vulnerable adult under Subsection G of this section.”<sup>203</sup>

**Permissive Conduct:** A dealer or investment adviser may also “notify a third party reasonably associated with the vulnerable adult of the suspected financial exploitation[.]”<sup>204</sup> However, the dealer or investment adviser is prohibited from notifying a designated third party that is suspected of financial exploitation or other abuse of the vulnerable adult.<sup>205</sup>

If a dealer or investment adviser submits a report of suspected financial exploitation under the statute, it also may place a hold on any transaction that “involves an account of the vulnerable adult [] and the dealer or investment adviser has cause to believe is related to the suspected financial exploitation.”<sup>206</sup> The hold is limited in time pursuant to statute.<sup>207</sup>

**Records:** A dealer or investment adviser, on request, “shall provide” access to or copies of records relevant to the suspected financial exploitation to the Securities Commissioner, the department, law enforcement, or prosecuting attorney’s office either as part of a report to, or on request from, those agencies.<sup>208</sup>

**Safe Harbor:** A securities professional or person serving in a legal capacity for a dealer or investment adviser who makes a notification under Subsection B of this section, a dealer or investment adviser that submits a report under Subsection C of this section or makes a notification to a third party under Subsection F of this section, or a securities professional or person serving in a legal capacity who or dealer or investment adviser that testifies or otherwise participates in a judicial proceeding arising from a notification or report is immune from any civil or criminal liability arising from the notification, report, testimony, or participation in the judicial proceeding, unless the securities professional, person serving in a legal capacity for the dealer or investment adviser,

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<sup>200</sup> *Id.* 581-45(G)(2).

<sup>201</sup> *Id.* 581-45(H) and (I).

<sup>202</sup> *Id.* 581-45(E).

<sup>203</sup> *Id.* 581-45(J).

<sup>204</sup> *Id.* 581-45(F).

<sup>205</sup> *Id.* 581-45(F).

<sup>206</sup> *Id.* 581-45(G)(1).

<sup>207</sup> *Id.* 581-45(H) and (I).

<sup>208</sup> *Id.* 581-45(M).

or dealer or investment adviser acted in bad faith or with a malicious purpose.<sup>209</sup> Likewise, “a dealer or investment adviser that in good faith and with the exercise of reasonable care places or does not place a hold on any transaction under Subsection G(1) of this section is immune from civil or criminal liability or disciplinary action resulting from the action or failure to act.”<sup>210</sup>

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### **Utah:**

An “**eligible adult**” means an individual who is 65 years of age or older or a vulnerable adult defined in Section 62A-3-301.<sup>211</sup> A “vulnerable adult” means an elder adult, or an adult who has a mental or physical impairment which substantially affects that person's ability to:

- (a) provide personal protection;
- (b) provide necessities such as food, shelter, clothing, or mental or other health care;
- (c) obtain services necessary for health, safety, or welfare;
- (d) carry out the activities of daily living;
- (e) manage the adult's own financial resources; or
- (f) comprehend the nature and consequences of remaining in a situation of abuse, neglect, or exploitation.<sup>212</sup>

“**Financial exploitation of an eligible adult**” means:

- (a) the wrongful or unauthorized taking, withholding, appropriation, or use of money, assets, or other property of an eligible adult; or
- (b) an act or omission, including through a power of attorney, guardianship, or conservatorship of an eligible adult, to:
  - (i) obtain control, through deception, intimidation, or undue influence, over an eligible adult's money, assets, or other property to deprive the eligible adult of the ownership, use, benefit, or possession of the eligible adult's money, assets, or other property; or
  - (ii) convert an eligible adult's money, assets, or other property to deprive the eligible adult of the ownership, use, benefit, or possession of the eligible adult's money, assets, or other property.<sup>213</sup>

**Mandatory Conduct:** A broker-dealer, investment adviser, or a qualified individual who “reasonably believes that a person has engaged in or attempted to engage in the financial exploitation of an eligible adult . . . shall promptly notify the division and Adult Protective Services.”<sup>214</sup> A “**qualified individual**” means an agent, investment adviser representative, or “an

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<sup>209</sup> *Id.* 581-45(K).

<sup>210</sup> *Id.* 581-45(L) (emphasis added).

<sup>211</sup> UTAH CODE ANN. § 61-1-201(2).

<sup>212</sup> *Id.* § 62A-3-301(29).

<sup>213</sup> *Id.* § 61-1-201(3).

<sup>214</sup> *Id.* § 61-1-202(1)(a).

individual who serves in a supervisory, compliance, or legal capacity for a broker-dealer or an investment adviser.”<sup>215</sup>

**Permissive Conduct:** A broker-dealer, investment adviser, or a qualified individual may also “notify a person previously designated by the eligible adult, a person allowed to receive notification under applicable law or any customer agreement, or an individual reasonably associated with the eligible adult.”<sup>216</sup> However, the qualified individual is prohibited from notifying a third party if the third party is suspected of engaging in the financial exploitation of the eligible adult or other abuse of the eligible adult.”<sup>217</sup>

A broker-dealer or investment adviser may *delay a disbursement or transaction* from an eligible adult's account or from an account on which the eligible adult is a beneficiary, so long as they follow the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>218</sup>

**Records:** Upon request, a broker-dealer or investment adviser “shall provide” access to or copies of records relevant to the suspected or attempted financial exploitation of an eligible adult to Adult Protective Services or law enforcement.<sup>219</sup>

**Safe Harbor:** “A broker-dealer or investment adviser who, in good faith and exercising reasonable care, delays a disbursement or transaction in accordance with Section 61-1-204 is immune from administrative or civil liability that might otherwise arise from the delay.” UC § 61-1-203.

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### **Vermont:**

**“Eligible adult”** includes a person 65 years of age or older or vulnerable adults whose health and welfare may be adversely affected through abuse, neglect, or exploitation.”<sup>220</sup>

**“Financial exploitation”** means:

- (1) The wrongful or unauthorized taking, withholding, appropriation, or use of money, assets or property of an eligible adult; or
- (2) Any act or omission taken by a person, including through the use of a power of attorney or, guardianship, or conservatorship of an eligible adult, to:

- (A) Obtain control, through deception, intimidation or undue influence, over the eligible adult's money, assets or property to deprive the eligible adult of

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<sup>215</sup> *Id.* § 61-1-201(5).

<sup>216</sup> *Id.* § 61-1-202(1)(b).

<sup>217</sup> *Id.* § 61-1-202(2).

<sup>218</sup> *See id.* § 61-1-204.

<sup>219</sup> *Id.* § 61-1-206.

<sup>220</sup> VT. STAT. ANN. tit. 33, § 6901; VT. ADMIN. CODE R. § 4-4-8:1-2(y) (defining an “eligible person”).

the ownership, use, benefit or possession of his or her money, assets or property; or  
(B) Convert money, assets or property of the eligible adult to deprive such eligible adult of the ownership, use, benefit or possession of his or her money, assets or property.<sup>221</sup>

**Mandatory Conduct:** A qualified individual who “reasonably believes that financial exploitation of an eligible adult may have occurred, may have been attempted, or is being attempted” to “promptly notify Adult Protective Services in the Vermont Department of Disabilities, Aging & Independent Living and the commissioner (collectively “the agencies”).”<sup>222</sup> A “**qualified individual**” means “any agent, investment adviser representative or person who serves in a supervisory, compliance, or legal capacity for a broker-dealer or investment adviser.”<sup>223</sup>

**Permissive Conduct:** A qualified individual may also “notify any third party previously designated by the eligible adult.”<sup>224</sup> However, the qualified individual is prohibited from notifying “any designated third party that is suspected of financial exploitation or other abuse of the eligible adult.”  
*Id.*

A broker-dealer or investment adviser may *delay disbursement* from an account of an eligible adult or an account on which an eligible adult is a beneficiary, so long as they follow the requirements for notice, reporting, internal review, and designated time periods.<sup>225</sup>

**Records:** A broker dealer or investment adviser “must” provide access to or copies of records relevant to the suspected or attempted financial exploitation of an eligible adult, on referral to or request from, state agencies charged with administering state adult protective services laws and law enforcement.<sup>226</sup>

**Safe Harbor:** A broker-dealer or investment adviser that, in good faith and exercising reasonable care, complies with subsection (e) above is immune from any administrative or civil liability that might otherwise arise from such delay in a disbursement in accordance with this section.<sup>227</sup>

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### **Virginia:**

As used in statutes relating to the protection of adults, an “**adult**” includes “any person 60 years of age or older, or any person 18 years of age or older who is incapacitated and who resides in

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<sup>221</sup> VT. ADMIN. CODE R. 4-4-8:1-2(cc).

<sup>222</sup> *Id.* 4-4-8:8-5(a).

<sup>223</sup> *Id.* 4-4-8:1-2(bbb).

<sup>224</sup> *Id.* 4-4-8:8-5(c).

<sup>225</sup> *See id.* 4-4-8:8-5(e).

<sup>226</sup> *Id.* 4-4-8:8-5(g).

<sup>227</sup> *Id.* 4-4-8:8-5(f).

the Commonwealth[.]”<sup>228</sup>An “incapacitated person” means “any adult who is impaired by reason of mental illness, intellectual disability, physical illness or disability, advanced age or other causes to the extent that the adult lacks sufficient understanding or capacity to make, communicate or carry out responsible decisions concerning his or her well-being.”<sup>229</sup>

“Financial exploitation” under the newly enacted law means:

the illegal, unauthorized, improper, or fraudulent use of the funds, property, benefits, resources, or other assets of an adult, as defined in § 63.2-1603, for another's profit, benefit, or advantage, including a caregiver or person serving in a fiduciary capacity, or that deprives the adult of his rightful use of or access to such funds, property, benefits, resources, or other assets. "Financial exploitation" includes

- (i) an intentional breach of a fiduciary obligation to an adult to his detriment or an intentional failure to use the financial resources of an adult in a manner that results in neglect of such adult;
- (ii) the acquisition, possession, or control of an adult's financial resources or property through the use of undue influence, coercion, or duress; and
- (iii) forcing or coercing an adult to pay for goods or services against his will for another's profit, benefit, or advantage if the adult did not agree, or was tricked, misled, or defrauded into agreeing, to pay for such goods or services.<sup>230</sup>

**Permissive Conduct (Not Mandatory):** Any “financial institution staff who suspects that an adult has been exploited financially” to “report such suspected financial exploitation to the local department of the county or city wherein the adult resides or wherein the exploitation is believed to have occurred or to the adult protective services hotline.”<sup>231</sup> **“Financial institution staff”** means “any employee, agent, qualified individual, or representative of a bank, trust company, savings institution, loan association, consumer finance company, credit union, investment company, investment advisor, securities firm, accounting firm, or insurance company.”<sup>232</sup>

Financial institution staff may *refuse to execute a transaction, may delay a transaction, or may refuse to disburse funds* if the financial institution staff:

- (i) believes in good faith that the transaction or disbursement may involve, facilitate, result in, or contribute to the financial exploitation of an adult or
- (ii) makes, or has actual knowledge that another person has made, a report to the local department or adult protective services hotline stating a good faith belief that the transaction or disbursement may involve, facilitate, result in, or contribute to the financial exploitation of an adult [,] [a]nd the financial institution staff otherwise follows the statutory requirements for notice, reporting, internal review, and designated time periods.<sup>233</sup>

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<sup>228</sup> VA. CODE ANN. § 63.2-1603.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* § 63.2-1606(C).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *See id.* § 63.2-1606(L).

**Safe Harbor:** A person who reports or provides information about suspected financial exploitation under the statute, or who testifies in any judicial proceeding arising from such report, records or information, or who takes or causes to be taken with the adult's or the adult's legal representative's informed consent photographs, video recordings, or appropriate medical imaging of the adult who is subject of a report shall be immune from any civil or criminal liability . . . unless such person acted in bad faith or with a malicious purpose."<sup>234</sup>

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<sup>234</sup> *Id.* § 63.2-1606(E).

# STATES WITH A CIVIL PRIVATE RIGHT OF ACTION FOR FINANCIAL ELDER ABUSE AND EXPLOITATION

Jeff Aidikoff, Esq. and Ashley Rivkin

## INTRODUCTION

Financial elder abuse and exploitation costs victims up to an estimated \$2.6 billion annually.<sup>1</sup> Although the number of reported cases is on the rise, financial abuse is often more difficult to detect and less widely reported than physical abuse because a person of trust such as a family member, or a fiduciary such as an investment advisor, is more likely to perpetrate the abuse.<sup>2</sup> These factors create unique challenges in preventing, detecting, and responding to cases of financial exploitation and abuse. Some states have addressed the difficulties associated with financial elder abuse and exploitation by enacting statutes with a civil private right of action, and heightened remedies and penalties to encourage enforcement and deter abuse; other states have failed to specifically address the growing epidemic of financial elder abuse and exploitation by statute and thus rely on laws that prohibit unlawful conduct generally, in addition to criminal penalties for people who abuse the elderly population.

This article is a survey of financial elder abuse laws in the U.S. It is divided into two tiers, the first presents each state that has enacted a statute (or statutes) creating a civil private right of action for financial elder abuse or exploitation and provides the available legal remedies for private civil litigants. The second tier presents the states that do not create a civil private right of action for financial elder abuse or exploitation, but which do have general elder abuse prevention laws, or which criminalize abusive and/or deceptive practices against elders.

### A. TIER 1:

Tier 1 represents states with statutes creating a civil private right of action for financial elder abuse and/or exploitation.

#### Arizona:

Arizona's financial abuse statute applies specifically to "Vulnerable Adults" and creates a private right of action for civil litigants for claims of financial exploitation.<sup>3</sup> The law requires a person who is in a position of trust and confidence to a vulnerable adult to "use the vulnerable adult's assets solely for the benefit of the vulnerable adult and not for the benefit of the person who is in the

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<sup>1</sup> Kevin E. Hansen, et al., *Criminal and Adult Protection Financial Exploitation Laws In the United States: How Do the Statutes Measure Up To Existing Research?*, 42 MITCHELL HAMLINE L. REV. 897, 899 (2016).

<sup>2</sup> Ron Acierno, et al., *Prevalence and Correlates of Emotional, Physical, Sexual and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100 AM. J. PUB. HEALTH 292-97 (Feb. 2010), available at <http://doi.org/10.2105/AJPH.2009.163089>; Lifespan of Greater Rochester, Inc., et al., *Under the Radar: New York State Elder Abuse Prevalence Study—Self-Reported Prevalence and Documented Case Surveys—Final Report*, 50 (May 2011), available at <http://www.nyselderabuse.org/documents/ElderAbusePrevalenceStudy2011.pdf>. This study estimated that only 1 in 44 cases of financial abuse came to the attention of agencies that provide services to victims of elder abuse in New York State.

<sup>3</sup> ARIZ. REV. STAT. ANN. §46-451 (2017).

position of trust and confidence to the vulnerable adult or the person's relatives.”<sup>4</sup> The court may award actual damages, reasonable costs, and attorney fees in a civil action brought by, or on behalf of, a vulnerable adult, including damages in an amount up to two times the amount of the actual damages; actual damages for financial exploitation are also not limited by the victim's survival.<sup>5</sup>

However, Arizona defines “Vulnerable Adult” as “an individual who is eighteen years of age or older and who is unable to protect himself from abuse, neglect, or exploitation by others because of a physical or mental impairment,” and also includes an incapacitated person as defined in section 14-510 of Arizona’s Revised Statute Annotated.<sup>6</sup>

### **California:**

California’s Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) creates a private right of action for civil litigants for claims of elder financial abuse, which occurs “when a person takes, secretes, appropriates, obtains or retains real or personal property of an elder or dependent adult for wrongful use or with intent to defraud or both,” or “when someone *assists* in taking secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.”<sup>7</sup> An elder is a person sixty-five years of age or older.<sup>8</sup> The statute further provides that “[a] person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity *knew or should have known that this conduct is likely to be harmful* to the elder or dependent adult.”<sup>9</sup>

Further, under the EADACPA, “[w]here it is proven by a preponderance of the evidence that a defendant is liable for financial abuse ... in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorneys fees and costs.”<sup>10</sup> Furthermore, “where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse,” the Plaintiff may recover punitive damages, in addition to compensatory damages, all other remedies otherwise provided by law, and reasonable attorney fees and costs.<sup>11</sup> There is a four-year statute of limitations in elder and dependent adult financial abuse cases.<sup>12</sup>

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<sup>4</sup> ARIZ. REV. STAT. ANN. §46-456.A (2017).

<sup>5</sup> *Id.*

<sup>6</sup> ARIZ. REV. STAT. ANN. §46-451.A.9 (2017).

<sup>7</sup> CAL. WELF. & INST. CODE § 15610.30 (West 2017) (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> CAL. WELF. & INST. CODE § 15657.5; CAL. WELF. & INST. CODE § 15610.3(b) (West 2017) (emphasis added).

<sup>10</sup> CAL. WELF. & INST. CODE § 15657.5(a) (West 2017).

<sup>11</sup> CAL. WELF. & INST. CODE § 15657.5 (West 2017). CAL. CIV CODE § 3294(a) (West 2017).

<sup>12</sup> CAL. WELF. & INST. CODE § 15657.5 (West 2017).

However, an employer shall not be liable for damages “based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others, or authorized or ratified the wrongful conduct for which the damages are awarded, or was personally guilty of oppression, fraud, or malice.”<sup>13</sup> For a corporate employer, “the advance knowledge and conscious disregard, authorization, ratification, or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.”<sup>14</sup>

A civil litigant in California may also make a claim on behalf of a financially aggrieved elder under its Consumer Legal Remedies Act (CLRA).<sup>15</sup> Specifically, the CLRA prohibits specified unfair and deceptive acts and practices in a transaction intended to result or which results in the sale or lease of goods or services to any consumer.<sup>16</sup> It also authorizes the recovery of punitive damages, three times actual damages, five-thousand dollars (\$5,000), as well as reasonable attorney fees, when the victim is a senior citizen (defined as 65 years or older).<sup>17</sup>

And last, California prohibits unfair competition and deceptive trade practices,<sup>18</sup> providing seniors victimized under the law to recover treble damages if it is found that the defendant “knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.”<sup>19</sup>

### **Connecticut:**

Connecticut’s elder abuse statute creates a civil private right of action for an elder who has been victimized and/or exploited, and provides recovery of actual and punitive damages for the exploitation, plus costs, and reasonable attorney fees.<sup>20</sup> An “elderly person” is anyone sixty-years or older, and “exploitation” is defined as “the act or process of taking advantage of an elderly person by another person or caregiver whether for monetary, personal or other benefit, gain, or profit.”<sup>21</sup>

An action under the statute “may be brought by the elderly person, or the elderly person’s guardian or conservator, by a person or organization acting on behalf of the elderly person with the consent of such elderly person or the elderly person’s guardian or conservator, or by the personal

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<sup>13</sup> CAL. CIV. CODE § 3294(b) (West 2017).

<sup>14</sup> *Id.*

<sup>15</sup> CAL. CIV. CODE § 1750, *et seq.*

<sup>16</sup> CAL. CIV. CODE § 1770(a) (West 2017).

<sup>17</sup> CAL. CIV. CODE § 1780, *et seq.*

<sup>18</sup> CAL. BUS. & PROF. CODE § 17200, *et seq.*

<sup>19</sup> CAL. CIV. CODE § 3345(b)(1) (West 2017).

<sup>20</sup> CONN. GEN. STAT. § 17b-462 (2015).

<sup>21</sup> CONN. GEN. STAT. § 17b-450(7) (FORMERLY SEC.17A-430) (2015).

representative of the estate of a deceased elderly victim.”<sup>22</sup> The court may also prohibit “the defendant from transferring, depleting, or otherwise alienating or diminishing any funds, assets or property.”<sup>23</sup>

### **Delaware**

Although Delaware has not enacted a specific statute addressing financial elder abuse, it does prohibit damages to an elder person (defined as 65 years of age or older) as a result of unfair or deceptive practices, including but not limited to misrepresentation and/or material omission.<sup>24</sup> Elderly civil litigants may seek injunctive relief and may also recover three times their actual damages, as well as costs and reasonable attorney fees for violations under the statute.<sup>25</sup>

### **Florida:**

Florida provides a private right of action for financial exploitation of a vulnerable adult.<sup>26</sup> A “vulnerable adult” is “a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or *the infirmities of aging.*”<sup>27</sup>

Exploitation is defined as where:

a person who ... [s]tands in a position of trust and confidence<sup>28</sup> with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult’s funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or [k]nows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult’s funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.<sup>29</sup>

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<sup>22</sup> CONN. GEN. STAT. § 17b-462(a) (2015).

<sup>23</sup> CONN. GEN. STAT. § 17b-462(b) (2015).

<sup>24</sup> DEL. CODE ANN. tit. 6, § 2532, § 2580(a) (2017).

<sup>25</sup> DEL. CODE ANN. tit. 6, § 2583(a), § 2533(a) (2017).

<sup>26</sup> FLA. STAT. § 415.1111 (2017).

<sup>27</sup> FLA. STAT. § 415.102(28) (2017) (emphasis added).

<sup>28</sup> This includes, among other relationships including child or spouse, someone who has a fiduciary relationship with the elderly person or disabled adult, including but not limited to, “a court-appointed or voluntary guardian, trustee, attorney or conservator.” FLA. STAT. § 415.102(11) (2017).

<sup>29</sup> FLA. STAT. § 415.102(8)(a) (2017).

Exploitation may also include, but is not limited to, breaches of fiduciary relationship, misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or “negligent failure to effectively failure to effectively use a vulnerable adult’s income and assets for the necessities required for that person’s support and maintenance.”<sup>30</sup>

A successful civil litigant may recover actual and punitive damages, reasonable attorney fees and costs.<sup>31</sup> Any such “action may be brought by the vulnerable adult, or that person’s guardian, by a person or organization acting on behalf of the vulnerable adult with the consent of that person or that person’s guardian, or by the personal representative of the estate of a deceased victim without regard to whether the cause of death resulted from the abuse, neglect, or exploitation.”<sup>32</sup> The remedies provided under the statute “are in addition to and cumulative with other legal and administrative remedies available to a vulnerable adult.”<sup>33</sup> Florida also provides that where a party is over the age of 65, the court may advance the trial date.<sup>34</sup>

### **Georgia:**

Although Georgia has not enacted a specific statute addressing financial elder abuse, it does provide enhanced remedies to an elderly as a result of unfair or deceptive practices.<sup>35</sup> Specifically, a civil litigant may recover “actual damages, punitive damages, if appropriate, and reasonable attorney fees.”<sup>36</sup>

### **Illinois:**

Illinois provides a civil private right of action for an elder or anyone suing on their behalf for financial exploitation, and defines elderly persons as 60 years of age or older.<sup>37</sup> A person commits financial exploitation of an elderly person when “he or she stands in a position of trust or confidence with the elderly person ... and he or she knowingly and by deception or intimidation obtains control over the property of an elderly person ... or illegally uses the assets or resources of an elderly person.”<sup>38</sup> A person who stands in a position of trust includes anyone with a legal or fiduciary relationship with the elderly person, in addition to financial planning or investment professionals.<sup>39</sup> “Deception” includes misrepresentation and false pretense, and false promise in

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<sup>30</sup> FLA. STAT. § 415.102(8)(b) (2017).

<sup>31</sup> FLA. STAT. § 415.1111 (2012).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> FLA. STAT. § 415.1115 (2012).

<sup>35</sup> GA. CODE ANN. § 10-1-850, *et seq.*

<sup>36</sup> GA. CODE ANN. § 10-1-853 (2017).

<sup>37</sup> 720 ILL. COMP. STAT. 5/17-56 (2014).

<sup>38</sup> 720 ILL. COMP. STAT. 5/17-56(A) (2014).

<sup>39</sup> *Id.*

order to induce, encourage or solicit, the elderly person to enter into a contract or agreement.<sup>40</sup> In addition, “[t]he illegal use of the assets or resources of an elderly person or a person with a disability includes, but is not limited to, the misappropriation of those assets or resources by undue influence, breach of a fiduciary relationship, fraud, deception, extortion, or use of the assets or resources contrary to law.”<sup>41</sup>

The statute provides damages of treble the amount of the value of the property obtained, plus reasonable attorney fees and costs.<sup>42</sup> The standard of proof under the statute is a preponderance of the evidence.<sup>43</sup>

### **Iowa:**

Under Iowa law, elder financial exploitation occurs when a person in a position of trust or confidence of a vulnerable elder knowingly, either” by undue influence, deception, coercion, fraud, or extortion, obtains control over or otherwise uses or diverts the benefits, property, resources, belongings, or assets of the vulnerable elder.”<sup>44</sup> “Vulnerable elder” is defined as “a person sixty years of age or older who is unable to protect himself or herself from elder abuse as a result of age or a mental or physical condition.”<sup>45</sup> In a successful claim under the act, the court may order any relief the court considers necessary, including but not limited to the recovery of attorney fees and costs.<sup>46</sup>

### **Minnesota:**

In Minnesota, a vulnerable adult<sup>47</sup> who is a victim of financial exploitation has a cause of action against a person who committed the financial exploitation.<sup>48</sup> In an action under this subdivision, “the vulnerable adult is entitled to recover damages equal to three times the amount of compensatory damages or \$10,000, whichever is greater.”<sup>49</sup> In addition to those damages, “the vulnerable adult is entitled to recover reasonable attorney fees and costs, including reasonable fees for the services of a guardian or conservator or guardian ad litem incurred in connection with a claim.”<sup>50</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> 720 ILL. COMP. STAT. 5/17-56(B) (2014).

<sup>42</sup> 720 ILL. COMP. STAT. 5/17-56(G) (2014).

<sup>43</sup> *Id.*

<sup>44</sup> IOWA CODE § 235F.1(8) (2017).

<sup>45</sup> IOWA CODE § 235F.1(17) (2017).

<sup>46</sup> IOWA CODE § 235F.6.2(a-d), § 235F.6.7 (2017).

<sup>47</sup> “Vulnerable adult” is defined in MINN. STAT. § 626.5572.21 (2017).

<sup>48</sup> MINN. STAT. § 626.557.20 (2017).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

However, “vulnerable adult” only includes persons 18 years of age or older with physical impairments and certain medical issues, including but not limited to, an impaired ability to provide adequately for one’s “own care without assistance, including the provision of food, shelter, clothing, health care, or supervision.”<sup>51</sup>

### **Oregon:**

In Oregon, a civil private right of action may be brought for financial abuse in the following circumstances: “when a person wrongfully takes or appropriates money or property of a vulnerable person, without regard to whether the person taking or appropriating the money or property has a fiduciary relationship with the vulnerable person.”<sup>52</sup> A vulnerable person under the statute includes an elderly person, which is defined as a person who is 65 years of age or older.<sup>53</sup>

In addition, the court shall provide an amount equal to three times all economic damages resulting from the abuse or \$500 to a prevailing plaintiff (whichever is greater), as well as three times all noneconomic damages resulting from the financial abuse.<sup>54</sup> The court shall also provide reasonable attorney fees, and reasonable fees for the services of a conservator or guardian *ad litem*.<sup>55</sup> There is a seven-year statute of limitations for financial abuse under the statute.<sup>56</sup> However, this statute **does not apply** liability to financial institutions and broker-dealers.<sup>57</sup>

### **South Dakota:**

In 2016, South Dakota created a private right of action for civil litigants for claims of financial exploitation, although the court must find that the exploitation first occurred before an “elder has a cause of action against the perpetrator and may recover actual and punitive damages for the exploitation.”<sup>58</sup> Exploitation is defined as “the wrongful taking or exercising of control over property of an elder or adult with a disability with intent to defraud the elder or adult with a disability.”<sup>59</sup>

If the elder financial exploitation victim dies, their guardian/conservator, a person or organization acting on their behalf (with consent), or a personal representative of a deceased elder victim may bring the action.<sup>60</sup>

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<sup>51</sup> MINN. STAT. § 626.5572.21(a) (2017).

<sup>52</sup> OR. REV. STAT. § 124.110(1)(a) (2017).

<sup>53</sup> OR. REV. STAT. § 124.100 (1)(a) (2017).

<sup>54</sup> OR. REV. STAT. § 124.100(2)(a-d) (2017).

<sup>55</sup> *Id.*

<sup>56</sup> OR. REV. STAT. §124.130 (2017).

<sup>57</sup> OR. REV. STAT. §124.115(1)(a),(d) (2017).

<sup>58</sup> S.D. CODIFIED LAWS §22-46-13 (2017).

<sup>59</sup> S.D. CODIFIED LAWS §22-46-1(5) (2017).

<sup>60</sup> S.D. CODIFIED LAWS §22-46-13 (2017).

The court may also order a variety of remedies or preventative measures in a claim for financial exploitation. These include but are not limited to:

(1) Directing the respondent to refrain from exercising control over the funds, benefits, property, resources, belongings, or assets of the vulnerable adult; (2) Requiring the respondent to return custody or control of the funds, benefits, property, resources, belongings, or assets to the vulnerable adult; (3) Requiring the respondent to follow the instructions of the guardian, conservator, or attorney in fact of the vulnerable adult; and (4) Prohibiting the respondent from transferring the funds, benefits, property, resources, belongings, or assets of the vulnerable adult to any person other than the vulnerable adult.<sup>61</sup>

### **Tennessee:**

Tennessee provides civil litigants with a private right of action for financial exploitation of an elder.<sup>62</sup> Exploitation is defined as “the improper use by a caretaker of funds that have been paid by a governmental agency to an adult or to the caretaker for the use or care of the adult.”<sup>63</sup> However, “a financial institution is not a caretaker of funds or other assets unless such financial institution has entered into an agreement to act as a trustee of such property or has been appointed by a court of competent jurisdiction to act as a trustee with regard to the property of the adult.”<sup>64</sup> Available remedies for successful litigants under the statute “include compensatory damages and costs, where it is proven that a defendant is liable for abuse or exploitation, or for theft of such elderly person's or disabled adult's money or property whether by fraud, deceit, coercion, or otherwise,” costs shall include reasonable expenses.<sup>65</sup>

Additionally, “if it is proven upon clear and convincing evidence that abuse or exploitation or theft resulted from intentional, fraudulent, or malicious conduct by the defendant, a claimant shall be entitled to recover reasonable attorneys' fees.”<sup>66</sup> A right of action against a wrongdoer will not extinguish upon the death of the elder, but shall pass as provided in the Abatement and Survival of Actions chapter of the Tennessee Code.<sup>67</sup> However, if the alleged wrongdoer is a family member, “the cause of action shall pass to the victim's personal representative.”<sup>68</sup>

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<sup>61</sup> S.D. CODIFIED LAWS §22-46-13 (2017), as stated in S.D. CODIFIED LAWS §22-46-17 (2017).

<sup>62</sup> “Elderly person or elder means a person who is sixty (60) years of age or older who has some mental or physical dysfunctioning, including any resulting from age.” TENN. CODE ANN. §71-6-120 (a)(3) (2017).

<sup>63</sup> TENN. CODE ANN. §71-6-102(8) (2017).

<sup>64</sup> TENN. CODE ANN. §71-6-102(5)(B) (2017).

<sup>65</sup> TENN. CODE ANN. §71-6-120(d)(2017).

<sup>66</sup> *Id.*

<sup>67</sup> TENN. CODE ANN. § 20-5-120(b) (2017).

<sup>68</sup> *Id.*

## **Utah:**

Utah provides civil litigants with a private right of action for financial exploitation of a vulnerable adult, and provides for the recovery of compensatory damages, as well as costs and reasonable attorney fees to a prevailing plaintiff under the statute.<sup>69</sup> The statute further provides that upon the death of a vulnerable adult, any cause of action shall constitute an asset of the vulnerable adult's estate.<sup>70</sup> A vulnerable adult is defined as a person sixty-five (65) years of age or older or an adult who has a mental or physical impairment which substantially affects that person's ability manage their own financial resources, along with their ability to provide themselves with basic living needs.<sup>71</sup>

Further, Utah defines financial exploitation as where, by deception or intimidation, "a person who is either in a position of trust and confidence or business relationship or has undue influence over the vulnerable adult and knowingly ... obtains or uses, or endeavors to obtain or use, a vulnerable adults funds, credit, assets or other property with the intent to temporarily or permanently deprive" the elder of her assets and property.<sup>72</sup> Undue influence "occurs when a person uses the person's role, relationship, or power to gain control deceptively over the decision making of the vulnerable adult."<sup>73</sup>

## **West Virginia:**

West Virginia provides civil litigants with a private right of action for financial abuse as follows: in an action brought against a person for financial abuse, and upon finding that an elderly or protected adult has in fact been financially exploited, the court may order the return of property or assets which were improperly obtained, controlled, or used.<sup>74</sup> Financial Exploitation is defined as "the intentional misappropriation or misuse of funds or assets of an elderly person, protected person or incapacitated adult, but shall not apply to a transaction or disposition of funds or assets where the defendant made a good-faith effort to assist the elderly person, protected person or incapacitated adult with the management of his or her money or other things of value."<sup>75</sup>

Further, in a successful action under the statute, the court may order "[a]n award of actual damages to the person who brought the action ... or for the value of the property or assets lost as a result of the violations."<sup>76</sup> For violations committed by a person who is not in a position of

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<sup>69</sup> UTAH CODE ANN. § 62A-3-314(1),(3) (2016). The statute also provides that "If the defendant prevails in an action brought under this section, the court may order that the plaintiff pay the costs and reasonable attorney fees of the defendant, if the court finds that the action was frivolous, unreasonable, or taken in bad faith." UTAH CODE ANN. § 62A-3-314(4) (2016).

<sup>70</sup> UTAH CODE ANN. § 62A-3-314(2) (2016).

<sup>71</sup> UTAH CODE ANN. § 62A-3-301(29) (2016).

<sup>72</sup> UTAH CODE ANN § 76-5-111(4) (2016).

<sup>73</sup> UTAH CODE ANN § 76-5-111(1)(r) (2016).

<sup>74</sup> W. VA. CODE §55-7J-3(a)(1) (2016).

<sup>75</sup> W. VA. CODE §55-7J-1(b)(3) (2016).

<sup>76</sup> W. VA. CODE §55-7J-3(a)(2) (2016).

trust and confidence, a court may order (in addition to the remedies provided above) “payment of two times the amount of damages incurred or for the value of property or assets lost.”<sup>77</sup> Additionally, “[f]or violations committed by a person in a position of trust and confidence,” a court may order payment of treble damages.<sup>78</sup> Moreover, the court may award reasonable attorneys fees and costs to the prevailing party.<sup>79</sup>

In addition, the standard of proof for showing that an individual committed financial exploitation is by a preponderance of the evidence.<sup>80</sup> An elderly, protected, or incapacitated adult “may bring an action to enjoin the alleged commission of financial exploitation and may petition the court to freeze the assets of the person who allegedly committed the financial exploitation.”<sup>81</sup>

**A. TIER 2:**

Tier 2 lists each state that fails to provide a civil private right of action for financial elder abuse and/or exploitation. Nonetheless, these states do have reporting requirements and/or criminal statutes:

<b>General Elder Abuse Prevention Statutes</b>	
<b>State</b>	<b>Statutes</b>
Alaska	ALASKA STAT. § 47.24.010 <i>et seq.</i> ; ALASKA STAT. § 13.27.010 <i>et seq.</i>
Arkansas	ARK. STAT. ANN. § 5-37-227; ARK. STAT. ANN. § 28-74-101 <i>et seq.</i>
Colorado	COLO. REV. STAT. § 26-3.1-101 <i>et seq.</i> ; COLO. REV. STAT. § 18-6.5-108
Delaware	DEL. CODE ANN. tit. 31, § 3901 <i>et seq.</i> ; DEL. CODE ANN. tit. 11, § 1105; DEL. CODE ANN. tit. 6, § 2580 <i>et seq.</i>
District of Columbia	D.C. CODE ANN. § 7-1901 <i>et seq.</i> ; D.C. CODE ANN. § 22-3227.03; D.C. CODE ANN. § 21-2401.01 <i>et seq.</i>
Georgia	GA. CODE § 30-5-1 <i>et seq.</i> ; GA. CODE § 16-5-100 <i>et seq.</i> ; GA. CODE § 10-1-850 <i>et seq.</i> ; GA. CODE § 29-11-1 <i>et seq.</i>
Indiana	IND. CODE § 12-10-3-1 <i>et seq.</i> ; IND. CODE § 35-46-1-12; IND. CODE § 24-5-0.5-0.1 <i>et seq.</i>

<sup>77</sup> W. VA. CODE §55-7J-3(b)(1) (2016).

<sup>78</sup> W. VA. CODE §55-7J-3(b)(2) (2016).

<sup>79</sup> W. VA. CODE §55-7J-4(a) (2016).

<sup>80</sup> W. VA. CODE §55-7J-4(b) (2016).

<sup>81</sup> W. VA. CODE §55-7J-5(a) (2016).

Kansas	KAN. STAT. ANN. § 39-1401 <i>et seq.</i> ; KAN. STAT. ANN. § 17-1776; KAN. STAT. ANN. § 59-3050 <i>et seq.</i>
Kentucky	KY. REV. STAT. § 41.305; KY. REV. STAT. § 209.005 <i>et seq.</i> ; KY. REV. STAT. § 387.810 <i>et seq.</i>
Louisiana	LA. REV. STAT. ANN. § 15:1501 <i>et seq.</i> ; LA. REV. STAT. ANN. § 14:67.16; LA. REV. STAT. ANN. § 13:4251.101 <i>et seq.</i>
Maryland	MD. CODE ANN., FAM. LAW § 14-101 <i>et seq.</i> ; MD. CODE ANN., FIN. INST. § 1-306; MD. CODE ANN., CRIM. LAW § 8-801; MD. CODE ANN., COM. LAW § 13-204; MD. CODE ANN., EST. & TRUSTS § 13.5-101 <i>et seq.</i>
Massachusetts	MASS. GEN. LAWS ANN. ch. 19A, § 14 <i>et seq.</i> ; MASS. GEN. LAWS ANN. ch. 190B, § 5A-101 <i>et seq.</i>
Michigan	MICH. COMP. LAWS § 400.581 <i>et seq.</i> ; MICH. COMP. LAWS § 750.174a; MICH. COMP. LAWS § 700.5301 <i>et seq.</i>
Mississippi	MISS. CODE ANN. § 43-47-1 <i>et seq.</i> ; MISS. CODE ANN. § 93-14-101 <i>et seq.</i>
Missouri	MO. REV. STAT. § 192.2400 <i>et seq.</i> ; MO. REV. STAT. § 565.184 <i>et seq.</i> ; MO. REV. STAT. § 475.501 <i>et seq.</i>
Montana	MONT. CODE ANN. § 52-3-801 <i>et seq.</i> ; MONT. CODE ANN. § 30-10-306; MONT. CODE ANN. § 45-6-333; MONT. CODE ANN. § 72-5-601 <i>et seq.</i>
New Hampshire	N.H. REV. STAT. ANN. § 161-F:43 <i>et seq.</i> ; N.H. REV. STAT. ANN. § 464-C:1 <i>et seq.</i>
New Mexico	N.M. STAT. ANN. § 27-7-14 <i>et seq.</i> ; N.M. STAT. ANN. § 45-5A-101 <i>et seq.</i>
Nevada	NEV. REV. STAT. § 200.5091 <i>et seq.</i> ; NEV. REV. STAT. § 90.611 <i>et seq.</i> ; Nev. § 200.5093; NEV. REV. STAT. § 159.1991 <i>et seq.</i>
North Carolina	N.C. GEN. STAT. § 108A-99 <i>et seq.</i> ; N.C. GEN. STAT. § 14-112.2; N.C. GEN. STAT. § 35B-1 <i>et seq.</i>
North Dakota	N.D. CENT. CODE § 50-25.2-01 <i>et seq.</i> ; N.D. CENT. CODE § 12.1-31-07.1; N.D. CENT. CODE § 28-35-01 <i>et seq.</i>

Ohio	OHIO REV. CODE ANN. § 5101.60 <i>et seq.</i> ; OHIO REV. CODE ANN. § 2101.26; OHIO REV. CODE ANN. § 2913.02; OHIO REV. STAT. ANN. § 2112.011 <i>et seq.</i>
Vermont	VT. STAT. ANN. tit. 33, § 6901 <i>et seq.</i> ; VT. STAT. ANN. tit. 13, § 1380; VT. STAT. ANN. tit. 14, § 3151 <i>et seq.</i>
Washington <sup>82</sup>	WASH. REV. CODE § 74.34.005 <i>et seq.</i> ; WASH. REV. CODE § 11.90.010 <i>et seq.</i>
Idaho	IDAHO CODE § 39-5301 <i>et seq.</i> ; IDAHO CODE § 18-1505; IDAHO CODE § 15-13-101 <i>et seq.</i>
Oklahoma	OKLA. STAT. tit. 43A, § 10-101 <i>et seq.</i> ; OKLA. STAT. tit. 21, § 843.1 <i>et seq.</i> ; OKLA. STAT. tit. 30, § 3-301 <i>et seq.</i>
New York	N.Y. SOC. SERV. LAW § 473 <i>et seq.</i> ; N.Y. MENTAL HYG. LAW § 83.10 <i>et seq.</i>
New Jersey	N.J. REV. STAT. § 52:27D-406 <i>et seq.</i> ; N.J. REV. STAT. § 3B-12B-1 <i>et seq.</i>
Pennsylvania	35 PA. CONST. STAT. § 10225.101 <i>et seq.</i> ; 18 PA. CONS. STAT. § 4120; 20 PA. CONS. STAT. § 5901 <i>et seq.</i>
Rhode Island	R.I. GEN. LAWS § 33-19.1-1 <i>et seq.</i> ; R.I. GEN. LAWS § 42-66-1 <i>et seq.</i> ; R.I. GEN. LAWS § 42-9.2-1 <i>et seq.</i> ; R.I. GEN. LAWS § 11-41-5; R.I. GEN. LAWS § 33-15.2-101 <i>et seq.</i>
South Carolina	S.C. CODE ANN. § 43-35-5 <i>et seq.</i> ; S.C. CODE ANN. § 62-5-700 <i>et seq.</i>
Texas	TEX. HUM. RES. CODE ANN. § 48.001 <i>et seq.</i> ; TEX. PENAL CODE ANN. § 31.03; TEX. EST. CODE ANN. § 1001.001 <i>et seq.</i>

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<sup>82</sup> Washington provides that when a vulnerable adult has been subjected to financial exploitation either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby. Further, in an action brought under this section, a prevailing plaintiff shall be awarded his or her actual damages, together with the costs of the suit, including a reasonable attorneys' fee. The term "costs" includes, but is not limited to, the reasonable fees for a guardian, guardian ad litem, and experts, if any, that may be necessary to the litigation of a claim brought under this section. WASH. REV. CODE § 74.34.200

Virginia	VA. CODE ANN. § 63.2-1600 <i>et seq.</i> ; VA. CODE ANN. § 18.2-178.1; VA. CODE ANN. § 64.2-2100 <i>et seq.</i>
Wyoming	WYO. STAT. ANN. § 35-20-101 <i>et seq.</i> ; WYO. STAT. ANN. § 6-2-507; WYO. STAT. § 3-8-101 <i>et seq.</i>

**CONCLUSION**

Too many states have failed to provide abused elderly victims with a civil private right of action, as well as heightened remedies to attempt to address the growing epidemic of financial elder abuse and exploitation, as evidenced by Tier 2. In response, the Consumer Financial Protection Bureau ("CFPB") and North American Securities Administration Association ("NASAA") have issued recommendations and a model statute, respectively, attempting to address some of the unique challenges specific to financial institutions, as well as the shortcomings in statutory protections for seniors. Specifically, CFPB's key recommendations are a) train management and staff to prevent, detect and respond to suspected exploitation; b) use technology to monitor for signs of elder financial exploitation; c) report all cases of suspected exploitation to relevant federal, state and local authorities; d) file suspicious activity reports (SARS); e) expedite document requests for Adult Protective Services (APS), law enforcement and other government entities; f) comply with the Electronic Fund Transfer Act (EFTA) and Regulation E.<sup>83</sup>

The recommendations are intended to provide specific provisions for legislators addressing financial exploitation in their respective states, including holding financial institutions and their employees to higher standards of conduct and reporting. For added protections, NASAA recommends that Broker-dealers and Investment Advisors use more technology to monitor signs of elder financial exploitation, including but not limited to, suspicious activity reports (SAR's) and digital information sharing with account-holder-approved third parties.<sup>84</sup>

Many states across the country have failed to implement these recommendations and thus have fallen short in protecting one of the most vulnerable sections of our population, the elderly.

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<sup>83</sup> CONSUMER FIN. PROT. BUREAU, RECOMMENDATIONS AND REPORT FOR FINANCIAL INSTITUTIONS ON PREVENTING AND RESPONDING TO ELDER FINANCIAL EXPLOITATION (2016), at [http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/082016\\_cfpb\\_Networks\\_Study\\_Report.pdf](http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/082016_cfpb_Networks_Study_Report.pdf).

<sup>84</sup> *Id.*

## SENIOR INVESTORS: COMMON ISSUES AND BEST PRACTICES FOR COMPLIANCE AND SUPERVISION

Courtney Werning, Hollie Mason, Mary Shea Tucker<sup>1</sup>

Our elder population is particularly vulnerable to financial abuse. Abuse by a family member or friend is, tragically, not uncommon throughout the United States. Likewise, senior investors are vulnerable to misconduct and abuse by their trusted financial professionals. As such, there are heightened standards that brokerage firms should employ when supervising the accounts of senior investors.

The SEC's Office of Compliance Inspections and Examinations ("OCIE") and FINRA have prioritized protecting seniors through risk-based exams of broker-dealers and investment advisers, including how broker-dealers are complying with FINRA Rule 2165 and amended Rule 4512 and supervising these activities. Exams on this topic typically focus on policies, procedures and practices addressing clients who are 60 years old or older, including:

- (i) clients provided trusted contacts;
- (ii) how financial professionals responded to concerns over diminished capacity;
- (iii) practices for handling requests to change beneficiaries;
- (iv) training provided to employees focused on spotting signs of financial exploitation.

Through these exams, regulators typically find weaknesses in policies and procedures meant to protect senior investors in the following ways:

1. The policies were not specific enough. Firm's escalation policies failed to state the concrete steps the representatives should take if they had a suspicion of exploitation. Regulators require that firms tailor their policies and procedures to their particular business and clients, and firms should have a clear escalation procedure that specify concrete steps registered representatives should take and who should be notified for particular events or red flags.
2. The policies did not have defined criteria (i.e. age, retirement status or other factors) for determining whether a client counted as a senior.

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<sup>1</sup> Courtney Werning has been a PIABA member since 2012. She dedicates her practice at the law firm of Meyer Wilson to representing investors who have claims against their brokers or investment advisers.

Hollie Mason has nearly 15 years of experience encompassing broker-dealer and financial institution compliance, trading, markets, risk management, financial regulation & securities litigation. She previously served as senior enforcement counsel at FINRA and senior in-house litigation counsel at TD Ameritrade.

Mary Shea Tucker joined the Law Department at Wells Fargo Advisors (then A.G. Edwards) in 2004. Beginning in 2010, she helped to create the Elder Client Initiatives Team. Under her leadership, WFA became a national leader among investment firms in reporting suspected elder abuse to Adult Protective Services and state securities agencies across the U.S. and providing guidance to financial advisors. She retired from WFA in 2020 and now leads the St. Louis Elder Financial Protection Multidisciplinary Team.

3. The guidance about how to spot signs of diminished capacity was too general or insufficient about how to spot red flags.
4. The policies failed to specify how accounts, flagged for suspicious changes to account beneficiaries, would be monitored and supervised.

In addition, firms should employ heightened supervision for the marketing and sale of particular products or investment strategies to seniors that may have inherently higher risks, such as annuities, structured notes, private placements, and other illiquid, complex or “alternative” products. Regulators have expressed concern about complex products because the intricacy of these products can impair the ability of registered representatives or their customers, especially seniors, to understand how the product will perform in a variety of time periods and market environments, and can lead to inappropriate recommendations and sales.

With respect to the marketing to senior investors, some firms have adopted the following as best practices<sup>2</sup>:

- Banning securities professionals from using marketing materials to target particular age groups, such as referring to an event as a “senior seminar” or a “senior meeting.”
- Providing an online brochure with detailed instructions accessible to all employees describing the approval process required for seminars, investor appreciation events, continuing education seminars, outside speaking events, booths/exhibits, and business building/networking events
- Providing a library of pre-approved materials that were reviewed and approved by supervisory and compliance personnel.
- Using a web-based training module for securities professionals to use as reference when they are creating materials for senior-oriented events.
- Performing a minimum number of unannounced compliance visits to seminars on a yearly basis.
- Instituting a “mystery shopper” program where a compliance professional attends seminars unannounced to verify that securities professionals are conducting seminars in accordance with firm policies and procedures.

A critical aspect of educational programs for broker-dealers is focused on identifying signs of diminished mental capacity in an investor. The ability to observe changes in investors’ behavior places securities professionals in a unique and challenging position. In circumstances where the investor appears to lack capacity to understand an investment or to provide informed consent, firms need to implement procedures for securities professionals to follow, such as seeking advice

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<sup>2</sup> SEC Office of Compliance Inspections and Examinations, *Protecting Senior Investors: Compliance, Supervisory and Other Practices Used by Financial Services Firms in Serving Senior Investors*, September 2008, available at <https://www.sec.gov/spotlight/seniors/seniorspracticesreport092208.pdf>.

from supervisors about contacting a trusted family member or the person designated in the investor's power of attorney<sup>3</sup>.

To that end, firms need to adopt practices to ensure they are regularly and effectively communicating with senior investors and trusted family members and that such communications are documented to help senior investors with lack of recall. FINRA, concerned with the increase in financial exploitation of seniors, adopted Rule 2165 and amended Rule 4512 to provide firms with tools to address suspected financial exploitation of seniors faster and more effectively. Rule 2165 permits, although does not mandate, that firms may place a temporary hold on disbursements from a customer's account if financial exploitation is suspected. Rule 4512 requires firms to make reasonable efforts to seek to obtain a trusted contact person for each customer, and requires a firm to notify a trusted contact person, if available, of any temporary hold within two business days.

Broker-dealers and investment advisers should have strong policies, procedures, and practices to protect seniors who are their clients. Regulators see this issue as a top priority and firms must address issues with senior investors to protect them against abuses, from inside and outside their organizations.

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<sup>3</sup> Investors with diminished capacity may lack the ability to lawfully execute a power of attorney. Firms must be careful in considering when and under what circumstances a power of attorney was given.

# REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

Nicole G. Iannarone and Mary Kate McDevitt\*

## INTRODUCTION

Lawyers representing clients in securities arbitration proceedings often face concerns related to the potential diminished capacity of their clients. This is particularly so because a high proportion of investors with FINRA arbitration claims are advanced in age. America is rapidly becoming much older, making it more important than ever that attorneys representing investors in securities arbitration proceedings be attuned to the ethical considerations that come into play should their clients present signs of impairment.

In this article, we begin by discussing the risk of diminished capacity, including how it may manifest in a lawyer's clients. In section II, we describe the ethical rules that govern an attorney's representation of a client who exhibits signs of diminished capacity. Finally, in section III, we conclude with a list of resources and additional information to assist attorneys as they navigate representing a client who exhibits diminished capacity.

This article is an intentionally short, high-level overview of ethical considerations and resources for lawyers who are concerned that their clients are exhibiting signs of diminished capacity and need guidance for the steps to take upon coming to that realization.

## I. DIMINISHED CAPACITY: RISK AND TYPES

In recent years, the United State Census Bureau has made a remarkable projection that “older people” will outnumber children for the first time in U.S. history.<sup>1</sup> Today, nearly 45 million Americans are 65 or older, a number that is expected to increase by 30 million before the year 2030.<sup>2</sup> By 2035, “the United States will – for the first time ever – be a country comprised of more older adults than of children.”<sup>3</sup>

Aging is inevitable and no one is immune from it or the challenges it brings. Those challenges include an increased risk of diminished capacity. The concept of capacity to make a decision is

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\* Nicole G. Iannarone, assistant professor at Drexel University Thomas R. Kline School of Law, J.D. Yale Law School; Mary Kate McDevitt, J.D. expected 2021, Drexel University Thomas R. Kline School of Law. This article was prepared to accompany the ethics CLE presentation at the 2020 PIABA Securities Law Seminar.

<sup>1</sup> United States Census Bureau, *Older People Projected to Outnumber Children for First Time in U.S. History*, <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html> (Mar. 13, 2018, last revised Oct. 8, 2019).

<sup>2</sup> Danielle Argoni, *Preparing for an Aging Population*, <https://www.aarp.org/livable-communities/about/info-2018/aarp-livable-communities-preparing-for-an-aging-nation.html#:~:text=Among%20the%20reasons%20AARP%20has,United%20States%20than%20under%2018.&text=We%20are%20all%2C%20of%20course,will%20reach%2073%20million%20Americans>, (last visited July 5, 2020).

<sup>3</sup> *Id.*

important because it is the baseline from which we can determine whether a person can legally engage in an act.<sup>4</sup>

Should an individual exhibit any diminishment of capacity, the client is more at risk of elder abuse, called by some to be “the crime of the 21<sup>st</sup> century.”<sup>5</sup> Even if a client or the client’s children do not come to an attorney with an elder abuse claim, lawyers should be aware that their clients – young and old – may have conditions that will render the representation more challenging.

Diminished capacity includes several conditions that can limit a client’s decision-making and participation abilities, conditions that may be permanent or temporal. The type and scope of diminished capacity should be evaluated so the lawyer can determine how best to proceed in the representation in accordance with the ethical rules described in section II of this article

Diminished capacity includes a number of conditions, and it may present in different ways. One of those conditions - dementia - impacts between one-third and one-half of people over the age of 85.<sup>6</sup> Dementia is a general decline in mental ability and can affect a person’s decision-making capabilities.<sup>7</sup> Dementia may manifest in several ways, including in cognitive, emotional, or behavioral forms.<sup>8</sup> For example, as described in a American Bar Association and American Psychological Association joint handbook for lawyers, cognitive signs of dementia can include forgetfulness, difficulty communicating, or confusion.<sup>9</sup>

Emotional indicators that a client has dementia might include responses or reactions that are inappropriate for the situation or cannot be explained.<sup>10</sup> Dementia may also be deduced from a client’s changed behaviors, including engaging in delusional actions or exhibiting poor hygiene.<sup>11</sup>

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<sup>4</sup> Lawrence A. Frolik and Mary R. Radford, “Sufficient” Capacity: The Contrasting Capacity Requirements for Different Documents, 2 NAELA Journal 303, 304 (2006) (“The legal concept of mental capacity, therefore, is the basis for ‘when a state legitimately may take action to limit an individual’s rights to make decisions about his or her own person or property.’”), [https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=1009&context=faculty\\_pub](https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=1009&context=faculty_pub).

<sup>5</sup> Kristin Lewis, *The Crime of the 21st Century: Elder Financial Abuse*, PROB. & PROP. Vol. 28 No. 4 (Jul./Aug. 2014).

<sup>6</sup> Mary F. Radford, *The Multifaceted Challenges of Recognizing & Representing Clients Whose Capacity is Diminishing* at 8 (2017), <https://www.saepec.org/assets/Councils/SouthernArizona-AZ/library/10-18-17%20Radford%20-%20Diminished%20Capacity.pdf> (hereinafter “Radford, *Multifaceted Challenges*”).

<sup>7</sup> *Id.*

<sup>8</sup> American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* at 14-18, <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>. *Id.* at 22-26 (“Capacity Worksheet for Lawyers”).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Though dementia is most often associated with advanced age, younger individuals may exhibit forms of the terminal disease.

Dementia is a form of a continued incapacity – while it can be slowed, it continues inexorably and is largely permanent. Other forms of cognitive decline may not be permanent or total. For example, cognitive decline can also present temporally.<sup>12</sup> Such temporal cognitive decline appears in what is known as Sundowner’s Syndrome, a condition in which an individual has sound mental capacity during certain parts of the day but loses those capabilities later in the day.<sup>13</sup>

Partial temporal incapacity can also be exhibited in forms that are not necessarily tied to age. Drug and alcohol abuse, which affects nearly 20 million Americans, also causes individuals to temporarily have a diminished capacity as it pertains to making important legal decisions.<sup>14</sup> Whether permanent incapacity resulting from dementia or temporal incapacity from Sundowner’s Syndrome or substance abuse, lawyers should be aware of the ethical rules that govern how the client-lawyer relationship should proceed under those circumstances.

## II. ETHICAL CONSIDERATIONS FOR CLIENTS WITH DIMINISHED CAPACITY

Lawyers should approach each representation with a client assuming that it will be a normal relationship. Each state has its own ethical requirements governing the client-lawyer relationship, although the *American Bar Association’s Model Rules of Professional Conduct* serve as a guide for discussing the key components of the client-lawyer relationship that apply in some fashion in most jurisdictions.

### A. *Maintaining a Normal Client-Lawyer Relationship When a Client has Diminished Capacity*

Model Rule 1.14 should be a starting point when lawyers are concerned that their representation of a client who they believe may be impacted by a form of diminished capacity. The rule simply requires that “[w]hen a client’s capacity to make adequately considered decisions in connection with a representation is diminished...the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”<sup>15</sup>

As the comments to Rule 1.14 explain, while client-lawyer relationships are normally founded on the client’s ability to make decisions, “a severely incapacitated person may have no power to make legally binding decisions.”<sup>16</sup> Notwithstanding the fact that a client may not be able to make certain decisions, the client may “often [have] the ability to understand, deliberate upon, and

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<sup>12</sup> Radford, *Multifaceted Challenges*, *supra* n. 6 at 25.

<sup>13</sup> *Id.*

<sup>14</sup> American Addiction Centers, *Alcohol and Drug Abuse Statistics*, available at <https://americanaddictioncenters.org/rehab-guide/addiction-statistics> (last visited July 5, 2020).

<sup>15</sup> MODEL RULES OF PROF’L CONDUCT, R. 1.14(a) (2000).

<sup>16</sup> *Id.*, at Comment [1].

reach conclusions about matters affecting the client's own well-being."<sup>17</sup> Thus, Model Rule 1.14 seeks to strike a balance between involving the client as much as possible, and as normally as possible, given the circumstances.<sup>18</sup>

Before Model Rule 1.14(a)'s admonition to maintain normalcy applies, an attorney must first determine whether and to what extent the client exhibits diminished capacity. Lawyers are not required to become doctors, though lawyers may consult with medical professionals as they undertake this analysis in appropriate circumstances.<sup>19</sup> Consulting with a professional is not required, however.

The ABA counsels lawyers to consider a number of factors in making their determination that a client has diminished capacity, including by evaluating "the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client."<sup>20</sup>

Lawyers must be careful in making this determination. Clients, -whether or not they have diminished capacity - have the right to make poor decisions and lawyers must not substitute their own judgment for that of their clients.<sup>21</sup>

Maintaining normalcy in the representation might differ depending on the form of incapacity exhibited by the client. For example, if a lawyer believes a client suffers from Sundowner's Syndrome after seeing the client engage in cogent, consistent, and independent decision making during certain times that dissipate at later times, the lawyer should work with the client and ensure that meetings and case-related events are scheduled when the client is most able to meaningfully participate and engage.<sup>22</sup>

What does not differ, however, are the ethical requirements that a lawyer must follow to maintain the normal client-lawyer relationship envisioned under Model Rule 1.14(a). For example, Model

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at Comment [6] ("In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.").

<sup>20</sup> *Id.*

<sup>21</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 404 (1996) ("A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment.").

<sup>22</sup> Radford, *Multifaceted Challenges*, *supra* n. 6 at 25. See also NAELA, *Aspirational Standards for the Practice of Elder Law and Special Needs Law with Commentaries*, <https://www.naela.org/AspirationalStandards> (2d ed. 2017) (last visited July 5, 2020) (encouraging attorneys to maintain as normal a relationship as possible, adapting the "interview environment, timing of meetings, communications, and decision making process to maximize the client's ability to understand and participate in light of the client's capacity and circumstances").

Rule 1.2, which addresses authority and control in the client-attorney relationship, mandates that “a lawyer shall abide by a client’s decisions concerning the objectives of representation.”<sup>23</sup>

To do so, a lawyer must abide by the duty to communicate, which requires that the lawyer “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”<sup>24</sup> Communication also includes a duty to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,” a responsibility that can be met even when a client has diminished capacity.<sup>25</sup> Finally, lawyers must ensure that they maintain client confidentiality.

Under Model Rule 1.6, a lawyer “shall not reveal information relating to the representation of a client.”<sup>26</sup> Confidentiality is a much broader duty than realized by most lawyers – protecting “all information relating to the representation, whatever its source.”<sup>27</sup> Confidential information would include that the client is suffering from some form of diminished capacity.<sup>28</sup> Accordingly, Rule 1.14 makes clear that “unless authorized to do so, the lawyer may not disclose” the client’s diminished capacity.<sup>29</sup>

#### *B. Protective Action When the Normal Client-Attorney Relationship is Impossible*

While normalcy can be maintained in many client-lawyer relationships even when the client exhibits signs of diminished capacity, a normal client-lawyer relationship is not always possible. Thus, Model Rule 1.14 provides the lawyer with the ability to “take reasonably necessary protective action” in the event that a client has diminished capacity and a fully normal representation is not possible.<sup>30</sup>

Those protective actions can include:

- seeking the appointment of a representative to take action on behalf of the client as an extreme step; or
- consulting with persons or entities who are in a position to protect the client.<sup>31</sup>

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<sup>23</sup> MODEL RULES OF PROF’L CONDUCT, R. 1.2(a).

<sup>24</sup> MODEL RULES OF PROF’L CONDUCT, R. 1.4(a)(2).

<sup>25</sup> MODEL RULES OF PROF’L CONDUCT, R. 1.4(b).

<sup>26</sup> MODEL RULES OF PROF’L CONDUCT, R. 1.6(a).

<sup>27</sup> *Id.* at Comment [3].

<sup>28</sup> MODEL RULES OF PROF’L CONDUCT, R. 1.14(c) (“Information relating to the representation of a client with diminished capacity is protected by Rule 1.6.”).

<sup>29</sup> MODEL RULES OF PROF’L CONDUCT, R. 1.14, Comment [8].

<sup>30</sup> MODEL RULES OF PROF’L CONDUCT, R. 1.14(b).

<sup>31</sup> *Id.* at Comment [5] (“Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate

Before taking such drastic measures, the lawyer should have attempted to continue the client-attorney relationship as normal and to take the least restrictive means to protect the client while respecting the client's autonomy and seeking to involve them and their wishes in the representation.<sup>32</sup>

### III. RESOURCES FOR LAWYERS REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

This short article has provided a high-level overview of the ethical concerns a lawyer should consider if the client may have some form of diminished capacity. Accordingly, lawyers may wish to consult additional sources before they take any actions that could impact the normal client-lawyer relationship. Here is a non-exhaustive list of further materials that should be of assistance:

1. American Bar Association Center for Professional Responsibility: The ABA maintains substantial resources online via its Center for Professional Responsibility. From model ethics rules to opinion letters providing advice to lawyers with questions on ethics matters, this site provides information for attorneys seeking to study and understand their ethical responsibilities to clients.<sup>33</sup>

2. NAELA Aspirational Standards for the Practice of Elder Law: Drafted by the National Academy of Elder Law Attorneys, the Aspirational Standards for the Practice of Elder Law and Special Needs Law with Commentaries provides attorneys with information “to navigate the many difficult ethical issues that often arise when representing elderly individuals and individuals with special needs.”<sup>34</sup> NAELA's work fills in gaps and questions left open under the ABA's Model Rules and provides advice for holistic representation.

3. American Bar Association/American Psychological Association, Assessment of Older Adults with Diminished Capacity: The ABA has a robust set of resources, including seminars and written materials, for lawyers, judges, psychologists, and physicians to

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decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.”).

<sup>32</sup> MODEL RULES OF PROF'L CONDUCT, R. 1.14 at Comment [2] (“Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.”); *id.* at Comment [5] (“In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.”).

<sup>33</sup> See, ABA, *Center for Professional Responsibility*, [https://www.americanbar.org/groups/professional\\_responsibility/](https://www.americanbar.org/groups/professional_responsibility/) (last visited July 5, 2020) (“The Center for Professional Responsibility provides national leadership in developing and interpreting standards and scholarly resources in legal and judicial ethics, professional regulation, professionalism and client protection.”).

<sup>34</sup> NAELA, *Aspirational Standards for the Practice of Elder Law and Special Needs Law with Commentaries*, available at <https://www.naela.org/AspirationalStandards> (2d ed. 2017) (last accessed July 5, 2020).

assist each professional when they believe that a lawyer's client may be suffering from diminished capacity.<sup>35</sup>

4. American College of Trust and Estate Counsel (ACTEC), Commentaries on the Model Rules of Professional Conduct: ACTEC undertook its own review of the ABA's Model Rules of Professional Conduct to provide guidance relevant to trust and estate counsel, many of whom work with clients who may be exhibiting signs of diminished capacity.<sup>36</sup>

5. AARP, Protecting Older Investors: The Challenge of Diminished Capacity: Focused on the entirety of the financial industry, lawyers representing clients in FINRA arbitration proceedings may find AARP's white paper on concerns facing older investors helpful as they both develop their case theory and navigate representing a client who may have diminished capacity.<sup>37</sup>

6. State and City Bar Association Ethics Hotlines: A lawyer concerned about ethical considerations in representing a client with diminished capacity may ethically seek out advice from an expert, including by hiring their own attorney or by contacting their licensing jurisdiction's ethics hotline. Many bar associations maintain a phone number that lawyers licensed in that jurisdiction may call to see the bar authority's free advice on matters of ethical concern.<sup>38</sup>

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<sup>35</sup> ABA, *Capacity Assessment*, [https://www.americanbar.org/groups/law\\_aging/resources/capacity\\_assessment/](https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/) (May 20, 2020) (last visited July 5, 2020).

<sup>36</sup> The American College of Trust and Estate Counsel, *Commentaries on the Model Rules of Professional Conduct*, [https://www.actec.org/assets/1/6/ACTEC\\_Commentaries\\_5th\\_rev\\_06\\_29.pdf](https://www.actec.org/assets/1/6/ACTEC_Commentaries_5th_rev_06_29.pdf) (5th Ed. 2016) (last visited July 5, 2020).

<sup>37</sup> Naomi Karp, *et al.*, *Protecting Older Investors: The Challenge of Diminished Capacity*, AARP Public Policy Institute (Nov. 2011), [https://www.aarp.org/content/dam/aarp/research/public\\_policy\\_institute/cons\\_prot/2011/rr2011-04.pdf](https://www.aarp.org/content/dam/aarp/research/public_policy_institute/cons_prot/2011/rr2011-04.pdf) (last visited July 5, 2020).

<sup>38</sup> See, e.g., The State Bar of California, *Ethics Hotline*, available at <http://ethics.calbar.ca.gov/Ethics/Hotline.aspx> ("The Ethics Hotline, a confidential research service for attorneys only, helps lawyers identify and analyze their professional responsibilities.") (800-238-4427); State Bar of Georgia, *Ethics & Professionalism*, available at <https://www.gabar.org/barrules/ethicsandprofessionalism/> ("Lawyers who would like to discuss an ethics dilemma with a member of the Office of General Counsel staff should contact the Ethics Helpline at 404-527-8741, 800-682-9806 or log in and submit your question by email."); New York City Bar, *Ethics Hotline*, available at <http://www.nycbar.org/member-and-career-services/ethics/hotline> ("New York lawyers faced with ethical questions regarding their own prospective conduct can reach the Ethics hotline through Customer Service at 212.382.6663."); Virginia State Bar, *Ethics Questions and Opinions*, available at <https://www.vsb.org/site/regulation/ethics> ("Any member of the bar may seek informal ethics or unauthorized practice of law advice by calling the Ethics Hotline at (804) 775-0564."); State Bar of Arizona, *Ethics Hotline*, available at <http://www.azbar.org/ethics/ethics hotline/> ("Ethics Hotline Number: 602.340.7284"); Pennsylvania Bar Association, *Ethics Hotline*, available at <http://www.pabar.org/public/Membership/ethics.asp> ("The Ethics Hotline provides free advisory opinions to PBA members based upon a review of a member's prospective conduct by members of the PBA Committee on Legal Ethics and Professional Responsibility .... The Ethics hotline can be reached at (800) 932-0311, ext. 2214."); State Bar of Texas, *Toll-Free Ethics Helpline for Lawyers*, available at

## CONCLUSION

Representing clients exhibiting forms of diminished capacity – either total, partial, or temporal – is difficult. If a lawyer suspects that a client has diminished capacity, the lawyer should start by looking to the ethical rules in the jurisdiction where the lawyer is licensed.

Core principles of client-centered representation, including communication, confidentiality, and allowing the client to direct the representation, should guide the lawyer's next steps. As much as possible, lawyers should strive to maintain normalcy in the client-lawyer relationship and allow the client to meaningfully participate in the representation.

In accommodating the most normal relationship that can be achieved, lawyers should not, however, be afraid to seek the help of others so long as core client-lawyer ethical responsibilities are not violated.

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[https://www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceandEthics/Toll\\_Free\\_Ethics\\_Helpline\\_for\\_Lawyers/default.htm](https://www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceandEthics/Toll_Free_Ethics_Helpline_for_Lawyers/default.htm) (800.532.3947); State Bar of Michigan, *Ethics Article: Ethics Hotline - Frequently Asked Questions*, available at <https://www.michbar.org/opinions/ethics/articles/july98> ("The Ethics Hotline at the State Bar of Michigan (877) 558-4760 receives approximately 20 calls per day from Michigan lawyers seeking guidance on a full array of ethics issues from lawyers."); The Florida Bar, *Ethics Hotline*, available at <https://www.floridabar.org/ethics/ethotline/> ((800) 235-8619).

PIABA Mid-Year Meeting, April 21, 2022

# Economic and Non-Economic Damages in Dealing with FINRA Arbitrations Involving Senior Citizens Fraud

Stacey A. Wood, Ph.D., Molly Mason Jones Professor of Psychology,  
Scripps College, Claremont, California

Frank J. Fox, Majors & Fox, San Diego, California



## Professor Stacey A. Wood

- BA Middlebury College Bio-Psychology
- PhD Clinical Neuropsychology U Houston
- Board Certified in Geropsychology
- Fellowship UCLA Neuropsychology
- Court appointed expert



## Frank J. Fox, Esq.

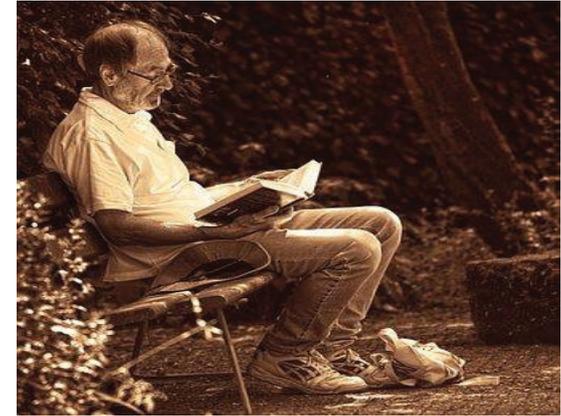
- Stanford Law School, JD
- Trial Lawyers College
- Co-founder Majors & Fox

# Goals of Lecture

- Explore the importance of identifying, assessing, developing and proving non-economic damages in case intake, discovery, settlement and trial preparation.
- Understand challenges the lawyer may face at each such stage
- Review research relevant to identifying and assessing non-economic costs of fraud.
- Identify tools to assist in assessment of certain non-economic damages in elderly clients.
- Beginning with a Case Example.

# Case Example: Mr. G

Mr. G was a 92-year-old World War II veteran struggling to care for his 89-year-old wife who had Parkinson's disease. Using the pretext of helping Mr. G qualify for VA Aid and Attendance and Medi-Cal benefits, a group of life insurance agents, aided by a lawyer, led Mr. G and his ailing wife into parting with their life savings and investments and placing everything they owned into two irrevocable trusts. The scheme resulted in the loss of ownership and control of their fully-paid-for home and the loss of virtually all their liquid net worth. It rendered them substantially impecunious, unable to receive private pay privileges at a skilled nursing facility and subject to serious tax consequences plus a host of other harms. However, the scheme did enable the life agents to sell a huge unsuitable annuity and reap an unconscionable commission.



Upon realizing their trust had been betrayed, Mr. and Mrs. G. struggled to regain ownership and control of their life savings. The betrayal's stress and other impacts took a heavy toll, not the least of which was Mrs. G suffering a stroke and stress induced heart attack which led to her early death one month after their lawsuit was filed.

**Jury Instruction CACI 3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)**

authorizes the jury to award damages for past physical pain and suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress and “other damages.” Caselaw cited in the instruction’s directions for use also recognize as compensable detriment fright, nervousness, worry, mortification, shock, indignity, embarrassment, apprehension, terror and ordeal. The instruction tells the jury “[n]o fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.” The jury is also authorized to award future damages for those items where the plaintiff proves he/she is reasonably certain to suffer them.

# The Non-Economic Costs of Fraud: Emotional Distress

- Consistent evidence that **the emotional costs of fraud are more distressing than economic costs** in survey research of fraud victims.
- Modic and Anderson (2015) survey of 10,000 participants assessed types of fraud victimization and impact.
  - Emotional impact as assessed by asking participants to self report perceived affective consequences.
  - Across fraud categories, emotional impact was rated as higher than financial impact.
  - Pyramid schemes had highest financial and emotional impact.

# Fraud victims are Similar to other Crime Victims

Button (2014). Survey by phone 800 fraud victims, 30 in person in depth interviews. Most common fraud investment, boiler room and identity.

Some findings:

- Increased reported stress
- Anger
- Lack of esteem
- Self blame
- Damage relationships
- Physical Health
- Mental health / increased risk of suicide
- Loss of confidence / change in financial behavior

# Research Related to Physical Health and Importance of Financial Recovery

- Zunzunegui et al (2017), conducted a survey of 188 individuals who were either victims of “preferred shares” and “foreign currency” mortgages in Spain using national health data.
- Individual who were victims of fraud had poorer health, more mental health issues, poorer sleep, and decreased quality of life that a comparable population matched for age.
- Those who had received financial compensation had better health and better quality of life than victims who remained uncompensated.
- **Financial fraud is detrimental to health.**

# Premorbid Vulnerabilities Increase Risk of Emotional Distress

- Ganzini et al. (1999) interviewed 77 victims of Ponzi / Pyramid schemes in Oregon and Utah.
- **Previous history of depression, large financial losses relative to net worth, and a perception of a decreased standard of living increased emotional distress among victims.**
- Interestingly, the affinity often was retained, but provided little to buffer Ed following loss.

# Using the Research at Case Intake: How Not to Overlook the Significant Case

- The fact that emotional costs of fraud are often greater than the economic costs bespeaks the importance of using carefully vigorous and thorough exploration of potential non-economic damages in evaluating those damages at the case intake stage.
- In other words, do **NOT** decline a case merely because the economic losses are “tiny.” What may seem like a tiny loss to you may be anything but small to the elderly fraud victim.

# Overall Approach

**Social / Environmental  
Factors**

**Risk Considerations**

**Financial Knowledge and  
skills**

**Financial Vulnerability  
and undue influence**

**Psychological  
Vulnerability**

# Overall Approach continued

## -Clinical Interview

- Background
- Education
- Values
- Meaning of financial security
- Role money plays in life

## -Diagnosis / Medical:

- Health conditions
- Health trajectory
- Cognitive Factors
  - Role of MCI
- Emotional / Psych Factors
  - Vulnerabilities
  - New Symptoms
  - Tests / approaches
- Functional
  - ADLS
  - IADLS
  - Sensory / hearing / vision

# Using Assessment Tools to Develop Non-Economic Damages for Settlement and Discovery

- **Settlement:** Thoroughly evaluating non-economic damages early in the case may facilitate an early resolution. After all, in many cases those non-economic damages (and attorney's fees) will only increase during the pendency of the case. For these and other reasons, the Rutter Guide on Elder Abuse Litigation explains that settlement demands generally *increase* during the case.
- **Discovery:** Because interrogatories will typically ask for a description of all damages and identification of all facts supporting those damages, having a thorough evaluation of the non-economic damages (supported by research) completed early in the case will assist preparation of discovery responses and help opposing counsel understand the enormous magnitude of the non-economic damages.

# Research from Ponzi Scheme Victims

Spalek (1999). Interviewed at length 25 of the 32,000 retirees who lost their pensions to Robert Maxwell using a mixed methods approach. Key themes were anxiety, anger, worse health, premature death, self blame, disillusionment, decreased trust in financial institutions, loss of sleep.

“Mrs. Riches had been burgled: when asked how that compared with the Maxwell scandal she answered:

*‘No, it's nothing like it. That's (the burglary) a one-off thing that you don't think about much. I was shocked but I didn't think too much about it, I got on with my life. But I couldn't get on with my life once Maxwell came, because it was there, it was there everyday of our lives. It was haunting Jack and his distress was haunting me.’”*

# Research from Ponzi Scheme Victims continued

- Freshman (2012), conducted a survey of 172 Madoff victims. **She reported that the sudden and dramatic personal financial loss resulted in PTSD like symptomatology.**
- 10 months post event, 56 % of the sample met criteria for PTSD as a group using DSM-4 criteria.
- 61 % reported high levels of anxiety, 58 % reported high levels of depression and 34 % indicated health related issues.
- Over 90 % affirmed a loss of confidence in financial institutions.

# Research from Ponzi/ Pyramid Scheme Victims

- Ganzini et al. (199) interviewed 77 victims of Ponzi / Pyramid schemes in Oregon and Utah.
- All had affinity component.
- Tended to be older, more affluent, more female.
- Found GAD and major depressive disorder most frequently following victimization.

# Trial: Using Thorough Evaluation of Non-Economic Damages for Trial Preparation

- Thoroughly understanding non-economic damages also will serve as an important guide for the trial or arbitration hearing.
- It provides an “evidence checklist” for identifying and designating to the appropriate expert and/or percipient witnesses (or documentary evidence) proof of facts supporting each form.
- While the plaintiff/claimant may be the source of some supporting testimony, very often abused elders find it difficult to tell the damage component of their story. Often tending towards stoicism, they are not born complainers and tend to minimize descriptions of their suffering.
- Family members or friends familiar with the “before and after” scam contrast may prove better witnesses.

# Trial: Proving The “How and Why” of Non-Economic Damages

- Consider how and why the fraudulent conduct caused the non-economic damages at issue. Doing this may depend upon having your expert apply research to the facts and circumstances of the situation.
- Mr. G lived through the depression, migrated as a child from Oklahoma to Northern California and grew up picking fruit for a nickel a bucket. In WW II, he volunteered to serve as a paratrooper because it paid an extra \$50 which he gave to his mother to help her survive in his absence. After the war, he studied and became a bookkeeper where he was required to account for every penny. To pay off their home, Mr. and Mrs. G went without dream vacations and used coupons to save every nickel, dime and quarter. For them, the marginal value of the dollars they lost was very high and amplified the trauma they suffered.

# Factors Present in Case Example

- Mr. G reported that childhood experiences during the depression and early life reinforced his values of frugality and work ethic.
- Mr. G's main identity was as breadwinner, astute bookkeeper, ethical. He saw opportunity to obtain veteran's benefits thereby preserving estate and assisting children.
- Devastating blow to lose control over home and savings and suffer significant tax consequences.
- Outcome: depression, anxiety, worry, sleep loss

# Literature Review

- Drentea and Reynolds (2015): Where does Debt Fit in the Stress Process Model?
- Bialowolski et al (2019): The impact of savings and credit on health behaviors
- Brown et al (2005): Debt and Distress: Evaluating the psychological costs of credit.
- Button et al (2014): Not a victimless crime: The impact of fraud on an individual victims and their families
- Cross et al (2016): The reporting experiences and support needs of victims of online fraud
- Sarria et al (2019): Financial Fraud, Mental Health, and Quality of Life: A Study on the Population of the City of Madrid, Spain
- Schneiderman et al (2005): Stress and Health: Physiological, Behavioral, and Biological Determinants
- Spalck (1999): Exploring the Impact of Financial Crime -- the Maxwell Pensioners
- Sweet et al (2013); The high price of debt: Household financial debt and its impact on mental and physical health
- Whitty and Buchanan (2015): The online dating romance scam: The psychological impact on victims
- Zunzunegui et al (2017): Financial fraud and health: The case of Spain
- Freshman (2012): Financial disaster as risk factor for PTSD
- McFarland and Bloom (1990): Victims of fraud: comparing victims of white collar and violent crime
- Goldstein et al (2010): Fraud Trauma Syndrome: The Victims of the Bernard Madoff Scandal
- Khan and Khan (2017): Chronic Stress Leads to Anxiety and Depression
- Kircanski et al (2018): Emotional Arousal May Increase Susceptibility to Fraud in Older and Younger Adults
- Modic and Anderson (2015): It's all Over but the Crying: The Emotional and Financial Impact of Internet Fraud
- Norris et al (2019): The Psychology of Internet Fraud Victimization: a Systematic Review
- Ross and Smith (2011): Risk Factors for Advance fee Fraud Victimization

# Contact Information

- Stacey Wood, PhD. ABPP
- Molly Mason Jones Professor,  
Psychology Scripps College
- (909) 607-9505 (office)
- (909) 706-2764 (Cell)
- [swood@scrippscollege.edu](mailto:swood@scrippscollege.edu)
- <https://www.drstaceywood.com/>
- Frank J. Fox, Esq.
- Majors & Fox
- [\(619\) 234-1000](tel:(619)234-1000)
- [fjfox@majorfox.com](mailto:fjfox@majorfox.com)

# **FINANCIAL ELDER ABUSE HOW TO ASSIST SENIORS AND OTHER VULNERABLE VICTIMS OF FINANCIAL EXPLOITATION**

Jon C. Furgison and Dr. Stacey Wood PhD ABPP

The impacts of fraud and financial exploitation on seniors reach far beyond finances. While the economic losses can be financially catastrophic, they are generally relatively easy to calculate. But the emotional harm is much more difficult to quantify and can be even more devastating and far reaching. However, attorneys and supporting professionals have the power to help.

## **What is financial exploitation, and how does it happen?**

Financial exploitation is a form of financial elder abuse that involves the illegal, unauthorized, or improper use of a vulnerable adult's resources for the perpetrator's personal gain. While anyone can fall victim to financial exploitation, seniors are some of the most common victims, and we witness its effects all too often in my practice as a securities attorney representing investors and my colleague's work as a geropsychology expert. In this article, we share what we've learned from our research and experience.

Unfortunately, there is an almost endless number of ways by which someone can financially exploit an older adult. Common types of financial exploitation include theft, fraud, Ponzi schemes, forgery, the improper use of guardianship or power of attorney, and the use of coercion, deception, or false pretenses to surrender finances and property or sale unsuitable investment products. Harassment, duress, or threats may also be used to coerce the victim.

Electronic scams such as "phishing" emails and lottery or sweepstake scams are some of the most well-known forms of financial exploitation designed to target seniors. However, more covert forms of exploitation involving breaches of fiduciary duty by trusted financial advisors, insurance agents, and even romantic or familial relationships are just as pervasive.

Perpetrators often attempt to build a relationship with the victim to establish trust, or they may take advantage of a relationship that already exists. Since seniors are especially vulnerable to loneliness, isolation, and elevated trust levels, they can be an ideal target for this type of deception. When other risk factors like cognitive impairment, poor physical health, and a subsequent need for daily assistance come into play, an older adult's vulnerability to these acts, as well as their risk of experiencing serious non-economic impacts as a result of it, only amplifies.

## **What are the non-economic impacts of financial exploitation?**

Financial exploitation is one of the most common types of elder abuse, with numbers rising at staggering rates. Despite this, the devastating effects of this form of exploitation, outside of the expected financial impacts, remain little understood in the general public. Although, a great deal has been learned from studies following the Bernie Madoff Ponzi Scheme meltdown.

Recent research on the emotional impact of financial fraud has consistently found that victim's perception of the emotional impact of fraud victimization is more severe than the victim's perception of the financial losses across fraud types.

## **PTSD type symptoms**

Audrey Freshman described the psychological aftermath of victims following the Bernie Madoff Ponzi scheme in her 2012 study *Financial disaster as a risk factor for posttraumatic stress disorder: Internet survey of trauma in Victims in the Madoff Ponzi Scheme*. Health & Social Work. Doi10.1093/hsw/hls002. In the Madoff study, 55.7 % of respondents met criteria for presumptive Post Traumatic Stress Disorder (“PTSD”) reporting symptoms of anxiety, depression, sleep disorders, health related problems, and increased use of prescription medications. Other statistically significant items included “life choices altered”, immediate family negatively affected, felt betrayed by FEC. This research has demonstrated that a catastrophic financial event can result in a clinical picture very similar to PTSD. Assessment of these symptoms can include tools that have been validated for use with PTSD.

## **Decreased physical health**

Financial fraud victimization has been linked to physical symptoms such as poor health, poor sleep and poor quality of life secondary to the high level of stress experienced by victims. Zunzunegui, M.V. (2017). *Financial Fraud and Health: The Case of Spain*. GAc Sanit. 2017; (31(4) 313-319. Assessment of physical health following the catastrophic loss is another component to consider.

## **Anxiety and depression**

Common symptoms after a financial setback are stress, depression, anxiety, worry, rumination, and lack of sleep. Button, Lewis & Tapley (2014). *Not A Victimless Crime: The Impact of fraud on individual victims and their families*. Security Journal, 27(1), 36-54. Tools that have scales assessing anxiety and depression symptoms that have been validated for use in older adults could also be considered.

## **Social isolation and social relationships**

Button and colleagues reported high incidences of financial setbacks on the victims as well as their families. Families may blame the victim for squandering money that was hoped to be used for college educations, etc. Adult children may have financial burdens that were unexpected. The change in social support can result in decreased quality of life.

## **Lack of Trust**

Victims may also report feelings of anger, distrust and betrayal. This is particularly true when scammers use a trusted individual or institutions. Lack of trust can impact future social relationships and ability to move forward. A senior’s feelings of betrayal, bitterness, and shame can also translate into changes in attitudes, which in turn impacts their relationships. They may be less trusting of people in general, but more specifically friends, family members, and institutions. This distrust leads to isolation and a loss of relationships, which in turn leads to a lower quality of life.

In summary, being financially exploited can be a truly traumatic experience for an older adult, and seniors who fall victim to financial exploitation or financial elder abuse often experience a range of significant mental health symptoms because of it. These include the following:

- Depression

- Anxiety
- Intrusive thoughts
- Rumination
- Nightmares
- An increased risk of suicide
- Disrupted Sleep

Our clients who have been victims of unscrupulous financial advisors feel intense shame. The shame arises from the recognition that they were duped, and it is intensified by the uncomfortable attention that the fraud attracts from clients' children, social service agencies, law enforcement, and the court. Often, these clients feel and are treated like vulnerable children. The embarrassment of this indignity causes some clients to close themselves off from their support network and makes them even more vulnerable to self-neglect and exploitation.

Additional feelings of self-doubt and an inability to plan for the future can leave a senior feeling lost, stagnant, and powerless. In the most severe cases of financial exploitation, a senior can experience significant debt, tax burdens, and even homelessness, further compounding these psychological impacts.

While most younger people could expect to eventually recover from these impacts, older adults have limited time horizons, so any effects will have a greater sense of permanency for them. Not all time is equal. When time is limited, it is more precious. A limited time frame of misery for a middle-aged person is different than an elder's misery for all the rest of their life. Many victims of financial elder abuse will never return to life as they knew it. Further, when you reach your retirement years, there is a premium placed on the value of those few remaining "Golden Years".

### **Families of victims**

Financial abuse and fraud can also impact the finances and emotional well-being of future generations, whether it's due to family members taking care of the exploited senior's damaged finances, a depletion of assets to be eventually passed down to loved ones, or the emotional burden that loved ones carry.

The non-economic impact of financial elder abuse isn't limited to an elder's loss of self-confidence, the feeling of safety, and or increased mortality rate. It also can devastate a victim's family and loved ones. The secondary victims of financial elder abuse are those who struggle to prevent the elder from further harm while managing their frustrations trying to reason with someone who, because of their failing abilities, are incapable of accepting their counsel.

Fortunately, not all hope is lost if a senior is exposed to financial exploitation, but it takes a quick and coordinated effort between loved ones and supporting professionals to mitigate its effects before it takes a destructive and irreversible toll on a senior's well-being.

### **What are the warning signs of financial exploitation?**

When financial exploitation occurs, early intervention is key to stop the abuse and limit the spread and severity of its impacts. Since it is so pervasive among seniors, anyone who regularly spends time with an older adult should be aware of—and on the lookout for—the warning signs of financial exploitation.

First, any changes in a senior's mental health or behavior should be treated as a warning sign of abuse. Some individuals may openly express feelings of shame, hopelessness, or distrust, while others may show more subtle signs of depression or other psychological impacts, including isolation, irritability, or a diminished interest in previously enjoyed activities.

While these may be difficult to measure, one clear sign is if the elderly person stops answering the phone or communicating with loved ones. One of the biggest non-economic impacts of fraud on seniors is that a vulnerable and isolated senior who is targeted by fraudsters often stops answering their phone regularly after receiving so many unwanted calls. This common response to being inundated with constant phone calls can leave a senior even more isolated if they are not answering phone calls from family, friends, or neighbors who truly care about them.

It's also important to look out for any resulting physical changes, such as sudden, significant weight loss or gain and signs of poor sleep like baggy eyes, lethargy, and unexplained impairments in memory.

Other, more obvious, signs of financial exploitation can include events such as sudden changes in one's financial situation, including unpaid bills, termination of vital utilities, and notices for eviction, foreclosure, or repossession despite adequate income. In addition to a reluctance toward discussions of financial matters, checks written to "cash", unexplained changes to estate documents, or extravagant spending can also be warning signs.

### **How can attorneys and other supporting professionals help?**

Attorneys and other supporting professionals who work directly with seniors are in a unique position to help their clients who are facing financial exploitation. This begins with establishing trust. However, this may be more difficult than it sounds because this type of emotional trauma often results in the seniors feeling a sense of betrayal. They have been betrayed by someone they wholeheartedly believed they could trust. Now, they don't know who to believe anymore and this makes it difficult for them to trust even the attorneys who are trying to help them obtain justice. It also makes it difficult for the victims to trust their family members and previously trusted inner circle.

That doesn't mean that all hope is lost, though. In my practice, the most important step is for the victim to have a sense of purpose in pursuing justice and working to break the vicious cycle of isolation. And for the attorney to know the best paths to recovery. Fortunately, the California financial elder abuse statutes provide some very powerful remedies to aid in that mission.

### **Treble damages via Civil Code § 3345**

California's Legislature enacted the California's Elder Abuse Act "to protect elders by providing enhanced remedies which encourage private, civil enforcement of laws against elder abuse and neglect." *Negrete v. Fid. & Guar. Life Ins. Co.* (C.D. Cal. 2006) 444 F.Supp.2d 998, 1001. The "enhanced remedies" entitles Claimants to treble recovery. "Section 3345 establishes that when a defendant knew or should have known his conduct was directed to a senior citizen, and that conduct caused the senior to suffer loss of income or property, that the court may impose a remedy up to three times greater than the amount the trier of fact would impose absent such a finding." *King v. Portfolio Preservation, LLC* (E.D. Cal., Feb. 22, 2021, No. 2:19-CV-01916-JAM-CKD) 2021 U.S. Dist. LEXIS 32770, at \*17-18, fn. 3.

California Civil Code section 3345 provides that “Whenever the trier of fact makes an affirmative finding in regard to one or more of the following factors, it may impose a fine, civil penalty or other penalty, or other remedy in an amount up to three times greater than authorized by the statute...”

Section 3345’s “trebled recovery provision comes into play when the governing statutory remedy has ‘the purpose or effect’ of punishing or deterring. (Civ. Code, § 3345, subd. (b))” *Clark v. Superior Ct.* (2010) 50 Cal. 4th 605, 614 [holding that trebled recovery may be awarded under Civ. Code § 3345(b) only if the statute under which recovery is sought permits a remedy that is in the nature of a penalty]. Trebling may be applied to statutory claims that are alleged in conjunction with an underlying cause of action involving unfair practices or deceptive acts against vulnerable or dependent adults. *Hood v. Hartford Life & Accident Ins. Co.* (E.D. Cal. 2008) 567 F. Supp. 2d 1221, 1229; see Statutory damages, Cal. Civ. Prac. Procedure (April 2021 Update), § 8:10 [defining statutory remedies as penal damages permitted under certain statutes (including Civil Code § 3345) that impose a penalty in a specified sum, sometimes regardless of actual damages suffered, and in addition to the award of compensatory damages]. This includes punitive damages under Section 3294, which qualifies as statutorily imposed punitive remedy subject to trebling under Section 3345. See *Hood*, supra, 567 F. Supp. 2d at 1229.

All damages authorized under the Elder Abuse Act are “punitive” in nature and thus should be subject to Section 3345’s trebling provisions. “The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment [...]”, which the Legislature enacted after recognizing in 1982 that “this state has a responsibility to protect such persons.’ (Former § 15600, added by Stats. 1982, ch. 1184, § 3, p. 4223.)” *Delaney v. Baker* (1999) 20 Cal.4th 23, 33. “The purpose of the Elder Abuse Act is to protect and deter, but not to compensate. [*Delaney v. Baker*, 20 Cal. 4th 23, 33 (1999)] General damages under the Act may be measured in relation to the harm done, but the purpose of such damages is nonetheless to protect (and deter).” California Practice Guide: Elder Abuse Litigation ¶ 9.89 (The Rutter Group, September 2020 Update); Welf. & Inst. § 15600(h), (j).

## Summary

While the non-economic impacts of financial exploitation are well-established, recognizing and effectively addressing them isn’t always as simple. However, with a coordinated and compassionate effort from loved ones, knowledgeable attorneys armed with the most power elder protection statutes, and supporting professionals, a senior who has experienced these impacts will have significantly greater odds of recovery.

# GETTING GRANDMA'S NEST EGG BACK<sup>1</sup>

Jenice L. Malecki, Esq.

## INTRODUCTION

People age differently and no two seniors are the same. Some may be sharp as a tack until their last breath is taken, others become victims to some form of diminished capacity.<sup>2</sup> When it comes to managing one's retirement assets, it can be tricky for and taxing on seniors, their families, as well as financial professionals that service their accounts at brokerage firms. Seniors have long been targets of financial fraud and this trend is only worsening as seniors cannot keep up with technology, new products and the fast pace in today's world. The Federal Bureau of Investigation's Elder Fraud Report in 2020 details as follows:

In 2020, IC3 received a total of 791,790 complaints with reported losses exceeding \$4.1 billion. Based on the information provided in the complaints, approximately 28% of the total fraud losses were sustained by victims over the age of 60, resulting in approximately \$1 billion in losses to seniors. This represents an increase of approximately \$300 million in losses reported in 2020 versus what was reported by victims over 60 in 2019.

*Elder Fraud Report, 2020*, Federal Bureau of Investigation, Internet Crime Complaint Center, p.3. It has been reported that about 10,000 Americans turn 65 daily and it is expected to continue at this pace until 2030, at which time, one in every five Americans will be 65 or older. See U.S. Census Bureau, [Older People Projected to Outnumber Children for First Time in U.S. History](#) (Mar. 13, 2018). It is believed that social isolation exacerbates these issues, and the impact of COVID may increase these numbers.<sup>3</sup>

Alzheimer's can cause cognitive, behavioral, and mood changes, including memory loss and confusion. Warning signs include an inability to perform the financial tasks of daily living and to manage one's financial affairs. Individuals who suffer from cognitive decline are more susceptible to financial fraud. As a result, these individuals are at the greatest risk of losing a significant amount of their retirement savings and in need of protection.

Alzheimer's and Dementia are not the only reason seniors get taken advantage of, there are many other reasons they become victims of fraud, including:

- Being too good mannered to be rude and trusting the wrong people
- Wanting more income
- Loneliness and believing a salesperson is nice, friendly and caring
- Feeling unsophisticated and being impressed with credentials and complex explanations

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<sup>2</sup> <https://www.alz.org/alzheimers-dementia/what-is-dementia/types-of-dementia>

<sup>3</sup> See, e.g., U.S. Securities and Exchange Commission ("SEC"), Office of the Investor Advocate and International Organization of Securities Commissions (IOSCO) [Senior Investor Vulnerability Final Report](#) (March 2018) (noting that social isolation and cognitive decline, among other factors, may make some senior investors more vulnerable to financial exploitation).

Many seniors also have financial decisions thrust on themselves late in life. They may meet brokers in social situations which lend unearned credibility to the financial professional. This context is important.

### FINRA, the SEC and NASAA Respond

The Financial Regulatory Authority (“FINRA”), the SEC and the North American Securities Administrators Association (“NASAA”) have all taken the situation into account when developing Rules and Guidance for the Industry to follow. FINRA Rule 4512 (Customer Account Information) requires members to make reasonable efforts to obtain the name of and contact information for a trusted contact person for senior clients as a resource for the member in servicing the customer’s account, protecting assets and responding to possible financial exploitation, which could come from many possible sources inside and outside the brokerage firm. FINRA Rule 2165 (Financial Exploitation of Specified Adults) allows a member that reasonably believes that financial exploitation has occurred, is occurring, has been attempted or will be attempted to place a temporary hold on the disbursement of funds or securities from the account of a “specified adult” customer. Specified adults are defined as a natural person at least 65 years old or a natural person at least 18 years old, who the member reasonably believes has a mental or physical impairment that makes them unable to protect their own interests. These rules have explanatory FAQs on FINRA’s website.

Numerous FINRA Regulatory Notices address issues relating to seniors: Regulatory Notice 22-05 (adopting<sup>4</sup> Regulatory Notice 20-34 Proposed Amendments to FINRA Rule 2165 and Retrospective Rule Review Report); Regulatory Notice 20-38 (FINRA Adopts Rule to Limit a Registered Person From Being Named a Customer’s Beneficiary or Holding a Position of Trust for or on Behalf of a Customer); Regulatory Notice 17-11 (SEC Approves Rules Relating to Financial Exploitation of Seniors); Regulatory Notice 07-43 (FINRA Reminds Firms of Their Obligations Relating to Senior Investors and Highlights Industry Practices to Serve these Customers). All these provide fodder for discovery, as do the many FINRA Examinations and Studies<sup>5</sup> on this topic.

Of course, it is inexcusable when the exploiter is a licensed financial advisor. There are times when elderly clients with dementia need to be protected from unscrupulous brokers. All the

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<sup>4</sup> Effective March 17, 2022 (Amended from Feb. 5, 2018), FINRA has adopted amendments to Rule 2165 (Financial Exploitation of Specified Adults) to permit member firms to: (1) place a hold on a securities transaction (in addition to the already-permitted hold on a disbursement of funds or securities) where there is a reasonable belief of financial exploitation; and (2) extend a temporary hold on a disbursement or transaction for an additional 30 business days, beyond the current maximum of 25 business days (for a total of 55 business days), if the member firm reported the issue to a state regulator, agency, or a court of competent jurisdiction.

<sup>5</sup> See, Consumer Financial Protection Bureau, Office of Financial Protection for Older Americans, Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends (Feb. 2019) (elder financial exploitation suspicious activity report (SAR) filings quadrupled between 2013 to 2017); U.S. SEC, Office of the Investor Advocate, Elder Financial Exploitation (June 2018) (overview of studies on the senior financial exploitation); Senior Investor Vulnerability Final Report, [supra](#); FINRA’s 2015 Report on the FINRA Securities Helpline for Seniors.

reporting-based rules look to the broker to report as a front-line person, so traditional and heightened, robust supervision over senior accounts must occur. FINRA examinations on these topics prove helpful and have included the following:

### FINRA Examinations

FINRA's exams focus on a broad range of topics relating to the protection of senior investors, including:

- the types of securities and suitability of securities sold to senior investors
- training of firm representatives with regard to senior specific issues and how firms address issues relating to aging (e.g., diminished capacity and elder financial abuse or exploitation);
- use of senior designations
- firms' marketing and communications to senior investors
- types of customer account information required to open accounts for senior investors
- disclosures provided to senior investors
- complaints filed by senior investors and the ways firms track those complaints
- supervision of registered representatives as they interact with senior investors

See <https://www.finra.org/rules-guidance/key-topics/senior-investors#overview>.

Section 303 of the “Economic Growth, Regulatory Relief, and Consumer Protection Act,” referred to as “The Senior Safe Act,” became federal law on May 24, 2018. It incentivizes reporting, but it does not mandate any action, providing certain individuals and financial institutions with immunity from liability in any civil or administrative proceeding for reporting potential exploitation of a senior citizen (65+) to certain entities if certain conditions are met. Certain states have adopted similar statutes and NASAA has created a model act for states to adopt. <http://serveourseniors.org/about/policy-makers/nasaa-model-act/>. According to NASAA:

The NASAA model act gives Industry participants and state regulators new tools to help detect and prevent financial exploitation of vulnerable adults. The act mandates reporting to a state securities regulator and state adult protective services agency when a qualified individual has a reasonable belief that financial exploitation of an eligible adult has been attempted or has occurred. The act also authorizes disclosure to third parties only in instances where an eligible adult has previously designated the third party to whom disclosure may be made. Importantly, the act directs that disclosures may not be made to the third party if the qualified individual suspects the third party of the financial exploitation.

Id.

In June of 2021, NASAA, the SEC and FINRA provided a senior training presentation as a resource for the securities industry, entitled “Addressing and Reporting Financial Exploitation of Senior and Vulnerable Adult Investors.” Within this document are several resources about training, including guidance of training, escalation within a firm, reporting and the Federal and state rules and laws relating to senior and vulnerable adult investor protection.

One thing the training presentation emphasizes is that, in order to obtain immunity under the Senior Safe Act of 2018, brokerage firms MUST give training to employees on how to identify and report financial exploitation of seniors. It also details potential red flags of exploitation:

## Red flags of potential financial exploitation

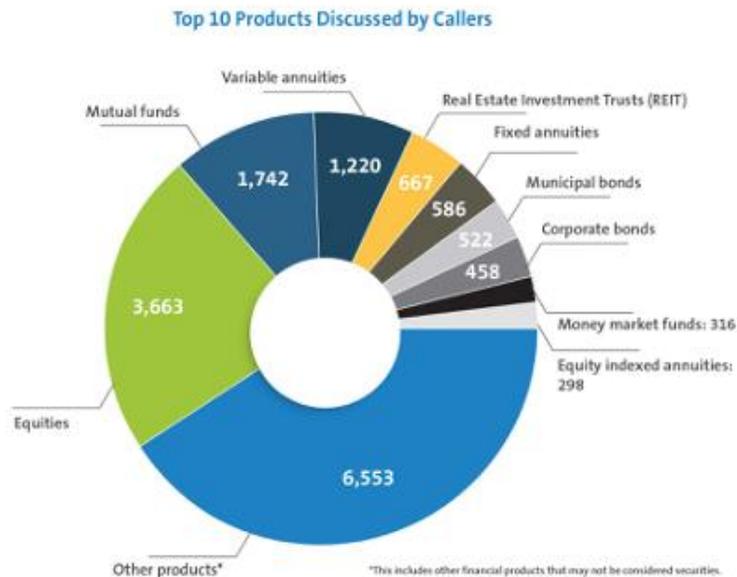


FINRA

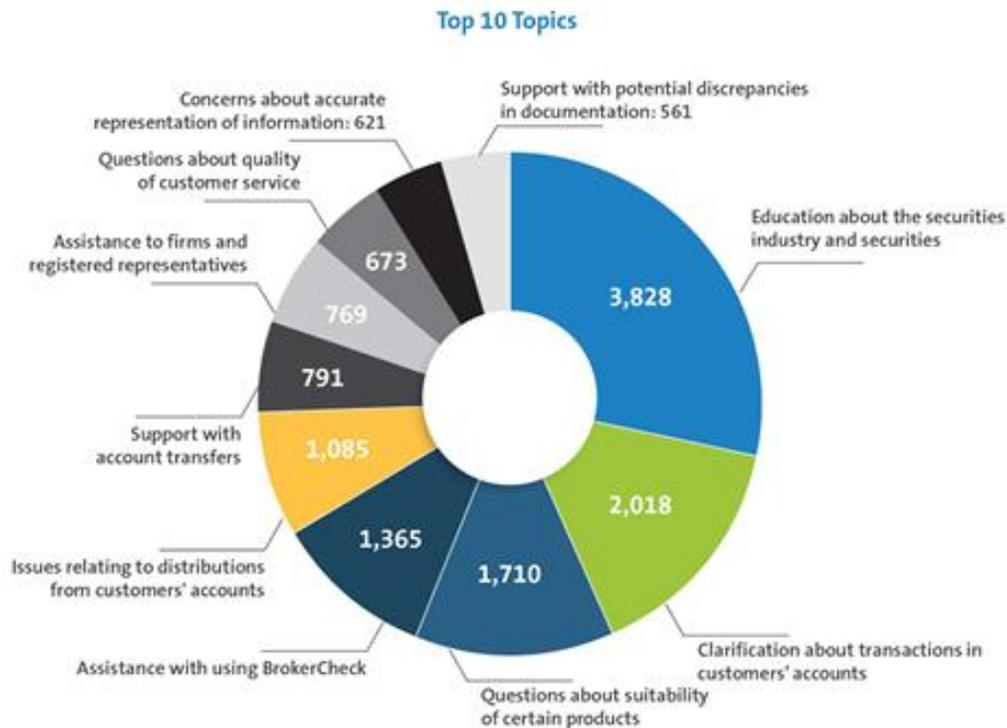
- Uncharacteristic and repeated cash withdrawals or wire transfers.
- Appearing with new and unknown associates, friends, or relatives.
- Uncharacteristic nervousness or anxiety when visiting the office or conducting telephonic transactions.
- Lacking knowledge about his, her, or their financial status.
- Having difficulty speaking directly with the client or customer without interference by others.
- Unexplained or unusual excitement about an unexplained or “too good to be true” windfall; reluctance to discuss details.
- Sudden changes to financial documents such as powers of attorney, account beneficiaries, wills, or trusts.
- Large, atypical withdrawals or closing of accounts without regard to penalties.
- Frequent password reset requests or new online account access requests.

<https://www.finra.org/rules-guidance/key-topics/senior-investors/elder-abuse-prevention-training>

Firms would further be wise to give extra attention to the top areas identified by the FINRA Securities Helpline for Seniors, An Update on the FINRA Securities Helpline for Seniors. (2020):



The topics discussed by callers include:



Id. These complaints can also be forwarded to FINRA Enforcement, state securities regulators, the SEC, law enforcement and other agencies, as well as other internationally based regulators.

The Report details several recent regulatory actions against registered representatives that have been initiated through tips to the Senior Hotline, include a number that include a broker becoming a joint account holder with the customer, annuity abuse, churning and other frauds such as Ponzi schemes and larceny.

Of course, nefarious actions in brokerage accounts are not only initiated by brokers, but can also be initiated by cyber thieves and scam artists, impostors, family members, lawyers and romantic partners.

## IDENTIFYING THE VICTIMS

Feelings of guilt and betrayal are typical amongst people who perceive themselves as a victim of any dishonesty or fraud. Many may not know what they can do or may be embarrassed to admit what happened to anyone. The Department of Justice has put it well:

Fraud crime is a personal violation. Your trust in your own judgment, and your trust in others, is often shattered. You may feel a sense of betrayal, especially if the perpetrator is someone you know. You may have hesitated to tell family members, friends, or colleagues about your victimization for fear of criticism. If they then were exploited by the same fraud, you might feel guilty and suffer a sense of isolation.

Fraud crimes can destroy your financial security and sometimes that of your loved ones. If you are elderly, disabled, or on a fixed income – and you lack opportunities to recover your losses – you may face additional trauma, even the loss of your independence.

You may experience feelings about:

- *Yourself*. That old saying, “Hindsight is 20-20,” is never more true than in financial fraud crimes. Many victims believe they should have known or recognized what was going on, or blame themselves for being too trusting or naïve.
- The *fraud criminal* for taking financial advantage of you, betraying your trust, and jeopardizing your financial independence and security.
- Your *family, friends* and *colleagues* for blaming you, being upset over what they perceive as your lack of judgment, or withdrawing financial or emotional support.
- The *investigative* and *prosecutorial phases* of the justice process, especially in cases that progress slowly or do not result in financial outcomes favorable to you.
- The *news media* for failing to warn the public about fraud schemes or for exploiting victims when fraud crimes are reported.
- *Consumer protection agencies* for failing to protect your interests.
- *Creditors* who don't understand your dire financial circumstances.
- *Community, state* and *federal agencies* if their resources are limited or they do not have the authority to help you.

<https://www.justice.gov/usao-wdwa/victim-witness/victim-info/financial-fraud>

Just getting to the point of admitting that one is a victim of a fraud and being willing and able to do something about it can seem daunting to seniors and even their families.

Further, as a legal practitioner, one seeking to represent a senior needs to question the situation themselves: Is the client competent? If not, is there a person who is helping the senior and do they have the proper authority to do so? That lawyer should obtain and maintain the documentation, as well as identify that person's involvement in retainers and throughout the representation when dealing with opposing counsel, courts and arbitrators.

It is also key for legal practitioners to obtain documentation upfront, at the time of retention, to document and create a chronology of what was discussed at earlier stages of the representation. For many seniors, the ability to recall and locate documents will only get worse over time. A timeline should track the victim's age, vulnerability to undue influence, assets, and actions against or taken by the victim and/or others. The timeline should take particular note of changes in investments or use of assets, as well as the purported reasons for the same. It is also important to track the mental and physical health of the victim. Seniors and vulnerable people will likely need

the help of family and friends in the process. Those roles need to be clearly defined and documented at the outset of the representation.

Moreover, it is not a bad practice to have a competent elderly victim to verify or swear to the truth of detailed pleadings at the outset. This can help protect the integrity of the process if that senior becomes unable to participate in the case at some future time. In some cases, it may make sense to agree with your adversary to depose a senior early in the process. Decisions that may be considered outside the norm need to be considered and weighed at the outset of the case, as there are special considerations about longevity and abilities where some seniors are concerned.

## IDENTIFYING THE RESPONDENT, THE PATH & THE FORUM

Wrongdoers are usually easily discerned. Brokers that engage in churning, unsuitable investments and high pressure sales tactics/misrepresentations and omissions – even those that are just negligent with customers – generally do not have a lengthy career and may be out of the business before you could even collect a judgment. While judgments may be good for 10 years or more depending on your state, your senior client does not have the time or money to chase a broker around the globe to get their money back. More importantly, retirement account rules, homestead rules, and not being able to get blood from a stone makes suing the actual wrongdoer generally unfruitful.

Most elder financial fraud cases target the lack of supervision of financial professionals, i.e., failure to supervise and respondeat superior cases. Even the less egregious cases, which do not involve fraud, but instead negligence or breach of contract, are usually pled to highlight the failures in supervision of the senior's account and what has happened in and around it.

If the case has a clear wrong, it might be worthwhile for your senior client to see if it can be resolved in a deadline-driven demand letter. Firms tend to be sensitive to cases involving vulnerable seniors, given FINRA, the SEC and other regulators have a keen interest in protecting seniors. FINRA Enforcement reviews every arbitration claim that is filed at its counterpart FINRA Dispute Resolution. FINRA Enforcement disciplines registered representatives and member firms, and its Sanction Guidelines mention more than once that “[w]hether the customer is age 65 or older” and “[t]he age, financial condition, and financial sophistication of the customer” can be aggravating factors in assessing penalties for rule violations. <https://www.finra.org/rules-guidance/oversight-enforcement/sanction-guidelines>. As a result, there can be incentives to settle a good case before it is even filed. Speedy resolution can be particularly important for seniors; however, because of the age of the client, any pre-filing process cannot continue for any prolonged period of time.

Many registered investment advisors, who are not FINRA registered, may have other arbitration venues or courts designated for dispute resolution. These forums tend to be more expensive and take longer than a FINRA arbitration. FINRA will accept cases between public customers and registered investment advisors if after a dispute arises the parties agree in writing to use the forum. That does not mean every scam artist and every victim can use FINRA arbitration.

There are currently a number of different arbitration bills pending. The Investor Choice Act, for instance, pertains specifically to arbitration agreements with brokers and advisers and has an aim to invalidate mandatory arbitration and give customers a choice of forum. <https://www.congress.gov/bill/117th-congress/house-bill/2620?s=1&r=95>

## ARBITRATION

In the brokerage context, when the senior has wrongdoing in a traditional brokerage account, it will likely be decided in FINRA arbitration. Even though a senior client may seek redress through an expedited FINRA arbitration, which is designed to get you to a hearing in about 9 months, it is not guaranteed. FINRA arbitrators are not legally required to honor the expedited timeline and have wide latitude. Many may be older themselves and not as sympathetic if they feel that perhaps, in their estimation – given their own state of being, “the senior is not in jeopardy” and may be close in age to the arbitrator, or even younger than the arbitrator. In fact, certain senior arbitrators may resent use of the expedited proceedings.

In an expedited arbitration, timelines are shortened, to speed the process along; however, as noted above, there are additional avenues for discovery that need to be employed to address issues around senior exploitation, training and reporting.

FINRA reports as of the date of this article, the following elder abuse statistics in its forum:

### Top 15 Controversy Types in Customer Arbitrations

A single arbitration case may include multiple controversy types.

Controversy		2021 Cases served	2020	2019	2018	2017
Elder Abuse	Through December	162	172	207	216	61
	Year-End	--	172	207	216	61

See <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics>. These statistics likely do not capture cases that bring causes of action unrelated to elder abuse, but are in fact cases involving seniors.

With registered investment advisors, the location of an arbitration forum varies – as do that forum’s procedures – and the outcomes are not reported, unless there is no arbitration designation. In that case, you are going to state or federal court with your claims under common law or the Investment Advisor Act – or its state equivalent, in which court filings can be searched. With motions to dismiss, depositions and appeals, cases filed in court can go on for many years, unlike arbitrations that are final and can only be vacated in court for extremely limited reasons.

In the arbitration context, the many rules, studies and guidance on senior issues by the regulators provides ample fodder for a good legal pre-hearing brief – much of which may have already been discussed in the statement of claim in arbitration. In the pre-hearing brief, issues targeted to supervision problems that may have existed and caused the issues to slip through the cracks can be focused on.

At the hearing, it is crucial to determine the best way to present your senior, their physical issues and/or limitations, if any, as well as obtain any support they may need to successfully participate in the hearing well in advance, so that if your adversary does not agree, a motion can be made to make sure the needed support can be accessed. This may include a family member to assist

during the case with the senior or other procedures or aids to insure the senior can fully participate. It can be helpful, for instance, to allow for extra copies of documents, bathroom breaks at set times, limited hours, a companion and the like.

For home-bound seniors with serious medical issues, virtual hearings may allow them to participate where they had previously been foreclosed from directly prosecuting their cases. While it is always best to be able to have your client interact in person with an arbitration panel, as mentioned in the beginning of this piece, feelings of guilt, illness and feelings of being overwhelmed often make victims retreat from taking action. A virtual hearing in this context may actually help these seniors take action. With the advent of pre-hearing conferences over Zoom, it is also advisable to have your elderly client participate in pre-hearing conferences to listen in and be seen by the Panel.

### EXPERTS & SPECIAL WITNESSES

In some cases, where there has been cognitive decline or complicated products, it is imperative to have expert witnesses to discuss those issues where medical evidence needs explanation, products are opaque, or conduct is targeted at seniors. Often, forensic accounting is needed.

### SETTLEMENT & MEDIATION

It behooves anyone representing a senior (or any other investor) to attempt to get that senior a settlement option, i.e., a choice to go to arbitration or court. For seniors, it gives them a window into the legal process and you can judge their ability to deal with the pressures of a long day and telling their story. It is key to have the client and their representatives present throughout the process.

### REPORTS TO AUTHORITIES

As mentioned earlier, FINRA, the SEC, the FBI, state regulators, and even local law enforcement have tools to report fraudulent conduct and abuse of seniors and vulnerable adults. A decision, with the client, must be made in every case about whether they do report the conduct and when such a reporting to other agencies should be made. Considerations include the wherewithal of the party being sued, if they cannot be sued, and whether you want to report after the suit is underway to prevent seizing of assets and collection issues if a big company is not involved.

### CONCLUSION

Firms that fail to implement adequate policies, procedures, supervision and training around the accounts of seniors and vulnerable adults may find themselves in litigation or arbitration with their elderly or vulnerable clients, or their heirs, not to mention facing the scrutiny of regulators and self-regulating organizations. The SEC, FINRA, NASAA and law enforcement, as well as other agencies and states, have protection of seniors in focus – and rightly so – as the cost of living rises for this group with irreplaceable assets that need to last through the remaining span of their lives.