2023 PIABA MID-YEAR MEETING

Public Investors Advocate Bar Association
1300 McGee Dr., Ste. 112
Norman, Oklahoma 73072
Office: 405.360.8776
Fax: 405.360.2063
E-Mail: piaba@piaba.org

2023 PIABA Mid-Year Meeting

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Alan J. Besnoff
Securities Expert Witness & Litigation Support, LLC
Fremont, New Hampshire

Alan J. Besnoff, CFP, ChFC, CLU is the founder of Securities Expert Witness & Litigation Support, LLC, which provides litigation consulting services and expert testimony for matters involving customer disputes and employment issues within the financial services industry.

Mr. Besnoff's expert engagements typically involve sales practices and alleged violations of rules and industry standards in the areas of securities, life insurance and annuities, as well as supervisory and U-5/wrongful termination matters.

Alan Besnoff has more than 30 years of financial services experience, primarily in supervisory and leadership positions.

Mr. Besnoff has passed FINRA registration examinations for Series 6, 63, 65, 7, 26, and 24, as well as state licensing examinations for Life Insurance & Annuities, Disability Insurance, Long Term Care Insurance, Variable Life Insurance and Variable Annuities.

Professional designations held by Mr. Besnoff include:

Certified Financial Planner, CFP Chartered Financial Consultant, ChFC Chartered Life Underwriter, CLU

Mr. Besnoff has developed and taught compliance training programs and has initiated and implemented policies and procedures to assure branch offices, financial advisors, registered representatives, brokers and managers are in compliance with FINRA regulations, and industry standards. He has taught securities, financial planning, insurance & annuities, and risk management at multiple universities and to financial advisors and managers throughout the financial services industry.

Industry leadership roles held by Mr. Besnoff include having served as President of the National Association of Insurance and Financial Advisors (NAIFA) in Connecticut.

Alan J. Besnoff is the current President of Securities Experts Roundtable.

Mr. Besnoff is serving a second term as Commissioner, Disciplinary and Ethics Commission of the Certified Financial Planner (CFP) Board of Standards.

Taylor Faw
South Carolina Assistant Attorney General
Columbia, South Carolina

Taylor Faw serves as the Chief Compliance Officer of Strathmore Capital Advisors, Inc., based in Charlotte, North Carolina. Prior to joining Strathmore Capital, Taylor was a Lead Compliance Associate with Fairview Investment Services, LLC and Fairview Cyber, LLC in Raleigh, North Carolina. He worked with a variety of investment advisers and investment companies to develop, implement, and maintain compliance programs and initiatives, as well as drafting information security policies and procedures.

Before working for Fairview, Taylor served as an Assistant Attorney General in the Enforcement Division of the South Carolina Securities Division. With the Securities Division, he focused on cases involving unregistered actors and more advanced technological aspects, including market manipulation and digital assets.

Angela Hayden, Esq.
Sage Legal, LLC
Newmarket, New Hampshire

Angela Hayden is a longtime member of PIABA and the founder of Sage Legal, LLC, a law practice located in Newmarket, NH, as well as Big Life Leaps Coaching (www.biglifeleaps.com) where she works with legal, financial services, and other professionals with demanding careers who are looking for more meaning in work and life. Angela addresses wellness issues in her coaching practice, helping professionals identify easy solutions to problems they are facing in their lives. She is a past PIABA board member and has served on multiple PIABA committees over the years. She started the PIABA Wellness Group in 2020, which meets online monthly. All PIABAns are welcome to join the monthly calls at any time - no work required!

Brian Henderson
Securities Litigation and Consulting Group, Inc.
McLean, Virginia

Dr. Henderson is Associate Professor of Finance at The George Washington University in Washington D.C. His teaching specialties include investment analysis and portfolio management, performance evaluation, derivative securities, fixed income portfolio management, and corporate finance. He is a Chartered Financial Analyst. He has presented his research at many academic conferences, universities, and to market regulators.

Dr. Henderson works as expert and is an expert in portfolio management, investment performance measurement and evaluation, structured products, fixed income securities, and investment companies. He has testified in FINA arbitrations, and both state and federal courts.

He has significant practical experience through numerous consulting engagements. These roles have included retirement plan design, investment performance evaluation, portfolio design, and quantitative investment research. He has also been on the investment committee at a tactical ETF portfolio manager. Prior to his graduate studies, he worked as an analyst in the Asset-Backed Securities Practice at PricewaterhouseCoopers LLP, where he developed payment models of complex, non-agency mortgage-backed securities.

Dr. Henderson has published extensively in peer-reviewed journals and professional books, including the *Journal of Financial Economics*, *Review of Financial Studies*, *Journal of Corporate Finance*, *Journal of Banking and Finance*, *Journal of Portfolio Management*, *Journal of Investment Management*, and *Journal of Fixed Income*. He has contributed chapters to *The Handbook of Fixed Income Securities* and *The Professional Risk Manager's Handbook*.

Mark Maddox, Esq.
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).

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

Jenice 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. Clients include 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 Practicing 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 LJaw 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.

Ms. Malecki has been a "Top Attorney" according to 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.

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.

Lance McCardle, Esq.
Fishman Haygood Phelps Walmsley Willis & Swanson LLP
New Orleans, Louisiana

Lance C. McCardle is a Partner in the law firm of Fishman Haygood, L.L.P. in New Orleans, Louisiana. He practices in the Firm's Litigation section, primarily in the areas of securities arbitration and litigation and general commercial litigation. Lance presently serves on the Editorial Board of the *Piaba Bar Journal,* and he is a member of the ABA Securities Law Committee, serving on the Securities Arbitration Subcommittee. Lance regularly represents investors in cases against brokers and investment advisors. He has represented several investors in cases against independent broker-dealers involving the sale of direct participation programs and multiple institutions in cases relating to the sale of auction rate securities.

He received his Juris Doctor, *magna cum laude,* and Masters in Business Administration from Loyola University in 2005. While in law school, Lance served on the Editorial Board of the *Loyola Law Review* and was the Oralist/Briefwriter for the school's First Amendment Moot Court Competition Team. He is the author of *Despite Congress's GOOD Intentions, the DMCA Produces a BAD Result: A Means to Create Monopolies*, published in 2004 in the Loyola Law Review and *Why Might A Broker Prefer To Be In Court, Not Arbitration* in HANDLING A SECURITIES CASE: FROM INVESTIGATION TO TRIAL AND EVERYTHING IN BETWEEN, published by the Practising Law Institute in 2012.

Lance is a fellow of the Louisiana Bar Foundation and a member of the Louisiana State, Federal, and American Bar Associations, as well as the American and Louisiana Associations for Justice. He has taught skills classes at Loyola University College of Law and Media Law at Tulane University. He is also a member of the St. Thomas More Inn of Court, and previously served as a Director of the Younger Lawyers Division of the New Orleans Chapter of the Federal Bar Association. Lance has been recognized in *The Best Lawyers in America* and *Super Lawyers* in the area of securities, and he has been named a Top Lawyer by *New Orleans Magazine,* and Future Star in *Benchmark Litigation*. He can be contacted at (504) 586-5298 or lmccardle@fishmanhaygood.com.

Debra G. Speyer, Esq.
Debra Speyer Law Firm
Bala Cynwyd, Pennsylvania

Debra G. Speyer is principal of the Law Offices of Debra G. Speyer and handles arbitrations throughout the United States. When she is not at her law office, she can be found on her solar powered farm raising heritage Scottish long horned Highland cattle, Galloway cattle, Llamas, and Dorper and Kahadian sheep.

Before going into private practice in 1990, Debra was an attorney with the Enforcement Division of the National Association of Securities Dealers (now known as FINRA) prosecuting brokerage firms and stockbrokers for investment fraud and regulatory violations. Prior to that, she was an attorney and vice president with Thomson McKinnon Securities, Inc., an international brokerage firm which later merged with Prudential Securities. While at Thomson McKinnon, she passed every stockbroker and brokerage firm examination that the securities industry offered, including all options and commodities examinations.

Debra holds a law degree, a master's degree in finance with a thesis on program trading and stock markets, and a bachelor's degree in accounting. Prior to entering law school, she was an accountant. She has been listed in Philadelphia Magazine's Best Lawyers, SuperLawyers, Suburban Magazine and Mainline Magazine for her work handling securities fraud and elder law matters. She is also listed in Who's Who in American Law and Who's Who in America. She was honored by the National Organization of Women Business Owners with their "Women Making History" award. Debra is a member of the Million Dollar Advocates Forum for her securities arbitration work. The Million Dollar Advocates Forum is limited to attorneys who have won million - and multi-million-dollar verdicts and settlements.

Jane L. Stafford, Esq.
Stafford Law Firm LLC
Prairie Village, Kansas

Jane L. Stafford founded her firm after gaining more than 20 years securities law experience with several highly regarded firms. Ms. Stafford focuses her practice in the area of securities law representing clients in addressing compliance, enforcement and regulatory matters as well as investors seeking recovery of lost money.

Areas of Practice: Investment Advisors; Broker-Dealers; Individual Investors; General Securities; Enforcement Work; Individual Registered Representatives; Issuers; Corporate Governance; Contested Estate Matters

Bar Admissions: Missouri

Education: American University, Washington College of Law, Washington, District of Columbia; Vanderbilt University, Nashville, Tennessee, Bachelor of Arts

Professional Associations and Memberships: Kansas City Securities Association, 1991 - Present
Director and Officer; Securities Industry Association, Legal and Compliance Division; Missouri Bar, 1992 - 1994, Vice Chairman Business Law Committee; Missouri Bar, 1995 - Present, Member Continuing Legal Education Committee; Kansas City Metropolitan Bar Association, 1994 – 1995
Chairman; Kansas City Metropolitan Bar Association, 2001 - 2003, Vice Chairman; Kansas City Metropolitan Bar Association, 1995 - 1996, Securities Committee and member Corporate Law Committee

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Peter J. Tepley, Esq.
RumbergerKirk
Birmingham, Alabama

Peter Tepley focuses his practice on commercial litigation. He represents securities broker dealers, including clearing brokers, and their registered representatives in customer, employment, and industry disputes in FINRA arbitrations as well as in state and federal courts. He also represents public and private companies and their officers and directors in a variety of complex business disputes, including business torts and breach of contract cases. Peter defends businesses and individual officers and directors in class actions, including securities class actions. In addition, he represents fiduciaries and other parties in will contest and breach of fiduciary duty cases.

Pete is the Chair of RumbergerKirk's Diversity and Inclusion Committee

Prior to his legal career, he spent nearly ten years in the computer software industry.

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.

Documenting Rollover Recommendations: The DOL and SEC Requirements

November 19, 2020
Written By: Fred Reish

The Department of Labor (DOL) and the Securities and Exchange Commission (SEC) are focusing on rollover recommendations and their impact on plan participants. The DOL has historically taken the position that a recommendation by a fiduciary advisor is subject to the ERISA prudent man rule and the duty of loyalty (known in combination as a best interest standard), and has recently expanded the definition of who is a fiduciary advisor. The SEC says that rollover recommendations by investment advisers and broker-dealers are subject to its best interest requirements. This article discusses the recent DOL guidance and the SEC's Regulation Best Interest (Reg BI).

In both documents, the DOL and the SEC have expressed opinions about documentation for those recommendations. The DOL makes documentation an explicit requirement of its proposed prohibited transaction exemption for fiduciary investment advice. The SEC encourages documentation in the preamble to Reg BI. Neither mandates the information that needs to be reviewed and documented, but both provide lists of relevant data in the preambles to their guidance. In this post, we discuss the requirement and provide a chart of the information that should be considered.

The DOL Requirement

The DOL's proposed fiduciary advice prohibited transaction exemption has an explicit documentation requirement for rollover recommendations. The proposed exemption requires that:

> *The Financial Institution* [for example, broker-dealer or RIA] *documents the specific reasons that any recommendation to roll over assets from a Plan to another Plan or IRA…, from an IRA … to a Plan, from an IRA to another IRA, or from one type of account to another (e.g., from a commission-based account to a fee-based account) is in the Best Interest of the Retirement Investor.* (Section II(c)(3))

While the factors to be documented are not addressed in the proposed exemption, the DOL discusses the issue in the preamble. It states that

> *The requirement is designed to ensure that Investment Professionals take the time to form a prudent recommendation, and that **a record is available for later review**.* (Emphasis added.)

The DOL then lists factors that should be considered, as reflected in the chart provided later in this post. The DOL also discusses the efforts a fiduciary advisor should expend to obtain the necessary information:

In evaluating a potential rollover from an ERISA-covered Plan, the Investment Professional and Financial Institution should make diligent and prudent efforts to obtain information about the existing Plan and the participant's interests in it.

Finally, the DOL addresses what happens if the information cannot be obtained, as shown in the chart.

The SEC Requirement

In the preamble to Reg BI, which applies to broker-dealers, the SEC says the following (in text preceding footnote 415):

> *…the decision to roll over a 401(k) into an IRA may be one of the most significant financial decisions a retail investor could make. Thus, a broker-dealer should discuss the basis of such recommendations with the retail customer. Similarly,* ***we encourage broker-dealers to record the basis for their recommendations****, especially for more complex, risky or expensive products and significant investment decisions, such as rollovers and choice of accounts,* ***as a potential way a broker-dealer could demonstrate compliance with the Care Obligation.*** (Emphasis added.)

Unlike the DOL, the SEC merely "encourages" broker-dealers to maintain records of the basis for a rollover recommendation rather than requiring it. The purpose of such records, the SEC says, is so that the broker-dealer can show later on, presumably during an examination, that it was acting in the customer's best interest in making the recommendation.

In the adopting release for Reg BI, the SEC lists various factors that a broker-dealer should consider. These factors are listed in the chart below.

While Reg BI has a detailed discussion of the need to keep records for rollover recommendations, the SEC's Interpretation Regarding the Standard of Conduct for Investment Advisers (the RIA Interpretation) does not address the need to develop and maintain documentation. That said, it is important to note that RIAs are held to a fiduciary standard that is at least arguably higher than the broker-dealer best interest standard. In light of this, it is a fair assumption that the SEC would not hold RIAs to a lower standard than that expected of broker-dealers. That view is bolstered by a public statement issued by SEC Chairman Clayton in June 2020, where he said:

> *In meeting their respective obligations under Reg BI and the Advisers Act, broker-dealers and investment advisers should review their operations to be sure they are making recommendations or providing investment advice to retail investors that is in those investors' best interest….I believe firms should ensure that, particularly under current conditions, focus is being applied in the following areas, to the extent they are included in a firm's recommendation or advice to a retail investor:*

Rollovers and withdrawals from 401(k) and other plans. Reg BI's application to recommendations of rollovers of and withdrawals from retirement accounts is one of its most significant enhancements over the status quo.

Chairman Clayton is in essence applying the same standards and, presumably, the same regulatory requirements to both broker-dealers and RIAs and highlights this similarity in the context of rollovers. As a result, it would be prudent for RIAs to gather and evaluate the same information that the SEC describes (below) for broker-dealers, and to maintain that information, as well as the reasons for recommending a rollover.

Information to Consider

DOL List	SEC List
Whether to roll over The Financial Institution should consider the Retirement Investor’s alternatives to a rollover, e.g., leaving the money in the current employer’s Plan, if permitted, and selecting different investment options	Whether to roll over Broker-dealers should: • consider whether to make a recommendation to open an IRA, or to roll over workplace retirement plan assets into an IRA versus • keeping assets in a previous employer’s workplace retirement plan or rolling over assets to a new employer’s workplace retirement plan, and • consider a variety of factors, the importance of which will depend on the particular retail customer’s needs and circumstances… • in order to compare the retail customer’s existing account to the IRA offered by the broker-dealer.
Factors for rollover from plan to IRA • the fees and expenses associated with both the Plan and the IRA • whether the employer pays for some or all of the Plan’s administrative expenses • the different levels of services and investments available under the Plan and the IRA.	Factors for rollover or account change • suitability information plus • additional factors specifically salient to IRAs and workplace retirement plans, in order to compare the retail customer’s existing account to the IRA, which “should generally include, among other relevant factors” • fees and expenses • level of service available • available investment options

	• ability to take penalty-free withdrawals • application of required minimum distributions • protection from creditors and legal judgments • holdings of employer stock • any special features of the existing account.
Rollover from another IRA or change from a commission-based account to a fee-based arrangement: • the services that would be provided under the new arrangement.	Not addressed However, under Reg BI and the RIA interpretation, the consideration of cost is an essential element of developing a recommendation.
If the Retirement Investor is unwilling to provide the information or information is not otherwise available, Investment Professional must provide: • a full explanation to the Retirement Investor of the significance of the information • an explanation of the assumptions used and their limitations to the Retirement Investor • a reasonable estimation based on publicly available information of • expenses • asset values • risk and returns	Not addressed While the SEC has not addressed this issue, we believe that it is likely that it would adopt the DOL's analysis, considering the DOL's experience and expertise in this area.

Conclusion

When financial professionals make rollover recommendations, whether from a plan to an IRA or from one IRA to another, they and their firms should maintain records of the factors reviewed and evaluated in making the recommendation. The DOL mandates documentation; the SEC suggests it for broker-dealers (and, as a result, it could be viewed as a good risk mitigation practice for RIAs). While neither the DOL nor the SEC specify the information that must be considered, both have provided examples of important factors. For the most part, the lists are very similar. As a result, broker-dealers and RIAs should consider reviewing both the SEC and DOL lists of factors and developing a checklist of factors to be used in the process of evaluating the rollover alternative that is in the best interest of a participant.

Recommending Rollovers in the Evolving Regulatory Environment (Part 1)

August 9, 2018
Written By: Fred Reish

With recent developments in the regulatory landscape – the demise of the DOL Fiduciary Rule, the SEC's proposed Regulation Best Interest (Reg BI) and RIA fiduciary interpretation, and the existing FINRA guidance on rollovers – it's important for firms to understand the rules for rollover recommendations. This article discusses the rules as they apply to both broker-dealers and RIAs. While there are similarities in the application, there are also material differences.

By "rollover" recommendation, we mean a recommendation made to a participant in a retirement plan to take a distribution of his or her account and roll it over to an IRA handled by the broker-dealer or RIA (which in this article we refer to as the "firms"). In this article, we look at the existing ERISA rules in light of the 5th Circuit's decision vacating the Fiduciary Rule, and then review existing FINRA guidance on rollover recommendations. In Parts 2 and 3, we'll discuss the SEC's proposals for broker-dealers and RIAs and where that may take firms in the future, as well as how to comply with the rules when making a rollover recommendation.

In 2005, the DOL opined that a rollover recommendation is not fiduciary advice under ERISA. On the other hand, it said that if an advisor is already a fiduciary to a plan, a rollover recommendation is considered a fiduciary act, which subjects the advisor to the ERISA fiduciary and prohibited transaction rules. The DOL did an about-face when it issued its new Fiduciary Rule, saying that the recommendation was fiduciary advice, so that even if an advisor was not a plan fiduciary, he or she became a fiduciary for that recommendation. But since the Fiduciary Rule is now gone, the 2005 advisory opinion re-emerges as the controlling guidance.

This re-emergence means that firms need to assess whether they and their advisors are plan fiduciaries. RIA services to plans would usually satisfy the "five-part test" used to determine whether someone is giving ERISA fiduciary investment advice. Assuming the RIA is a fiduciary to the plan, this means that it and its advisors would also be fiduciaries under ERISA for rollover recommendations. Even if they are not fiduciaries for ERISA purposes, they would nonetheless be fiduciaries to participants in that plan.

Depending on the facts, broker-dealer services may or may not constitute fiduciary investment advice. Broker-dealers will need to carefully assess their advisors' services to plans to determine whether the advisors and the broker-dealer are fiduciaries to the plans and therefore are fiduciaries for rollover recommendations to participants in that plan.

Even if the broker-dealer and its advisor are not fiduciaries under ERISA, they are still governed by FINRA's rules, which are in FINRA Regulatory Notice 13-45. In that Notice, FINRA said that a rollover recommendation is inherently a recommendation about the purchase, sale or holding of securities, which triggers application of Rule 2111, the suitability rule. Regarding rollover recommendations, FINRA said:

> *A recommendation to roll over plan assets to an IRA rather than keeping assets in a previous employer's plan or rolling over to a new employer's plan should reflect consideration of various factors, the importance of which will depend on an investor's individual needs and circumstances.*

It then listed factors to be considered and compared, including differences in the plan and the proposed IRA regarding investment options, fees and expenses, services, penalty-free withdrawals, creditor protection and required minimum distribution requirements.

FINRA also provided what amounts to an admonishment about how an advisor should approach the recommendation:

> *If Rule 2111 is triggered, a registered representative must have a reasonable basis to believe that the recommendation is suitable for the customer, based on information about the options obtained through reasonable diligence, and* ***taking into account factors such as tax implications, legal ramifications, and differences in services, fees and expenses between the retirement savings alternatives.*** *[Emphasis added]*

The factors to be considered, including those at the end of that quote, are similar to the approach taken by the DOL in its vacated Fiduciary Rule. Put another way, to the extent a firm modified its procedures and policies with a view to complying with the DOL rule for rollover recommendations, it may want to consider the requirements of 13-45 before reverting to its prior practices.

FINRA acknowledged in Notice 13-45 that some firms only permit advisors to provide educational information about rollovers (which is consistent with the DOL position). In those cases, FINRA said, firms should adopt measures reasonably designed to ensure that the firm and its advisors do not make recommendations. Those measures should include training, consideration of compensation arrangements that could cause an advisor to make a recommendation, and monitoring advisor communications to ensure that the prohibition against rollover recommendations is not compromised.

Where does this leave firms today? FINRA's suitability rules apply to the recommendations, so firms need to follow the Notice 13-45 guidance. Firms also need to assess whether they are plan fiduciaries under the DOL's five-part test. If they are, the recommendation is also subject to the ERISA fiduciary and prohibited transaction rules.

The bottom line is that firms need to carefully consider existing requirements in developing a compliance approach for recommending or educating participants about rollovers.

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Recommending Rollovers in the Evolving Regulatory Environment (Part 2)

September 18, 2018
Written By: Fred Reish

In our **first post on this topic**, we discussed the existing rules that apply to rollover recommendations by broker-dealers and RIAs. This discussion included the ERISA guidance that remains after the 5th Circuit's decision vacating the Fiduciary Rule, as well as FINRA's Regulatory Notice 13-45. In this post, we focus on the SEC's best interest proposals for broker-dealers and RIAs and where that may take firms in the future. In our next, and final, post in this series, we'll talk about how to make a compliant rollover recommendation.

(As a reminder, by "rollover" recommendation, we mean a recommendation to a retirement plan participant to take a distribution of his or her account and roll it over to an IRA being advised by the broker-dealer or RIA.)

Application to Broker-Dealers

In April, the SEC released its proposed Regulation Best Interest ("Reg BI"). The SEC indicates that broker-dealers will (if and when Reg BI is finalized) have an obligation to act in the best interest of their clients when making securities recommendations. (Keep in mind that broker-dealers are already subject to FINRA Notice 13-45, discussed in **Part 1**. While Notice 13-45 does not impose a "best interest" standard when a broker-dealer makes a rollover recommendation, it does require an in-depth assessment of differences in costs, investments and services between the plan and IRA.)

Reg BI applies only to retail customers. This means that advice to plans and institutional investors would not be covered, but the SEC makes clear that the best interest standard will apply to "investment" recommendations to individual participants, including rollover recommendations. This refers to participants in participant-directed plans, such as 401(k) and 403(b) plans.

To understand how Reg BI applies, let's start with the fact that it would govern recommendations of "securities transactions." But is a rollover recommendation a securities transaction? According to the SEC, it is: they explain that "[s]ecurities transactions may also include recommendations to roll over or transfer assets from one type of account to another, such as recommendations to roll over or transfer assets in [a participant-directed plan] account to an IRA."

The SEC also references FINRA Notice 13-45 in Reg BI, as well as the FINRA suitability requirements, explaining (in footnote 155) that "a firm may recommend that an investor sell his plan assets and roll over their cash proceeds into an IRA. Recommendations to sell securities in the plan or to purchase securities for a newly-opened IRA are subject to FINRA's suitability obligations." Since almost all plans will only distribute cash, a rollover recommendation involves an implicit recommendation of a securities transaction.

But Reg BI goes beyond suitability. The SEC also says that a rollover recommendation involves a material conflict of interest. This is because a broker-dealer will earn commissions or other fees as a result of the recommendation, whereas “a recommendation that a retail investor leave his plan assets with his old employer or roll the assets to a plan sponsored by a new employer likely results in little or no compensation for a firm or a registered representative.” (See footnote 204.) The SEC goes on to say that broker-dealers have an obligation to mitigate the financial conflict. One obvious way to mitigate would be not to receive compensation from the IRA, but that is not realistic. Thus, in the rollover context, we think firms will likely need to adopt a robust process for ensuring that the recommendation is in the customer’s best interest.

Reg BI imposes both best interest and suitability standards of care on rollover recommendations by broker-dealers. This requires care, skill, prudence and diligence in making recommendations and includes a duty of loyalty. The suitability and best interest standards apply to recommendations about the re-investment of distributed money in the IRA.

Application to RIAs

In April, the SEC also released its proposed interpretation of the fiduciary obligation of RIAs under the Investment Advisers Act. Unlike Reg BI, which contains proposed rules that require additional action to become applicable, the RIA interpretation is the SEC’s view of existing rules. This suggests that RIAs should be looking to comply with the interpretation now.

In the context of a rollover recommendation by an RIA, the best interest standard would apply to any type of plan – not just participant-directed plans – because recommendations to all clients are covered by the RIA fiduciary standard. An RIA’s recommendation about the investments in the rollover IRA would be covered by the best interest standard.

Where does this leave us? For a broker-dealer, the Notice 13-45 requirements apply and, if it becomes final, the Reg BI best interest requirement – including the duty of loyalty and avoidance or mitigation of material financial conflicts – would apply to retail customer recommendations. For RIAs, the SEC’s best interest standard applies to all of their rollover recommendations to participants in all types of plans, as well as to IRAs.

In our next post, we’ll discuss how to apply the best interest standard to rollover recommendations.

Recommending Rollovers in the Evolving Regulatory Environment (Part 3)

October 22, 2018
Written By: Fred Reish

In Parts 1 and 2 of this post, we talked about the current and proposed rules applicable to rollover recommendations by broker-dealers and RIAs. Part 1 discussed the DOL and FINRA rules that apply now. In Part 2, we explained the SEC proposals. In this post, we talk about how to make a compliant rollover recommendation, regardless of which set of rules applies.

("Rollover recommendation" refers to advice to a retirement plan participant to take a distribution of his or her account and roll it over to an IRA that is being advised by the broker-dealer or RIA.)

General Standards

Before discussing the factors an advisor must consider, let's review the general standards for making the recommendation:

- The ERISA standard is the prudent process. The advisor must use "care, skill, prudence and diligence" and engage in a thorough investigation, which means gathering relevant information and evaluating that information in light of the needs and circumstances of the participant. In other words, the SEC's proposals and the DOL's vacated rule are remarkably similar on rollover recommendations, though the SEC's proposal applies to all recommendations and the DOL's rule would only have applied in the case of plans subject to ERISA.

- The SEC's Reg BI imposes similar requirements and uses similar wording. It refers to FINRA Regulatory Notice 13-45, which, like the ERISA requirement, says an advisor must obtain information about important factors (see below) and assess it in light of the investor profile. In addition to making sure the recommendation is "suitable," Reg BI and the SEC's RIA interpretation say it must be in the "best interest" of the participant. It then goes on to say that the advisor and his firm owe the participant a duty of loyalty, i.e., their interests cannot supersede those of the participant.

Stated simply, regardless of which rule is being applied, to satisfy the best interest and loyalty standards, an advisor (of a broker-dealer or an RIA) must use and document a process of gathering and carefully and professionally considering the relevant information.

Relevant Factors

What are the relevant factors? We think the two best sources are Regulatory Notice 13-45 and the DOL's Best Interest Contract Exemption (BICE). Notice 13-45 is especially relevant since the SEC refers to it in Reg BI (and elsewhere). In essence, FINRA and the DOL said that advisors must consider, among other factors, the following:

- the investments, services and expenses in the plan;
- the investments, services and expenses for the proposed rollover IRA;
- information about the participant, e.g., needs, financial objectives and risk tolerance;
- though not required, other factors, such as participant preferences, outside assets, other family investments, and so on.

Why are we suggesting that advisors look at BICE? After all, it was vacated by the Fifth Circuit in June. But we think it reflects the DOL's current thinking and is helpful guidance in trying to apply a "best interest" standard. Further, the DOL might use this list in enforcement actions against advisors who are plan fiduciaries making rollover recommendations. Also, FINRA and the SEC may defer to the DOL's thinking in this area.

Keep in mind, though, the alternative we mentioned in Part 1…to provide participants with education about their options and not make a recommendation that triggers the best interest requirements.

Conclusion

In making rollover recommendations, good risk management suggests that broker-dealers and RIAS should develop policies, procedures and supervisory practices for gathering and considering the relevant information mentioned earlier: information about the plan investments, services and costs; and do a comparison with the same information in the proposed IRA, taking into account the investment profile of the participant.

faegre drinker

SLOW Your Roll: DOL Temporarily Halts Enforcement of Compliance with PTE and ERISA Fiduciary Obligations for Rollover Advice

November 30, 2021
Written by: Sandra D. Grannum, Jamie L. Helman and Edward J. Scarillo

Benjamin Franklin once said “don’t put off until tomorrow what you can do today.” While that is always prudent advice, the Department of Labor (DOL) believes it’s best to grant an extension to investment advisors and broker-dealers to comply with the full terms of the Prohibited Transaction Exemption 2020-02 (PTE 2020-02), beyond the current December 21, 2021, deadline. A previous blog post covered the scope of the PTE and provided guidance on compliance.

In Field Assistance Bulletin 2021-02, the DOL announced that it would delay, until February 1, 2022, pursuing claims against “financial institutions”, including broker-dealers and investment advisers, “who are working diligently and in good faith to comply with the Impartial Conduct Standards” set forth in PTE 2020-02. The DOL also announced that it will not enforce the requirement that retirement investors be provided with the specific reasons why a rollover recommendation is in their best interest until July 1, 2022. (The DOL definition of “rollover” includes rolling over assets from 401(k) plans to individual retirement accounts and transfers of IRAs from other firms.) The DOL will begin enforcing all of PTE’s other requirements on February 1, 2022.

The DOL’s extensions come on the heels of financial institutions’ concerns that the December 20 deadline would be impractical because firms would (a) incur significant costs to distribute disclosures, (b) more efficiently perform the required annual retrospective reviews on a calendar-year basis, and (c) have significant challenges in implementing the rollover documentation and disclosure requirements in a sufficiently automated and systematic manner. The DOL took these concerns to heart and noted, “The Department understands that the December 20, 2021 expiration date of the current transitional relief poses practical difficulties for financial institutions.”

Advisers and broker-dealers will certainly appreciate the extensions. Nevertheless, our advice (in line with Mr. Franklin’s) remains: The time to act is now. PTE 2020-02’s requirements remain complex and burdensome and will involve considerable time and thought.

faegre drinker

The DOL's Fiduciary Interpretation and Exemption: Impact on Rollover Recommendations

January 12, 2021
Written by: Fred Reish

On December 18, 2020, the Department of Labor published its expansion of the fiduciary interpretation and exemption for conflicted advice in the Federal Register. (Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers and Retirees.) The exemption will be effective on February 16, 2021. The interpretation is effective immediately.

Since the effective date for the exemption is after the inauguration of the Biden administration, it is almost certain that the effective date will be further delayed. During that delay, we think it is likely the exemption will be revised or possibly withdrawn. But, it is just as likely that the expanded definition of fiduciary advice for rollover recommendations will be retained and possibly expanded. That could make life more difficult for broker-dealers, investment advisers and insurance companies. While these rules will affect all of those industries, this article focuses on the impact of the likely outcomes on broker-dealers.

To understand the impact of these changes, the starting point is in the prohibited transaction restrictions in ERISA and the Internal Revenue Code (Code). Without getting into the weeds, those rules prohibit fiduciary recommendations to plans, participants or IRA owners that result in increased compensation for the "fiduciary advisor." That raises two issues. The first is the meaning of increased compensation and the second is what constitutes a fiduciary recommendation? We discuss both questions, and the answers, in the context of rollover recommendations.

In the preamble to the exemption, the DOL explains the conflict of interest (that is, the prohibited transaction):

A firm that recommends a rollover to a Retirement Investor can generally expect to earn transaction-based compensation such as commissions, or an ongoing advisory fee, from the IRA, but may or may not earn compensation if the assets remain in the Title I Plan. In light of potential conflicts of interest related to rollovers from Title I Plans to IRAs, Title I and the Code prohibit an investment advice fiduciary from receiving fees resulting from investment advice to Title I Plan participants to roll over assets from the plan to an IRA, unless an exemption applies.

In other words, the compensation that would be earned for investment services to the rollover IRA would be prohibited, absent an exemption, or exception, to the prohibited transaction restriction. Thus, the purpose of this exemption is to provide that exception, but only if the conditions in the exemption are satisfied. (While the conditions are beyond the scope of this article, one example is that the specific reasons why the rollover recommendation is in the best interest of the participant must be put in writing, and that writing must be given to the participant.) A point to remember, though, is that if there isn't an exemption, the compensation resulting from a fiduciary rollover recommendation would be prohibited.

In response to the second question…when is a rollover recommendation fiduciary advice…the DOL dramatically changed its interpretation of the 5-part fiduciary test. That test includes as one prong a requirement that advice be rendered "on a regular basis." In the past, most broker-dealers had relied on the "regular basis" part to say that a rollover recommendation was not fiduciary advice. That is, since rollover recommendations are usually made only once, a broker-dealer (or its representative) would not become a fiduciary because of the rollover recommendation. However, in its new interpretation the DOL appears to have found a way around that limitation. Here's what they said:

However, advice to roll over plan assets can also occur as part of an ongoing relationship or an intended ongoing relationship that an individual enjoys with his or her investment advice provider. ***In circumstances in which the investment advice provider has been giving advice to the individual about investing in, purchasing, or selling securities or other financial instruments through tax-advantaged retirement vehicles subject to Title I or the Code, the advice to roll assets out of a Title I Plan is part of an ongoing advice relationship that satisfies the regular basis prong.***

The DOL is, in effect, tacking the previous advice about how to invest, *e.g.*, in an IRA, onto the recommendation to rollover, and saying that the two combined satisfy the regular basis test for fiduciary status. Certainly innovative, but not everyone is convinced that advice to an individual about investing in an IRA can be attached to a rollover recommendation to that same investor in his or her capacity as a participant. But the DOL has the upper hand here in the sense that it can seek to enforce the rules this way, and the broker-dealer will be arguing in court that the interpretation is incorrect.

In the preamble to the exemption, the DOL also said:

Similarly, advice to roll assets out of a Title I Plan into an IRA where the investment advice provider has not previously provided advice but will be regularly giving advice regarding the IRA in the course of a more lengthy financial relationship would be the start of an advice relationship that satisfies the regular basis prong. *It is clear under Title I and the Code that advice to a Title I Plan includes advice to participants and beneficiaries in participant-directed individual account pension plans, so in these scenarios, there is advice to the Title I Plan— meaning the Plan participant or beneficiary—on a regular basis.*

This is a continuation of the same reasoning as the first example, but in this case there is a connection in the sense that the money in the rollover IRA came from advice about the participant's account in the plan.

Accepting, for the purposes of this article, that the DOL position will hold up, and acknowledging that it is an enforcement interpretation, it is already in effect. Since we suspect that most rollover recommendations will fall under the new fiduciary interpretation, that means that broker-dealers need the exemption in order to avoid prohibited transactions for compensation earned from the investments in the rollover IRAs. But, what if the Biden administration delays the effective date of the exemption or, for that matter, withdraws the exemption? That would mean that rollover recommendations would be stymied…because of the prohibited transaction rules and the lack of an exemption.

Fortunately, though, the DOL and IRS have agreed to extend a non-enforcement policy (FAB 2018-02) for one year…until December 20, 2021. That means that neither the DOL nor the IRS will enforce the prohibited transaction rules for fiduciary rollover recommendations until that date, so long as the Impartial Conduct Standards (ICS) are satisfied. The ICS are, in essence, the best interest standard of care, a limitation to reasonable compensation, and a prohibition on materially misleading statements.

However, that's not the end of the story. While the DOL and IRS will not enforce those rules during 2021, ERISA can also be enforced by private rights of action. For example, a participant who received "bad" rollover advice could seek damages for breach of fiduciary duty by the broker-dealer or its representative. And, of course, the SEC and FINRA could enforce the best interest standard for rollover recommendations in Reg BI.

This article is a straightforward presentation of the rules and issues. There is more complexity than could be discussed here. This is an area where broker-dealers should obtain expert advice from experienced professionals.

Managing IRAs: Charging Different Fees for Different Investments

January 17, 2023
Written By: Fred Reish and Joan M. Neri

Key Takeaways:

Registered investment advisers, including dual registrant broker-dealers (collectively "advisers") who provide discretionary investment management services to individual retirement accounts (IRAs), are fiduciaries under the Internal Revenue Code (the "Code"). While the Code does not have a fiduciary standard of care, it does have a duty of loyalty in the sense that most conflicts of interest are prohibited.

The Code prohibits an investment adviser fiduciary to an IRA from using its authority as a fiduciary to receive additional compensation. This means that an adviser with the authority to make asset allocation decisions in an IRA cannot charge a different fee for different investment categories (e.g., equities vs. fixed income) unless a prohibited transaction exemption is available. Alternatively, there are other compensation structures that can be considered.

Advisers who manage IRAs may have discretionary authority to determine the asset allocation among equities and fixed income assets based on the investor's investment objectives, financial needs and circumstances. The fee charged for this service may be a level fee based on the value of all assets – equity and fixed income; in that case, there would not be a conflict that it was a prohibited transaction. But, let's suppose the adviser wants to charge one fee for advising on the portion of the investor's IRA portfolio that is allocated to equities, and a lower fee for the portion allocated to fixed income investments, and the adviser has the discretion to decide how much is allocated to equities and how much is allocated to fixed income. As explained later in this article, the allocation to the higher fees (that is, to equities) is an exercise of discretion that is a conflict and a prohibited transaction because it increases the adviser's compensation.

Fiduciary Status under the Code

Under the Code, an adviser who exercises authority or control over management of IRA assets is a fiduciary. Incidentally, there is a similar definition of fiduciary under the Employee Retirement Income Security Act (ERISA), but stand-alone IRAs are not subject to ERISA. Similar to ERISA, though, the Code prohibits transactions involving self-dealing.

The Self-Dealing Rule

Under the Code, an adviser cannot use her fiduciary authority – i.e., the authority to make allocation decisions – to cause herself to receive additional compensation. The rule applies to an adviser who charges a higher level fee for equities, as compared to fixed income, because the adviser's use of her fiduciary authority to allocate more to equities results in additional compensation to her.

Compensation Structure Solutions

This raises the question of whether there is a prohibited transaction exemption available to address this compensation structure when the adviser has discretion over the asset allocation decisions. Unfortunately, there is not. (PTE) 2020-02 (Improving Investment Advice for Workers & Retirees) (the "PTE") is not available because it is limited to variable compensation resulting from non-discretionary fiduciary investment advice to IRAs.

Therefore, one approach is to change the service structure so that the asset allocation decision is non-discretionary, i.e., the investor has the final decision-making authority over the asset allocation and needs to consent before a change is implemented. If the asset allocation is non-discretionary, then the adviser can rely on PTE 2020-02, if the conditions of the exemption are satisfied.

An alternative solution is for the adviser to charge a blended fee that is level across the IRA portfolio. For example, an adviser might charge 100 basis points for advising on an equity-only portfolio, but 80 basis points on a fixed income-only portfolio. For a 50/50 asset allocation, the adviser could charge, as an example, 90 basis points for that portfolio.

Another alternative is for the adviser to establish several asset allocation strategies and develop an established fee that reflects the general considerations of each asset allocation. As an example, an adviser might charge 100 basis points on the 80% equities/20% fixed income portfolio, 95 basis points on the 60% equities/40% fixed income portfolio, 90 basis points on the 50% equities/50% fixed income portfolio, 85 basis points on the 40% equities/60% fixed income portfolio, and 80 basis points on the 20% equities/80% fixed income portfolio. The retirement investor can then decide which portfolio strategy to use for his IRA. This structure will not result in a prohibited transaction as long as the level fee is reasonable and is charged across the whole portfolio on an ongoing basis.

Conclusion

With the heightened attention on rollovers and compliance with PTE 2020-02, it is likely that regulators will also focus their attention on the services and fees charged to IRAs. Broker-dealers should review current practices and compensation structures for IRAs to ensure that the prohibited transaction rules of the Code are satisfied.

faegre drinker

Rollover Recommendations – Do the SEC and DOL Requirements Align?

November 3, 2022
Written by: Fred Reish and Joan M. Neri

Key Takeaways

The SEC and the DOL have separately issued guidance on rollover recommendations – however, a close examination indicates that the guidance by both agencies is very similar. The SEC's guidance for broker-dealers is in Regulation Best Interest and a recent Staff Bulletin on account recommendations. The DOL's guidance about rollover recommendations came in the form of an expanded interpretation of fiduciary advice found in the Preamble to PTE 2020-02 and a set of Frequently Asked Questions. These pieces of guidance share the following three principles: (1) a best interest standard, (2) a process to support that best interest standard that requires consideration of relevant factors about the investor, the investor's current retirement account and the recommended rollover account, and (3) documentation supporting the basis for the recommendation.

There are a few differences between the SEC and the DOL guidance that broker-dealers and their registered representatives should know about, including that the SEC rollover guidance is applicable to a much broader array of retirement plans and accounts, and also that the SEC guidance does not require a disclosure about the best interest reasons for the rollover recommendation as does the DOL under PTE 2020-02.

Background

As we have discussed in previous posts, the DOL's prohibited transaction exemption (PTE) 2020-02 (Improving Investment Advice for Workers & Retirees), (the "PTE") allows broker-dealers and their registered representatives (investment professionals) to receive conflicted compensation resulting from non-discretionary fiduciary investment advice to private sector tax-qualified and ERISA-governed retirement plans, participants in those plans, and IRA owners (collectively, "retirement investors"). Also, in the Preamble to the PTE, the DOL expanded its interpretation of fiduciary advice. As a result of that expanded interpretation, many more broker-dealers and their investment professionals are fiduciaries for their recommendations to retirement investors – including rollover recommendations – and therefore will need the protection provided by the PTE.

The SEC's guidance about rollover recommendations by broker-dealers and their investment professionals first appeared in the SEC's "best interest" rulemaking package that included "Regulation Best Interest: The Broker-Dealer Standard of Conduct" ("Reg BI"). More recently, the SEC issued Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors which provides specific guidance about rollover recommendations.

Best Interest Standard

Both the SEC and the DOL impose a best interest standard that reflects the ERISA concepts of prudence and loyalty. As explained by the SEC in Reg BI:

The revised obligation, in requiring the broker-dealer to ‘‘exercise reasonable diligence, care and skill’’ and to have a “reasonable basis to believe that the recommendation is in the best interest. . . and does not place’’ the interest of the broker-dealer ahead of the interest of the retail customer, will continue to require an analysis that is comparable to the notion of ‘‘prudence’’ as described in other regulatory frameworks, but does so using the terms ‘‘diligence, skill, and care’’—terminology with which broker-dealers are familiar and that is well understood under the federal securities laws.

Best Interest Process

In addition, the SEC’s best interest process involves the same general approach as does that of the DOL – namely:

- Obtaining information about the retirement investor;
- Obtaining information about the investments, services and expenses of the retirement investor’s current retirement account and the recommended rollover account; and
- Evaluating the information collected to determine the option that is in the retirement investor’s best interest.

Obtaining Information about the Retirement Investor

The SEC staff explains that in order to have a reasonable basis to believe a recommendation is in the retirement investor’s best interest, an investment professional should consider investor characteristics, such as —

the retail investor’s: financial situation (including current income) and needs; investments; assets and debts; marital status; tax status; age; investment time horizon; liquidity needs; risk tolerance; investment experience; investment objectives and financial goals; and any other information the retail investor may disclose to you in connection with an account recommendation. The staff also believes that you should consider, without limitation, the retail investor’s: anticipated investment strategy (e.g., buy and hold versus more frequent trading); level of financial sophistication; preference for making their own investment decisions or relying on advice from a financial professional; and the need or desire for account monitoring or ongoing account management.

Similar to this approach, the DOL’s best interest standard under PTE 2020-02 requires that the recommendation be “based on the investment objectives, risk tolerance, financial circumstances and needs” of the plan participant. In other words, in the view of both agencies, the best interest process is not a one size fits all approach, but instead requires that the investment professional consider what is important for satisfying that particular participant’s needs – e.g., active management, wider array of investments, asset allocation services, periodic withdrawals, sustainable income, etc.

Obtaining Information About the Current Retirement Account and the Recommended Rollover Account

The SEC staff points out that in addition to information about the retirement investor, there are specific factors about the current retirement account and the account being recommended that should be considered:

These factors include, without limitation, costs; level of services available; features of the existing account, including costs; available investment options; ability to take penalty-free withdrawals; application of required minimum distributions; protection from creditors and legal judgments; and holdings of employer stock.

The DOL also references factors like these in describing the comparative analysis of the current plan account and proposed rollover account that should be undertaken to determine whether a rollover is in the best interest. Further, the DOL says that a best interest recommendation requires that the broker-dealer and investment professional consider not only two options — leaving the money in the current retirement account or rolling it over to an account with the investment professional — but also the investor's other options. These other options may include rollover to the plan of a new employer (if the employee is switching jobs and the plan accepts plan rollovers) or taking a taxable distribution.

The SEC does not mention these other alternatives; however, rolling over to a new plan — if available — is an account type that may need to be considered in determining which account type is in the best interest of the investor. Further, the SEC staff highlights the importance of complying with the conditions of PTE 2020-02 if a broker-dealer is relying on it — and in that case, all of the investor's options should be considered:

If you are relying on Prohibited Transaction Exemption 2020-02 ("PTE 2020-02"), you may want to review guidance from the Department of Labor on factors to consider in making a rollover recommendation, as well as relevant documentation requirements.

Documenting the Basis for the Recommendation

A condition of PTE 2020-02 is that the broker-dealer retain for six years the underlying documentation necessary to prove compliance with the PTE conditions, including the best interest standard. While the SEC does not require a specific documentation or retention obligation, the SEC Staff points out the importance of retaining documentation of compliance:

In the staff's view, when making a rollover recommendation, it may be difficult for a firm to assess periodically the adequacy and effectiveness of its policies and procedures or to demonstrate compliance with its obligations to retail investors without documenting the basis for the recommendation.

DOL vs. SEC — Two Significant Differences

As indicated above, the DOL and SEC guidance on rollover recommendations is very similar. However, there are two significant differences.

One is that the DOL's rules apply only to rollover recommendations from ERISA-governed plans, private sector qualified plans and IRAs. The SEC's rules apply to rollover recommendations from all plans, including non-ERISA plans such as government plans.

The second is that the DOL's PTE 2020-02 requires that, when a rollover recommendation is made, the participant must be provided, in writing, with the "specific reasons" why the rollover recommendation is in the best interest of the participant. The SEC does not require this. However, a fair reading of the SEC Staff Bulletin is that a broker-dealer and its representatives must have “specific reasons” why the rollover recommendation is in the best interest of the retirement investor.

Conclusion

The SEC and DOL requirements for satisfying the best interest standard for rollover recommendations is very similar. For plans covered by the fiduciary and prohibited transaction rules in ERISA and the Internal Revenue Code, broker-dealers need to have compliant practices that satisfy both SEC and DOL standards. In fact, it would appear that compliance with the DOL requirements will satisfy the guidance in the SEC Staff Bulletin. And, even for plans not covered under ERISA or the Code, it could be that the most efficient course of action for SEC compliance would be to apply the DOL approach to those rollover recommendations.

Standard of Care for Rollover Advice

August 27, 2019
Written By: Joan M. Neri

The standard of care for rollover recommendations has been top of mind for broker-dealers beginning with the issuance of the Department of Labor's (DOL's) now vacated fiduciary rule, and more recently with the SEC's Regulation Best Interest (Reg BI), raising the question of the extent to which the SEC standard of care for rollover recommendations differs from the DOL's.

The standards appear to be essentially the same – a requirement to act in the customer's best interest (keeping in mind that Reg BI will not be applicable until June 30, 2020, while the DOL rules are applicable now). However, there are two major differences:

- First, the DOL standard applies to rollover recommendations made only if the firm is a fiduciary to the plan or to the participant. However, the Reg BI standard applies to all rollover recommendations made to a retail customer, regardless of whether the firm is a fiduciary to the plan – plus Reg BI applies to recommendations to participants in non-ERISA plans.

- Second, the SEC and the DOL take different approaches to conflicts of interest. The SEC requires the delivery of a Form CRS, which discloses the firm's services, fees and conflicts to customers, and mitigation of material conflicts (*e.g.,* where a conflict creates an incentive for an advisor to place his/her or the firm's interests ahead of the customer's). In contrast, under the DOL rules, disclosure is not sufficient – the DOL strictly prohibits conflict of interest transactions under its prohibited transaction rules unless an exemption is available.

Reg BI

The Reg BI standard of care applies to recommendations made to a retail customer – such as an individual or plan participant – related to a securities transaction or an investment strategy involving securities; it includes account recommendations. This means that in the rollover context, the Reg BI standard of care applies to advice about whether a participant should roll over plan assets, the account type into which the assets should be rolled and how the assets should be invested. As stated by the SEC, the Reg BI standard of care obligation requires that a broker-dealer have a reasonable basis to believe that taking the assets out of the plan and rolling them over to an IRA is in the best interest of the participant at the time of the recommendation.

DOL Standard

The DOL's standard of conduct only applies if the firm is already an ERISA fiduciary to the plan. (See our blog post Recommending Rollovers in the Evolving Regulatory Environment (Part 1.) An advisor who is not already a fiduciary who recommends a rollover is not considered to be giving fiduciary advice – but this could change if the DOL issues a new fiduciary regulation. If the broker-dealer and/or the advisor are ERISA fiduciaries, the rollover recommendation is a fiduciary act subject to ERISA's duty of loyalty and prudent man standard of care. And, if it causes the firm to receive additional compensation that it would not have received absent the recommendation (*i.e.*, the IRA advisory fee), the firm may be committing a prohibited transaction.

Although there is no prohibited transaction exemption for this transaction (the Best Interest Contract Exemption, which would have provided relief, was also thrown out by the Fifth Circuit), the DOL has issued a temporary non-enforcement policy. (For more about that policy, review our post [The DOL's Temporary Enforcement Policy: Potential Traps for the Unwary].) Note, however, that the non-enforcement policy does not protect against private rights of action by plans or participants against firms. The good news is we believe the DOL is likely to issue an exemption to replace the non-enforcement policy.

Process Requirement

Both ERISA's prudent man standard and the Reg BI standard require a similar process for rollover advice. Both require that the firm evaluate the participant's options – leave the money in the plan, take a distribution or roll it over to an IRA (or a new employer's plan if the participant is changing jobs). The firm must determine which option is in the participant's best interest, taking into account relevant factors.

This means the firm should develop a process for obtaining sufficient information about the existing plan, the proposed IRA and the participant in order to determine whether a rollover recommendation aligns with the participant's needs and is in his/her best interest. The advisor should consider asking questions, such as:

- How do the investments in the existing plan and those available in the proposed IRA compare in terms of their quantitative (including costs) and qualitative characteristics?
- Does the existing plan offer participant-level investment services, educational and planning tools, a managed account solution and/or a self-directed brokerage feature?
- What are the fees and expenses charged to the participant under the plan and the proposed IRA, and does the employer pay for some or all of the plan expenses?
- What are the potential impacts of the minimum distribution requirements and asset protection rules?
- Does the plan provide for periodic distributions?

Most of this information should be available on the participant's disclosure statement (the 404a-5 disclosure) and quarterly statements. The advisor also must consider all types of accounts – both brokerage and advisory – in making a best interest determination.

Conclusion

There is a convergence of the standards of care applicable to rollover recommendations as applied by the DOL and the SEC. At a minimum, the best interest process needed to satisfy these standards should include (1) a comparison of the investments, services and fees in the plan and the IRA; (2) information about the investor's financial circumstances, needs and preferences (an “investor profile”); and (3) a recommendation that aligns with the investor’s profile. Once this process is undertaken, the firm may find there are circumstances when an advisor has to recommend that the participant leave the money in the plan.

Note: We recently updated the State Fiduciary Duty and Best Interest Developments chart to reflect the finalization of the Massachusetts Advisor Fee Table.

The DOL's New Fiduciary Rule: What We Can Expect

February 21, 2023
Written By: Fred Reish and Joan M. Neri

Key Takeaways:

The current DOL fiduciary rule says that a broker-dealer and its registered representatives (advisors) are fiduciaries to a plan under ERISA if a functional 5-part test is satisfied. This same 5-part test applies to determining whether an advisor is a fiduciary to an IRA under the Internal Revenue Code (the Code).

The DOL expanded its interpretation of fiduciary advice in the Preamble to PTE 2020-02 by re-interpreting one of the elements of that 5-part test. As a result, many more broker-dealers and their advisors are fiduciaries under ERISA and/or the Code for their recommendations to retirement investors, including rollover recommendations. While a recent decision by a Federal District Court in Florida set aside the DOL's position on fiduciary status due to rollover recommendations, it did not change the 5-part test and its application to advice to retirement plans or IRAs. (We will discuss the impact of that holding on rollover recommendations in a future article.)

The DOL's regulatory agenda indicates that in the near future, the DOL will be proposing a new fiduciary definition and proposing amendments to existing prohibited transaction exemptions (PTEs) to align with the proposed regulation. While we don't know what the new regulation will say, we anticipate that, at the least, it will include the DOL's expanded interpretation of fiduciary advice for rollovers (and might go beyond that). We also anticipate that many of the conditions in PTE 2020-02 will be included in the proposals for other exemptions, for example, in PTE 84-24.

Background

Under the current regulatory definition of fiduciary advice, a broker-dealer and its advisor are fiduciaries under ERISA and/or the Code when (1) providing advice about investments for a fee, (2) on a regular basis, (3) under a mutual understanding with the plan fiduciary or IRA owner, (4) that the advice will serve as a primary basis for investment decisions with respect to plan or IRA assets, and (5) that the advice is based on the particular needs of the plan or IRA (the 5-Part Test).

The DOL expanded its interpretation of the "regular basis" component in the Preamble to (PTE) 2020-02 (Improving Investment Advice for Workers & Retirees), (the PTE). Under its new interpretation, a broker-dealer and its advisor are providing advice on a regular basis (1) if the advisor has a pre-existing advice relationship with the investor on tax-qualified retirement assets (e.g., advising on another IRA), or (2) if the advisor anticipates that the rollover recommendation is the first step in an ongoing financial relationship concerning tax-qualified retirement assets (e.g., the rollover IRA). This is the interpretation that the Florida court set aside. We expect that the court's decision will increase the sense of urgency for the issuance of a new regulation.

Why the DOL Believes a New Fiduciary Rule is Needed

On January 4, 2023, the DOL published its regulatory agenda. The regulatory agenda is a listing of the regulations (including exemptions) that the Department expects to have under active consideration for promulgation, proposal, or review during the coming 6- to 12-month period. In its regulatory agenda, DOL explains why it believes a new rule is needed:

> *The 1975 regulation's five-part test is not founded in the statutory text of ERISA, does not take into account the current nature and structure of many individual account retirement plans and IRAs, is inconsistent with the reasonable expectations of plan officials and participants, and IRA owners who receive investment advice, and allows many investment advice providers to avoid status as a fiduciary under federal pension laws…The Department believes that the 1975 regulation must be revised to align with retirement investors' reasonable expectations regarding their relationships with investment advice providers and to reflect developments in the investment advice marketplace since the 1975 regulation was adopted. Failure to appropriately define an investment advice fiduciary under ERISA is likely to expose retirement investors to conflicts of interest that will erode retirement savings.*

The DOL observes that amending the fiduciary advice rule and associated exemptions are especially important to address the conflicts of interest associated with rollovers.

> *The risks are especially great with respect to recommendations to roll assets out of ERISA-covered plans to IRAs because of the central importance of retirement plan savings to workers, the relative size of rollover transactions, and the technical requirements of the current fiduciary regulation, which have encouraged advisers to argue that their advice falls outside the regulation's purview regardless of its importance.*

Based on this, it is likely that the proposed rule will specifically address rollover recommendations. While it's possible that the proposal will take an approach similar to the way rollovers are addressed under the Preamble to PTE 2020-02, it's also possible that the DOL will go beyond the re-interpretation in the Preamble, for example, the proposal could say that a rollover recommendation is, in and of itself, fiduciary advice.

Impact on PTE 2020-02 and other PTEs

The DOL explains that as part of the rulemaking, it will be making conforming changes to existing PTEs:

> *In conjunction with this rulemaking, EBSA also will evaluate available prohibited transaction class exemptions and consider proposing amendments or new exemptions to ensure consistent protection of employee benefit plan and IRA investors.*

The DOL further explains that the proposed rule and associated PTE amendments will include the following requirements:

- adherence to a best interest standard;
- no more than reasonable compensation may be charged;
- elimination or mitigation of conflicts of interest; and
- important disclosures to affected parties.

Because PTE 2020-02 already contains these requirements, it does not seem likely that the proposed rule will have a significant impact on that PTE. However, other PTEs that do not contain all of these conditions — such as PTE 84-24 which applies to insurance and annuity transactions — will likely be amended as part of the rulemaking.

Conclusion

Since we don't know how far the new proposal will go in modifying the definition of fiduciary advice and we don't know for sure what conditions will be imposed by the proposed changes to the exemptions, it is premature to make changes to policies and procedures for compliance with the existing rules. However, it is almost certain that the proposals will be no less demanding than the current rules. As a result, broker-dealers should, for the moment, ensure that their policies and practices are consistent with the current rules and, of course, be attentive to any new proposals.

You Might Want to Write Down Why You Recommended that Rollover

March 8, 2023
Written By: Sandra D. Grannum, Jamie L. Helman and Emmanuel L. Brown

Since Regulation Best Interest's (Reg BI) June 30, 2020 compliance date, the Division of Examinations of the Securities and Exchange Commissions (the Division) has been busy implementing examinations of broker-dealers to assess compliance with the regulation. The Division is planning to include Reg BI compliance into future examinations of broker-dealers. Therefore, the Division issued a Risk Alert on January 30, 2023 calling attention to deficiencies found during broker-dealer compliance examinations, as well as certain inadequate practices that might lead to deficiencies. Broker-dealers should pay attention to the issues identified by the SEC so that they do not expose themselves to regulatory trouble later down the line.

Some of the exposed weaknesses and deficiencies regarding the Reg BI Care Obligation[1] involved inadequate written policies that directed financial professionals to document the basis for their recommendations but failed to state when doing so is required or which information is needed. Under Reg BI, financial professionals are required to make account recommendations that are in the best interest of the retail investor. Doing so is especially important when a financial professional is recommending a significant financial transaction to a retail investor, like an account rollover recommendation.

When making a rollover recommendation, a financial professional should consider several factors, which include but are not limited to the following: cost of services available, features in existing accounting, available investment options, ability to take penalty-free withdrawals, application of required minimum distributions, protection from creditors and legal judgments, and holdings of employer stock.

The Adopting Release of Reg BI (the Adopting Release), does not require that broker-dealers document the basis for their recommendations, but says a broker-dealer "may wish" to document the basis for a recommendation in certain contexts, such as a recommendation of a "complex product" or a recommendation that may seem "inconsistent with a retail customer's investment objective on its face." Adopting Release at 272-3. The Adopting Release encourages broker-dealers to take a "risk-based approach." *Id.* In other words, "figure it out on your own, and fail to document at your own risk!"

Practically speaking, it may be advisable to document rollover recommendations because they are often material to the participant and are based on a complex analysis of plan features, IRA features and retail investor needs and circumstances, and inherently involve material conflicts of interest. In addition, the Department of Labor's PTE 2020-02 requires that rollover recommendations to tax qualified, ERISA-governed

[1] Care Obligation requires broker-dealers to "exercise reasonable diligence, care, and skill when making a recommendation to a retail customer." Adopting Release at 13-14.

retirement plans be documented and that the participant be given a written explanation of why a rollover is in the best interest of the participant.

The SEC is clear that financial professionals need to recommend the option that is in the best interest of the retail investor/participant, even if that includes recommending that the rollover not be made to an IRA with the broker-dealer. It is important to remember that making a rollover recommendation based solely on a customer's preference does not satisfy Reg BI because a plan participant likely does not have a full understanding of what is in their best interest. While there is nothing in Reg BI that prohibits a financial professional from opening an account at the customer's direction (against the professional's recommendation), the failure to document the basis for opening that account could cause further investigation if the SEC examines the recommendation in the future. (In addition, if the DOL investigates, or the SEC refers the matter to the DOL, an undocumented recommendation would not obtain the relief of PTE 2020-02 and the recommendation could be both a fiduciary breach and a prohibited transaction.)

Broker-dealers beware. When creating written policies and procedures to have your financial professionals comply with Reg BI's requirements, make sure you take a "risk-based" rather than a "risky" approach. It is always better to err on the side of caution and give your financial professionals specific instructions on when (often!) and how (very detailed!) they should document the basis for their rollover recommendations.

IRS

Retirement Plan Investments FAQs

There are certain limitations on the types of investments a retirement plan can have. Some investment restrictions apply to different plan types. Prohibited transactions are certain transactions between a retirement plan and a disqualified person. If you are a disqualified person who takes part in a prohibited transaction, you must pay a tax.

These frequently asked questions and answers provide general information and should not be cited as legal authority.

Are there special limits on the type of investments available to retirement plans?

Although there is no list of approved investments for retirement plans, there are special rules contained in the Employee Retirement Income Security Act of 1974 (ERISA) that apply to retirement plan investments. In general, a plan sponsor or plan administrator of a qualified plan who acts in a fiduciary capacity is required, in investing plan assets, to exercise the judgment that a prudent investor would use in investing for his or her own retirement. (ERISA Section 404) In addition, certain rules apply to specific plan types. For example, there are different limits on the amount of employer stock and employer real property that a qualified plan can hold, depending on whether the plan is a defined benefit plan, a 401(k) plan, or another kind of qualified plan. (ERISA Section 407) Certain plans, such as 401(k) plans, that permit participant-directed investment can avoid some fiduciary responsibilities if participants are offered at least three diversified options for investment, each with different risk/return factors. (Labor Reg. Section 2550.404c-1)

In addition, under the Code, both participant-directed accounts and IRAs cannot invest in collectibles, such as art, antiques, gems, coins, or alcoholic beverages, and they can invest in certain precious metals only if they meet specific requirements. (IRC Section 408(m))

Individual retirement accounts also are not permitted to invest in life insurance. (IRC Section 408(a)(3))

Finally, certain transactions between a plan and a "disqualified person" are specifically prohibited by law (see below). Similar rules apply to transactions between an IRA and its owner or beneficiary or between an IRA and a disqualified person.

What is a prohibited transaction?

A prohibited transaction is a transaction between a plan and a disqualified person that is prohibited by law.

Prohibited transactions generally include the following transactions:

- a transfer of plan income or assets to, or use of them by or for the benefit of, a disqualified person;
- any act of a fiduciary by which plan income or assets are used for his or her own interest;
- the receipt of consideration by a fiduciary for his or her own account from any party dealing with the plan in a transaction that involves plan income or assets;
- the sale, exchange, or lease of property between a plan and a disqualified person;
- lending money or extending credit between a plan and a disqualified person; and
- furnishing goods, services, or facilities between a plan and a disqualified person.

Certain transactions are exempt from being treated as prohibited transactions. For example, a prohibited transaction does not take place if a disqualified person receives a benefit to which he or she is entitled as a plan participant or beneficiary. However, the benefit must be figured and paid under the same terms as for all other participants and beneficiaries.

The Department of Labor (DOL) has granted class exemptions for certain types of investments under conditions that protect the safety and security of the plan assets. In addition, a plan sponsor may request that the DOL give them an administrative exemption for a proposed transaction that would otherwise be a prohibited transaction.

For additional information, see Publication 560, Retirement Plans for Small Business (SEP, SIMPLE, and Qualified Plans) PDF, and Retirement Topics – Prohibited Transactions.

Additional Resources

- Retirement Topics – Investing Plan Assets
- IRA FAQs - Investments
- Retirement Plans FAQs regarding IRAs
- Pub 4222, 401(k) Plans for Small Businesses PDF
- Investing 401(k) Monies
- Ten Warning Signs That 401(k) Contributions Are Being Misused PDF
- Duties of Fiduciaries in Light of Recent Events Regarding Bernard L. Madoff Investment Securities, LLC
- Beginners' Guide to Asset Allocation, Diversification and Rebalancing
- MyMoney.gov (Saving & Investing)
- Savings Fitness: A Guide to Your Money and Your Financial Future PDF
- Taking the Mystery Out of Retirement Planning PDF

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U.S. DEPARTMENT OF LABOR

Employee Benefits Security Administration

Investing And Diversification

The Pension Protection Act of 2006 directed the Department of Labor to provide plan participants and beneficiaries sources of information on investing and diversification.

Many employees have the ability to choose or direct their investments in their workplace retirement plans. For example, many people who participate in a 401(k) plan choose where the money in their individual accounts is invested among the plan's options. The Department of Labor has a number of publications that provide information on various types of investments typically offered in 401(k) and other employer retirement plans, as well as information on the importance of diversification.

The Department's publication, Savings Fitness: A Guide to Your Money and Your Financial Future, provides an overview of how to include retirement savings in your overall financial plan. The chapter on Strengthening Your Fitness Plan, pages 13–17, describes different types of investments and explains how diversifying investments can reduce investment risk. This publication is available in English and Spanish.

Taking the Mystery Out of Retirement Planning is designed to assist individuals who are within 10 years of retirement plan their finances. Chapter 2, pages 9–11, provides information on investing and diversification. In addition, A Look at 401(k) Plan Fees includes descriptions of different types of investments typically offered through 401(k) plans.

Other Information On Investing And Diversification

- Securities and Exchange Commission publication *Beginners' Guide to Asset Allocation, Diversification, and Rebalancing*
- AARP has information on investing in their Topics in Money and Work

Employee Benefits Security Administration

An agency within the U.S. Department of Labor

200 Constitution Ave NW
Washington, DC 20210
1-866-4-USA-DOL
1-866-487-2365
www.dol.gov

U.S. Securities and Exchange Commission

Variable Annuities: What You Should Know

Variable annuities have become a part of the retirement and investment plans of many Americans. Before you buy a variable annuity, you should know some of the basics – and be prepared to ask your insurance agent, broker, financial planner, or other financial professional lots of questions about whether a variable annuity is right for you.

This is a general description of variable annuities – what they are, how they work, and the charges you will pay. Before buying any variable annuity, however, you should find out about the particular annuity you are considering. Request a prospectus from the insurance company or from your financial professional, and read it carefully. The prospectus contains important information about the annuity contract, including fees and charges, investment options, death benefits, and annuity payout options. You should compare the benefits and costs of the annuity to other variable annuities and to other types of investments, such as mutual funds.

Contents

What Is a Variable Annuity?

A variable annuity is a contract between you and an insurance company, under which the insurer agrees to make periodic payments to you, beginning either immediately or at some future date. You purchase a variable annuity contract by making either a single purchase payment or a series of purchase payments.

A variable annuity offers a range of investment options. The value of your investment as a variable annuity owner will vary depending on the performance of the investment options you choose. The investment options for a variable annuity are typically mutual funds that invest in stocks, bonds, money market instruments, or some combination of the three.

Although variable annuities are typically invested in mutual funds, variable annuities differ from mutual funds in several important ways:

First, variable annuities let you receive **periodic payments** for the rest of your life (or the life of your spouse or any other person you designate). This feature offers protection against the possibility that, after you retire, you will outlive your assets.

Second, variable annuities have a **death benefit.** If you die before the insurer has started making payments to you, your beneficiary is guaranteed to receive a specified amount – typically at least the amount of your purchase payments. Your beneficiary will get a benefit from this feature if, at the time of your death, your account value is less than the guaranteed amount.

Third, variable annuities are **tax-deferred**. That means you pay no taxes on the income and investment gains from your annuity until you withdraw your money. You may also transfer your money from one investment option to another within a variable annuity without paying tax at the time of the transfer. When you take your money out of a variable annuity, however, you will be taxed on the earnings at ordinary income tax rates rather than lower capital gains rates. In general, the benefits of tax deferral will outweigh the costs of a variable annuity only if you hold it as a long-term investment to meet retirement and other long-range goals.

Caution!

Other investment vehicles, such as IRAs and employer-sponsored 401(k) plans, also may provide you with tax-deferred growth and other tax advantages. For most investors, it will be advantageous to make the maximum allowable contributions to IRAs and 401(k) plans before investing in a variable annuity.

In addition, if you are investing in a variable annuity through a tax-advantaged retirement plan (such as a 401(k) plan or IRA), you will get **no additional tax advantage** from the variable annuity. Under these circumstances, consider buying a variable annuity only if it makes sense because of the annuity's other features, such as lifetime income payments and death benefit protection. The tax rules that apply to variable annuities can be complicated – before investing, you may want to consult a tax adviser about the tax consequences to you of investing in a variable annuity.

Remember: Variable annuities are designed to be long-term investments, to meet retirement and other long-range goals. Variable annuities are not suitable for meeting short-term goals because substantial taxes and insurance company charges may apply if you withdraw your money early. Variable annuities also involve investment risks, just as mutual funds do.

How Variable Annuities Work

A variable annuity has two phases: an **accumulation phase** and a **payout phase**.

During the **accumulation phase**, you make purchase payments, which you can allocate to a number of investment options. For example, you could designate 40% of your purchase payments to a bond fund, 40% to a U.S. stock fund, and 20% to an international stock fund. The money you have allocated to each mutual fund investment option will increase or decrease over time, depending on the fund's performance. In addition, variable annuities often allow you to allocate part of your purchase payments to a fixed account. A fixed account, unlike a mutual fund, pays a fixed rate of interest. The insurance company may reset this interest rate periodically, but it will usually provide a guaranteed minimum (*e.g.*, 3% per year).

> **Example:** You purchase a variable annuity with an initial purchase payment of $10,000. You allocate 50% of that purchase payment ($5,000) to a bond fund, and 50% ($5,000) to a stock fund. Over the following year, the stock fund has a 10% return, and the bond fund has a 5% return. At the end of the year, your account has a value of $10,750 ($5,500 in the stock fund and $5,250 in the bond fund), minus fees and charges (discussed below).

Your most important source of information about a variable annuity's investment options is the prospectus. Request the prospectuses for the mutual fund investment options. Read them carefully before you allocate your purchase payments among the investment options offered. You should consider a variety of factors with respect to each fund option, including the fund's investment objectives and policies, management fees and other expenses that the fund charges, the risks and volatility of the fund, and whether the fund contributes to the diversification of your overall investment portfolio. The SEC's online publication, *Mutual Fund Investing: Look at More Than a Fund's Past Performance*, provides information about these factors. Another SEC online publication, *Invest Wisely: An Introduction to Mutual Funds*, provides general information about the types of mutual funds and the expenses they charge.

During the accumulation phase, you can typically transfer your money from one investment option to another without paying tax on your investment income and gains, although you may be charged by the insurance company for transfers. However, if you withdraw money from your account during the early years of the accumulation phase, you may have to pay "surrender charges," which are discussed below. In addition, you may have to pay a 10% federal tax penalty if you withdraw money before the age of 59½.

At the beginning of the **payout phase**, you may receive your purchase payments plus investment income and gains (if any) as a lump-sum payment, or you may choose to receive them as a stream of payments at regular intervals (generally monthly).

If you choose to receive a stream of payments, you may have a number of choices of how long the payments will last. Under most annuity contracts, you can choose to have your annuity payments last for a period that you set (such as 20 years) or for an indefinite period (such as your lifetime or the lifetime of you and your spouse or other beneficiary). During the payout phase, your annuity contract may permit you to choose between receiving payments that are fixed in amount or payments that vary based on the performance of mutual fund investment options.

The amount of each periodic payment will depend, in part, on the time period that you select for receiving payments. Be aware that some annuities do not allow you to withdraw money from your account once you have started receiving regular annuity payments.

In addition, some annuity contracts are structured as **immediate annuities**, which means that there is no accumulation phase and you will start receiving annuity payments right after you purchase the annuity.

The Death Benefit and Other Features

A common feature of variable annuities is the **death benefit**. If you die, a person you select as a beneficiary (such as your spouse or child) will receive the greater of: (i) all the money in your account, or (ii) some guaranteed minimum (such as all purchase payments minus prior withdrawals).

> **Example:** You own a variable annuity that offers a death benefit equal to the greater of account value or total purchase payments minus withdrawals. You have made purchase payments totaling $50,000. In addition, you have withdrawn $5,000 from your account. Because of these withdrawals and investment losses, your account value is currently $40,000. If you die, your designated beneficiary will receive $45,000 (the $50,000 in purchase payments you put in minus $5,000 in withdrawals).

Some variable annuities allow you to choose a "stepped-up" death benefit. Under this feature, your guaranteed minimum death benefit may be based on a greater amount than purchase payments minus withdrawals. For example, the guaranteed minimum might be your account value as of a specified date, which may be greater than purchase payments minus withdrawals if the underlying investment options have performed well. The purpose of a stepped-up death benefit is to "lock in" your investment performance and prevent a later decline in the value of your account from eroding the amount that you expect to leave to your heirs. This feature carries a charge, however, which will reduce your account value.

Variable annuities sometimes offer other optional features, which also have extra charges. One common feature, the guaranteed minimum income benefit, guarantees a particular minimum level of annuity payments, even if you do not have enough money in your account (perhaps because of investment losses) to support that level of payments. Other features may include long-term care insurance, which pays for home health care or nursing home care if you become seriously ill.

You may want to consider the financial strength of the insurance company that sponsors any variable annuity you are considering buying. This can affect the company's ability to pay any benefits that are greater than the value of your account in mutual fund investment options, such as a death benefit, guaranteed minimum income benefit, long-term care benefit, or amounts you have allocated to a fixed account investment option.

> **Caution!**
>
> You will pay for each benefit provided by your variable annuity. Be sure you understand the charges. Carefully consider whether you need the benefit. If you do, consider whether you can buy the benefit more cheaply as part of the variable annuity or separately (*e.g.*, through a long-term care insurance policy).

Variable Annuity Charges

You will pay several charges when you invest in a variable annuity. Be sure you understand all the charges before you invest. **These charges will reduce the value of your account and the return on your investment.** Often, they will include the following:

- **Surrender charges** – If you withdraw money from a variable annuity within a certain period after a purchase payment (typically within six to eight years, but sometimes as long as ten years), the insurance company usually will assess a "surrender" charge, which is a type of sales charge. This charge is used to pay your financial professional a commission for selling the variable annuity to you. Generally, the surrender charge is a percentage of the amount withdrawn, and declines gradually over a period of several years, known as the "**surrender period**." For example, a 7% charge might apply in the first year after a purchase payment, 6% in the second year, 5% in the third year, and so on until the eighth year, when the surrender charge no longer applies. Often, contracts will allow you to withdraw part of your account value each year – 10% or 15% of your account value, for example – without paying a surrender charge.

> **Example:** You purchase a variable annuity contract with a $10,000 purchase payment. The contract has a schedule of surrender charges, beginning with a 7% charge in the first year, and declining by 1% each year. In addition, you are allowed to withdraw 10% of your contract value each year free of surrender charges. In the first year, you decide to withdraw $5,000, or one-half of your contract value of $10,000 (assuming that your contract value has not increased or decreased because of investment performance). In this case, you could withdraw $1,000 (10% of contract value) free of surrender charges, but you would pay a surrender charge of 7%, or $280, on the other $4,000 withdrawn.

- **Mortality and expense risk charge** – This charge is equal to a certain percentage of your account value, typically in the range of 1.25% per year. This charge compensates the insurance company for insurance risks it assumes under the annuity contract. Profit from the mortality and expense risk charge is sometimes used to pay the insurer's costs of selling the variable annuity, such as a commission paid to your financial professional for selling the variable annuity to you.

> **Example:** Your variable annuity has a mortality and expense risk charge at an annual rate of 1.25% of account value. Your average account value during the year is $20,000, so you will pay $250 in mortality and expense risk charges that year.

- **Administrative fees** – The insurer may deduct charges to cover record-keeping and other administrative expenses. This may be charged as a flat account maintenance fee (perhaps $25 or $30 per year) or as a percentage of your account value (typically in the range of 0.15% per year).

> **Example:** Your variable annuity charges administrative fees at an annual rate of 0.15% of account value. Your average account value during the year is $50,000. You will pay $75 in administrative fees.

- **Underlying Fund Expenses** – You will also indirectly pay the fees and expenses imposed by the mutual funds that are the underlying investment options for your variable annuity.

- **Fees and Charges for Other Features** – Special features offered by some variable annuities, such as a stepped-up death benefit, a guaranteed minimum income benefit, or long-term care insurance, often carry additional fees and charges.

Other charges, such as initial sales loads, or fees for transferring part of your account from one investment option to another, may also apply. You should ask your financial professional to explain to you all charges that may apply. You can also find a description of the charges in the prospectus for any variable annuity that you are considering.

Tax-Free "1035" Exchanges

Section 1035 of the U.S. tax code allows you to exchange an existing variable annuity contract for a new annuity contract without paying any tax on the income and investment gains in your current variable annuity account. These tax-free exchanges, known as 1035 exchanges, can be useful if another annuity has features that you prefer, such as a larger death benefit, different annuity payout options, or a wider selection of investment choices.

You may, however, be required to pay surrender charges on the old annuity if you are still in the surrender charge period. In addition, a new surrender charge period generally begins when you exchange into the new annuity. This means that, for a significant number of years (as many as 10 years), you typically will have to pay a surrender charge (which can be as high as 9% of your purchase payments) if you withdraw funds from the new annuity. Further, the new annuity may have higher annual fees and charges than the old annuity, which will reduce your returns.

Caution!

If you are thinking about a 1035 exchange, you should compare both annuities carefully. Unless you plan to hold the new annuity for a significant amount of time, you may be better off keeping the old annuity because the new annuity typically will impose a new surrender charge period. Also, if you decide to do a 1035 exchange, you should talk to your financial professional or tax adviser to make sure the exchange will be tax-free. If you surrender the old annuity for cash and then buy a new annuity, you will have to pay tax on the surrender.

Bonus Credits

Some insurance companies are now offering variable annuity contracts with "bonus credit" features. These contracts promise to add a bonus to your contract value based on a specified percentage (typically ranging from 1% to 5%) of purchase payments.

> **Example:** You purchase a variable annuity contract that offers a bonus credit of 3% on each purchase payment. You make a purchase payment of $20,000. The insurance company issuing the contract adds a bonus of $600 to your account.

Caution!

Variable annuities with bonus credits may carry a downside, however – higher expenses that can outweigh the benefit of the bonus credit offered.

Frequently, insurers will charge you for bonus credits in one or more of the following ways:

- ***Higher surrender charges*** – Surrender charges may be higher for a variable annuity that pays you a bonus credit than for a similar contract with no bonus credit.
- ***Longer surrender periods*** – Your purchase payments may be subject to surrender charges for a longer period than they would be under a similar contract with no bonus credit.
- ***Higher mortality and expense risk charges and other charges*** – Higher annual mortality and expense risk charges may be deducted for a variable annuity that pays you a bonus credit. Although the difference may seem small, over time it can add up. In addition, some contracts may impose a separate fee specifically to pay for the bonus credit.

Before purchasing a variable annuity with a bonus credit, ask yourself – and the financial professional who is trying to sell you the contract – whether the bonus is worth more to you than any increased charges you will pay for the bonus. This may depend on a variety of factors, including the amount of the bonus credit and the increased charges, how long you hold your annuity contract, and the return on the underlying investments. You also need to consider the other features of the annuity to determine whether it is a good investment for you.

> **Example:** You make purchase payments of $10,000 in Annuity A and $10,000 in Annuity B. Annuity A offers a bonus credit of 4% on your purchase payment, and deducts annual charges totaling 1.75%. Annuity B has no bonus credit and deducts annual charges totaling 1.25%. Let's assume that both annuities have an annual rate of return, prior to expenses, of 10%. By the tenth year, your account value in Annuity A will have grown to $22,978. But your account value in Annuity B will have grown more, to $23,136, because Annuity B deducts lower annual charges, even though it does not offer a bonus.

You should also note that a bonus may only apply to your initial premium payment, or to premium payments you make within the first year of the annuity contract. Further, under some annuity contracts the insurer will take back all bonus payments made to you within the prior year or some other specified period if you make a withdrawal, if a death benefit is paid to your beneficiaries upon your death, or in other circumstances.

Caution!

If you already own a variable annuity and are thinking of exchanging it for a different annuity with a bonus feature, you should be careful. Even if the surrender period on your current annuity contract has expired, a new surrender period generally will begin when you exchange that contract for a new one. This means that, by exchanging your contract, you will forfeit your ability to withdraw money from your account without incurring substantial surrender charges. And as described above, the schedule of surrender charges and other fees may be higher on the variable annuity with the bonus credit than they were on the annuity that you exchanged.

> **Example:** You currently hold a variable annuity with an

account value of $20,000, which is no longer subject to surrender charges. You exchange that annuity for a new variable annuity, which pays a 4% bonus credit and has a surrender charge period of eight years, with surrender charges beginning at 9% of purchase payments in the first year. Your account value in this new variable annuity is now $20,800. During the first year you hold the new annuity, you decide to withdraw all of your account value because of an emergency situation. Assuming that your account value has not increased or decreased because of investment performance, you will receive $20,800 minus 9% of your $20,000 purchase payment, or $19,000. This is $1,000 less than you would have received if you had stayed in the original variable annuity, where you were no longer subject to surrender charges.

In short: Take a hard look at bonus credits. In some cases, the "bonus" may not be in your best interest.

Ask Questions Before You Invest

Financial professionals who sell variable annuities have a duty to advise you as to whether the product they are trying to sell is suitable to your particular investment needs. Don't be afraid to ask them questions. And write down their answers, so there won't be any confusion later as to what was said.

Variable annuity contracts typically have a "free look" period of ten or more days, during which you can terminate the contract without paying any surrender charges and get back your purchase payments (which may be adjusted to reflect charges and the performance of your investment). You can continue to ask questions in this period to make sure you understand your variable annuity before the "free look" period ends.

Before you decide to buy a variable annuity, consider the following questions:

- Will you use the variable annuity primarily to save for retirement or a similar long-term goal?
- Are you investing in the variable annuity through a retirement plan or IRA (which would mean that you are not receiving any additional tax-deferral benefit from the variable annuity)?
- Are you willing to take the risk that your account value may decrease if the underlying mutual fund investment options perform badly?
- Do you understand the features of the variable annuity?
- Do you understand all of the fees and expenses that the variable annuity charges?
- Do you intend to remain in the variable annuity long enough to avoid paying any surrender charges if you have to withdraw money?
- If a variable annuity offers a bonus credit, will the bonus outweigh any higher fees and charges that the product may charge?
- Are there features of the variable annuity, such as long-term care insurance, that you could purchase more cheaply separately?
- Have you consulted with a tax adviser and considered all the tax consequences of purchasing an annuity, including the effect of

annuity payments on your tax status in retirement?

- If you are exchanging one annuity for another one, do the benefits of the exchange outweigh the costs, such as any surrender charges you will have to pay if you withdraw your money before the end of the surrender charge period for the new annuity?

Remember: Before purchasing a variable annuity, you owe it to yourself to learn as much as possible about how they work, the benefits they provide, and the charges you will pay.

For More Information

Other SEC Online Publications

- *Invest Wisely: An Introduction to Mutual Funds* – Basic information about investing in mutual funds. Much of this information applies to variable annuities, as well.
- *Mutual Fund Investing: Look at More Than a Fund's Past Performance* – Describes some of the factors you should consider in choosing a mutual fund.
- *Mutual Fund Cost Calculator* – Allows you to compare the total costs of owning different mutual funds.
- *Ask Questions* – Questions you should ask about all of your investments, the people who sell them to you, and what to do if you run into problems.
- *Check Out Brokers and Advisers* – Describes how to get background information about your broker or investment adviser, including prior employment history and disciplinary actions.
- *Complaints? What to Do* – Describes how to handle a problem with your broker or investment adviser.

Other Web Sites That May Be Helpful

- FINRA — FINRA is an independent self-regulatory organization charged with regulating the securities industry, including sellers of variable annuities. The FINRA has issued several investor alerts on the topic of variable annuities, and has also issued a release to its members giving guidance on how to present information on the impact of taxes upon investment returns in a variable annuity as compared to a non-specific taxable account. If you have a complaint or problem about sales practices involving variable annuities, you should contact the District Office of FINRA nearest you. A list of FINRA District Offices is available on FINRA's web site.
- National Association of Insurance Commissioners (NAIC) — The NAIC is the national organization of state insurance commissioners. Variable annuities are regulated by state insurance commissions, as well as by the SEC. The NAIC's web site contains an interactive map of the United States with links to the home pages of each state insurance commissioner. You may contact your state insurance commissioner with questions or complaints about variable annuities.

How To Contact the SEC With Questions or Complaints

Office of Investor Education and Advocacy
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0213
Fax: (202) 772-9295
Questions: Fast Answers
Online Complaint Form.

http://www.sec.gov/investor/pubs/varannty.htm

INVESTORS, CORNERED

Lance C. McCardle, Jason W. Burge

“Investors, Cornered” is a forward-looking section about issues investors face today, and PIABA members may face in the future when those investors call.

Editor Lance C. McCardle along with Jason W. Burge, discuss a hidden issue faced by workers with 401(k) or 403(b) retirement plans. When an investor “rolls-over” a 401(k) or 403(b) plan into an IRA, the investor loses the protection of a federally mandated fiduciary duty. Once the monies are in an IRA, any recommendation made by a broker needs only meet the lower “suitability” standard. The Crash of 2008 and subsequent “Great Recession” exposed some of the more nefarious recommendations by brokers and the commissions they earned as a result.

The Department of Labor seized on the issue with its proposed implementation of a fiduciary standard for retirement accounts. Wall Street is spending millions to resist being forced to put its clients' interests first. As more people retire and seek financial advice, the potential for abuse only grows.

The Department of Labor recently proposed new regulations that would apply a “fiduciary” standard to broker-dealers who manage assets in retirement accounts, including IRAs. As President Obama described it in a speech to the AARP, “It's a very simple principle: You want to give financial advice, you've got to put your client's interests first. You can't have a conflict of interest.”[1] While it remains unclear whether the proposed regulations will be implemented, the recent debate has brought renewed attention to an issue that has been drawing criticism for many years: the decision to rollover assets from an employer- sponsored 401(k) or 403(b) plan into a broker-managed IRA account. The effect that a fiduciary standard would have on broker-dealers' advice about this decision received a great deal of press coverage and industry response.

Many in the brokerage industry have come out against the proposed regulations. That is, they do not want to be constrained to act in a client's “best interests” when recommending that clients move their funds from employer-sponsored accounts to broker-managed accounts. But why would brokers resist something that so clearly serves to benefit their clients? The obvious answer is that brokers fear that this change will severely curtail their ability to make substantial fees and commissions on the management of investments in IRA accounts.

In light of the brokerage industry's resistance to the imposition of a fiduciary duty of care for advice about the decision to rollover assets into an IRA, customers should carefully consider the implications of converting their employer-sponsored 401(k) and 403(b) plans into a broker-managed IRA account. Barbara Roper, director of investor protection at the Consumer Federation of America, recently described IRA rollovers as “the most important investment decision most people will ever make.”[2]

IRA rollovers expose investors to the risk of being preyed upon by unscrupulous brokers. Retirement funds are often an investor's most important asset. Investors need to know that their investment funds will be there for them when the time comes to draw on them for retirement needs (both expected and unexpected needs). Therefore, retirement funds should not be placed in overly risky, costly, or illiquid investments. Unsurprisingly, the speculative, costly, and illiquid investments are the ones that pay the highest commissions to the brokers that sell them. These investments are rarely (if ever) an available investment option in a 401(k) plan. Once 401(k) assets are rolled into a broker-managed IRA account, those assets become exposed to the possibility of mismanagement and conflicted advice by a commission-incentivized broker.

When an employee with an employer-sponsored 401(k) retires or leaves his job, he typically has four options for what to do with his 401(k) proceeds:

- he can take the cash value, often subject to an IRS 10% early withdrawal penalty;
- he can leave the money in his former employer's 401(k);
- he can rollover the funds into his new employer's 401(k), if allowed; or
- he can rollover the funds into a private IRA account.[3]

An IRA rollover is simply the transfer of funds from a retirement account into a traditional IRA or a Roth IRA, often by direct transfer from the plan administrator to an IRA. IRAs are individually-held, tax-advantaged retirement accounts, and they are one of the fastest-growing segments of the financial services industry. As of 2011, an industry study estimated total IRA balances at $4.5 trillion, representing about 8% of total personal financial assets in the U.S.[4] Over the past twenty years, total IRA balances have grown seven-fold.[5]

Funds rolled over from 401(k)s are the largest source of funds in IRA accounts. The Employee Benefit Research Institute found that “rollovers overwhelmingly outweigh new contributions in dollar terms in 2011, almost 13 times the amount of dollars were added through rollovers compared with contributions.”[6] Not surprisingly, broker-dealers compete feverishly for IRA rollover business, with firms often offering commissions or other fees or credits to professionals who recommend rollovers.[7] Accordingly, investors should be concerned that the broker advising them to rollover funds from a 401(k) into an IRA is doing so primarily for the broker's own interest.

Many investors do not understand that in rolling over funds from a 401(k) to an IRA, the investor is giving up significant legal protections. 401(k) investments are protected by ERISA, which requires that brokers and investment advisors act as fiduciaries to plan participants and choose investments that are in an investor's best interests. IRAs are currently governed by FINRA's suitability standard, which requires that brokers recommend to buy, sell, or hold investments that are suitable for the investor, based on the investor's objectives, needs, and circumstances.[8] These standards may sound similar, but in practice they differ significantly.

An ERISA fiduciary cannot recommend an investment with a higher cost structure than another similar investment; a broker subject to the suitability standard may be free to recommend a higher cost investment so long as that investment meets the customer's risk profile.[9] An ERISA fiduciary cannot engage in a transaction with a conflict of interest; a broker is free to recommend products promoted by companies that offer the broker higher commissions or non-cash benefits.[10]

The importance of the difference between these standards is demonstrated by a series of abuses that have occurred in IRA accounts. IRA investors are often targeted for high commission products, including load mutual funds, reverse convertibles, and private placements such as non-traded real estate investment trusts ("REITs"), tenant in common real estate projects ("TICs"), limited partnerships, promissory note programs, oil and gas endeavors, and equipment leasing plans. Perhaps most troublingly, IRA investors are often sold annuity products, which are often inappropriate for tax-protected retirement investments. The Investment Company Institute found that *35% of IRA accounts hold annuities, and 22% hold variable annuities*.[11] Variable annuities have extremely high fees, and given that one of the principal benefits of variable annuities - advantaged tax treatment - is wasted in an already tax-advantaged IRA account, investment in a variable annuity will almost never be in an IRA holder's best interest.

While most brokers may not prey on unsuspecting clients with retirement accounts, there are plenty of devious brokers who seek access to their client's retirement assets in addition to whatever other assets they may have under management. Many clients preyed on by unscrupulous brokers have expressed relief that they did not allow their brokers to have access to their 401(k) assets. Indeed, in cases involving the mismanagement of non-retirement account assets, many clients report something along the lines of "the broker also tried to get me to turn over my 401(k) account to him, I'm just glad we didn't make that mistake too." Others have not been so fortunate, and many attorneys have seen myriad inappropriate and high-commission- paying products purchased in clients' IRA accounts, causing severe losses that many times cannot be recouped due to the age and needs of the retired investor.

A recent case involved a 94 year old client whose former broker had invested more than 85% of the assets in her IRA account in non-traded REITs. Not only did she suffer devastating losses in the account, but the illiquidity of her investments meant that she was unable to meet the required minimum distributions mandated by the IRS. Moreover, she was not even able to obtain a reliable estimate of the value of her account as there was no market for many of the securities. Such inappropriate investments would be unheard of in a 401(k) plan.

Ultimately, the DOL may or may not pass a new fiduciary rule, and the negotiations over its implementation may or may not apply a fiduciary standard to advice about IRA rollovers. Especially now, investors with employer-sponsored retirement plans should be very careful when considering a rollover, as they will be giving up a great deal of investor protection, and may face high fees and conflicted advice. Investors need to think carefully before making that decision, lest it be a tragic one.

Footnotes

1 President Obama's Speech to the AARP, *available at:* https://www.whitehouse.gov/the-press-office/2015/02/23/ remarks-president-aarp (last visited Aug. 15, 2015).

2 Mark Schoeff Jr., *Obama directs Labor Department to move ahead on fiduciary rule*, INV. NEWS, Feb. 23, 2015, *available at* http://www.investmentnews.com/article/20150223/FREE/150229979/obama-directs-labor-department-to- move-aheadonfiduciary-rule (last visited Aug. 15, 2015).

3 *See* FINRA, 401(k) ROLLOVERS, *at http://www.finra.org/investors/401k-rollovers* (last visited Aug. 15, 2015).

4 *See* Oliver Wyman, *Oliver Wyman report: Assessment of the impact of the Department of Labor's proposed "fiduciary" definition rule on IRA consumers*, *available at https://www.dol.gov/ebsa/pdf/WymanStudy041211.pdf* (last visited Aug. 15, 2015).

5 *Id.*

6 *See* Craig Copeland, Ph.D., *Individual Retirement Account Balances, Contributions, and Rollovers, 2011: The EBRI IRA Database*, EMPLOYEE BENEFIT RESEARCH INSTITUTE, ISSUE BRIEF, May 2013 at 13, *available at http:// www.ebri.org/pdf/briefspdf/EBRI_IB_05-13.No386.IRAs.pdf*. (last visited Aug. 15, 2015).

7 FINRA, INVESTOR ALERTS, *at http://www.finra.org/investors/alerts/ira-rollover-10-tips-making-sound-decision,* (last visited Aug. 15, 2015).

8 *See* FINRA RULE 2111.

9 *See* Tara Siegel Bernard, *A Fancy Financial Adviser Title Does Not Ensure High Standards*, N.Y. TIMES, July 7, 2012, at B1, *available at http://www.nytimes.com/2012/07/07/your-money/beware-of-fancy-financial-adviser-titles.html?src=me&ref=business&_r=0* (last visited Aug. 15, 2015).

10 *Id.*

11 *See* 2013 INVESTMENT COMPANY FACT BOOK, INVESTMENT COMPANY INSTITUTE 128 (2013) *available at* https://www.ici.org/pdf/2013_factbook.pdf (last visited Aug. 15, 2015).

COMPLIANCE, SUPERVISION AND SUITABILITY IN IRA, PENSION, AND RETIREMENT ACCOUNTS

Jenice L. Malecki, Esq.

The Retirement Issues Working Group of the Certified Financial Planning Board ("CFP Board") has embarked on a study around the U.S. Retirement System, noting:

> It is widely accepted in policy circles that America faces a retirement crisis. There is concern about the consequences of insufficient retirement savings for individuals, families and the nation, as more Americans are expected to manage their own retirement savings plans, and as American are living longer. Many of those who have saved are concerned they will outlive their money in retirement because they lack the necessary tools to safely spend their nest eggs. There is an overwhelming sense that that our retirement system has serious gaps around coverage and adequacy, and that these issues tend to be addressed in only a fragmented way.[1]

https://www.cfp.net/initiatives/driving-public-policy/who-we-work-with/retirement-issues-working-group

With retirement accounts, investors face not only complex investment issues, but also complex tax issues. Many investors need the assistance of a professional to manage lifetime income over a long accumulation phase and then (hopefully) a long in-retirement phase. Lastly, retirees and their advisors need to insure there are no mistakes in the payout phase during retirement to avoid penalties and necessary tax implications.

The United States Securities and Exchange Commission ("SEC") and Financial Regulatory Authority ("FINRA"), as well as state regulators individually and through the North American Securities Administrators Association ("NASAA") and the Department of Labor ("DOL") have written on these topics extensively, as the safety and security of a retirement income stream is vital for the American people and the American economy.

[1] It is no surprise American consumers are in a retirement savings crisis – studies have shown that they are ill-prepared for retirement, with nearly 8-in-10 American workers with less than $250,000 saved for retirement. Often, it can be challenging for consumers to know what must be put away now to be prepared for the future." April 17, 2019, https://www.cfp.net/news/2019/04/urgent-and-important-the-new-retirement-savings-mentality A study by the CFP Board showed that: "nearly half of Americans (49 percent) think adults should start saving for retirement in their 20s, but few follow their own advice. More than one in four (26 percent) delay saving for retirement until their 30s, while another 15 percent wait until their 40s. Most alarming, approximately one in ten Americans (eight percent) wait to start saving for retirement until after 50 years of age." https://www.cfp.net/knowledge/industry-insights/2019/05/morning-consult-research-may-2019

What Plans Are Investors Holding Assets In?

Individual Retirement Accounts ("IRA"):

There are four types of IRAs utilized to plan for retirement: Traditional IRAs that are funded with before-tax income (tax deductible) and not taxed until withdrawn in retirement, Roth IRAs that are funded with after-tax income (not tax deductible) and earnings and withdrawals are tax free, SEP IRAs that are typically used by self-employed persons and/or small businesses to make tax deductible retirement plan contributions and Simple IRAs which are similar to 401Ks, with certain matching, less administration and lower contribution limits.

Defined Benefit Pension Plans:

A Defined Benefit Pension Plan provides a fixed, pre-established benefit for employees at retirement. On the employer side, businesses can generally contribute (and therefore deduct) more each year than in defined contribution plans. Employee benefits are calculated from a formula considering many factors, such as length of employment and salary history. The company is responsible for managing the plan's investments and risk and will usually hire an outside investment manager to do this. It provides employees some guarantees. However, as the SEC has noted:

> U.S. Department of Labor data show a trend away from defined benefit plans and toward defined contribution plans, though. A key difference is that the employer bears the investment risks of a defined benefit plan. In defined contribution plans, employees bear the investment risks, and there is no guarantee that your defined contribution account balance will be adequate for your retirement.
>
> Another difference is that defined benefit plans generally are required to make annuities available to participants at retirement. If you have a pension plan that provides a lifetime annuity, it protects you against longevity risk, the risk of outliving your assets. Defined contribution plans, such as 401(k) plans, typically do not provide an annuity option.
>
> The trend toward defined contribution plans means employees are responsible for saving enough for retirement and for ensuring that their savings last through their retirement years. Here is some information to help you manage this.

https://www.investor.gov/additional-resources/retirement-toolkit/managing-lifetime-income

401(k) Plans:

401(k) plans are pre-tax, salary-deferral programs set up by private-sector employers and are generally self-directed, meaning generally investors must choose among a list of investments offered by the plan. Investors can determine how much to save withing allowable limits and it can be changed from time to time. There is optional matching and profit sharing by employers.

403(b) Plans:

A 403(b) Plan (also called a tax-sheltered annuity or TSA plan) is a retirement plan offered by public schools and certain 501(c)(3) tax-exempt organizations. Employees can contribute a part of their salary to the plan and the employer may also contribute. These are pre-tax contributions not taxed until withdrawal.

FERS, TSPs and 402(g) Plans:

Federal employees are automatically in the Federal Employee Retirement System when meeting plan requirement, which is a retirement plan with three different sources: the Basic Benefit Plan, Social Security and the TSP. Social Security at the TSP are transferable to a "next job." The Basic Benefit Plan gives lifetime annuity payments.

There are also Thrift Savings Plans ("TSP") plans for military families that operate a lot like 401Ks, but have 1% automatic payments not deducted, but given as a benefit to military persons, it has low net expenses and military service members can increase the amount they save pre-tax. They then have the choice between traditional and Roth IRA treatment and can choose how to invest.

The 457(b) Plans are for employees of state or local government. They are tax deferred and can be maximized to contribute up to Internal Revenue Code 402(g) limits.

Who Regulates These Plans?

All Employee Retirement Income Security Act of 1974 ("ERISA") plans are regulated by the Department of Labor (DOL). ERISA is a federal law that sets minimum standards for most voluntarily established retirement plans in private industry to provide protection for employees. ERISA creates fiduciary duties around the plan assets:

> The Employee Retirement Income Security Act (ERISA) protects your plan's assets by requiring that those persons or entities who exercise discretionary control or authority over plan management or plan assets, anyone with discretionary authority or responsibility for the administration of a plan, or anyone who provides investment advice to a plan for compensation or has any authority or responsibility to do so are subject to fiduciary responsibilities. Plan fiduciaries include, for example, plan trustees, plan administrators, and members of a plan's investment committee.
>
> The primary responsibility of fiduciaries is to run the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses. Fiduciaries must act prudently and must diversify the plan's investments in order to minimize the risk of large losses. In addition, they must follow the terms of plan documents to the extent that the plan terms are consistent with ERISA. They also must avoid conflicts of interest. In other words, they may not engage in transactions on behalf of the plan that benefit parties related to the plan, such as other fiduciaries, services providers or the plan sponsor.
>
> Fiduciaries who do not follow these principles of conduct may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of plan assets. Courts may take whatever action is appropriate against fiduciaries who breach their duties under ERISA including their removal.

https://www.dol.gov/general/topic/retirement/fiduciaryresp

Who Regulates the Investment Professionals Advising Retirement Accounts?

Several different types of investment professionals may advise investors around retirement accounts: Registered Financial Professionals, regulated by FINRA and the SEC, Investment Advisers, regulated by the SEC or state securities regulators, Financial Planners, whose regulation and licensing depend on the services offered, and Insurance Agents, who sell life, health and property insurance policies and other insurance products, including annuities, are regulated by state insurance commissions. Brokerage and Investment Advisory firms also have heightened supervisory and compliance requirements around retirement assets and senior investors.

There are also other types of professionals that help investors make decisions about their retirement assets, including Accountants, who provide professional assistance with taxes and financial planning, tax reporting, auditing and management consulting, regulated by national and state licensing standards. Lastly, Lawyers offer legal assistance related to financial planning and investment decisions, as well as represent clients in disputes with firms or investment professionals, they are regulated by state bar associations.

In February 2023, several regulators ("Joint Task Force") issued a joint Investor Alert around Self-Directed IRAs, which they warn can be repositories for fraud, as they can hold investments (like promissory notes notoriously used in Ponzi schemes) that lack "legal and regulatory protection and a heightened risk of fraud, particularly when investing in alternative assets":

> *The SEC's Office of Investor Education and Advocacy, the North American Securities Administrators Association (NASAA), and the Financial Industry Regulatory Authority (FINRA) are updating this Investor Alert to warn investors of potential risks associated with self-directed Individual Retirement Accounts (self-directed IRAs). Self-directed IRAs allow investment in a broader—and potentially riskier—portfolio of assets than other types of IRAs. Those assets may include real estate, private placement securities, precious metals and other commodities, and crypto assets. Investors should be mindful that investing through self-directed IRAs raises risks, including fraudulent schemes, high fees and volatile performance.*

https://www.finra.org/investors/insights/self-directed-IRAs-risk-of-fraud

Self-directed IRA custodians can often be a repository for fraud. the Joint Task Force warns:

> Due to federal laws and regulatory rules related to selling investment products or providing investment advice, most custodians for other types of IRAs limit the holdings in IRA accounts to firm-approved stocks, bonds, mutual funds, and CDs. However, these limitations do not apply to self-directed IRAs. **Self-directed IRA custodians:**
>
> ***DO NOT sell investment products or provide investment advice;***
>
> ***DO NOT evaluate the quality or legitimacy of any investment in the self-directed IRA or its promoters; and***
>
> ***DO NOT verify the accuracy of any financial information that is provided for an investment in the account.***
>
> Self-directed IRA custodians are **only** responsible for holding and administering the assets in the account. Furthermore, most custodial agreements between a self-

> directed IRA custodian and an investor explicitly state that the self-directed IRA custodian has no responsibility for investment performance.

https://www.finra.org/investors/insights/self-directed-IRAs-risk-of-fraud

The Joint Task Force goes on to warn investors to check credentials of those whom make recommendations to investors in retirement accounts or who recommend "qualified custodians" outside the regulated environment. "Promoters" may be behind illegitimate investments because they are often not registered and subjected to oversight. There is a risk of fake custodians, misrepresentation of custodial responsibilities, exploitation of tax-deferred characteristics, and high fees. Id.

At the same time, many "legitimate" investment professionals attempt to flaunt "designations" such as "Senior Specialist" and "Retirement Specialist," but:

> The Securities and Exchange Commission and the Financial Industry Regulatory Authority (FINRA) do not endorse professional designations or titles such as "senior specialist" or "retirement advisor" that some financial professionals use to market themselves.
>
> The requirements for being designated as a "senior specialist" vary greatly. In some cases, a financial professional may need to pass several rigorous exams and have several years of experience working in a particular field to receive a specialist designation. Other "senior specialist" designations may be relatively quick and easy to obtain, even for an individual with no relevant experience.

https://www.investor.gov/additional-resources/retirement-toolkit/senior-specialists-designations.

FINRA maintains a database of professional designations and accreditation requirements, while not endorsing the same: https://www.finra.org/investors/investing/working-with-investment-professional/professional-designations-credentials. In that database, there are "Registered Employee Benefits Professional," "Registered Retirement & Wealth Specialist," "Registered Social Security Analyst," "Registered Tax Professional," "Retirement Income Certified Professional," "Retirement Income Specialist," "Retirement Management Advisor," and "Retirement Plans Associate." FINRA totes that:

> Some state securities and insurance regulators don't allow financial professionals to use a designation unless it has been accredited by either the ANSI National Accreditation Board (ANAB), a subsidiary of the American National Standards Institute, or the National Commission for Certifying Agencies (NCCA), the certification program accreditation body of the Institute for Credentialing Excellence (I.C.E.). Find accredited designations using ANAB or NCCA search tools.

Id.

State regulators also may prohibit or restrict designations of investment professionals as have special skills and/or education. NASAA warns:

> Seniors should carefully check the credentials of individuals holding themselves out as "senior specialists." Some of these individuals hold nothing more than a "designation" as "senior specialists" implying that they have expertise in assisting seniors when in fact they have received no significant education or training in senior financial matters.
>
> State regulators are concerned these individuals are misusing "senior specialist" designations to provide a false sense of security to their customers. NASAA issued a model rule prohibiting the misleading use of senior and retiree designations in 2008.

https://www.nasaa.org/1999/misleading-senior-designations/?qoid=scams-frauds. See also: https://www.nasaa.org/1987/senior-investor-alert-senior-specialist-designations/?qoid=investor-education. ("Con artists use the promise of high commissions to lure brokers, insurance agents, investment advisers, accountants, and lawyers, some of them not licensed to sell securities, into offering investments they may know little about, such as variable or equity-indexed annuities, bogus limited partnerships or promissory notes.") NASAA is equally concerned with "free lunch" seminars, designed to rope in retirees. https://www.nasaa.org/7516/nasaa-to-outline-efforts-to-protect-seniors-from-misleading-free-lunch-investment-seminars-and-professional-designations/?qoid=current-headlines

Retirement Accounts are Fiduciary Accounts

The Department of Labor (DOL) issued a fiduciary rule in April of 2016, taking effect in June 2019, designed to protect retirement assets and protect investors from being taken advantage of by investment professionals. The rule mandates that anyone who provides investment advice to retirement accounts must act in the best interest of those clients and establishes a fiduciary duty for brokers, dealers, and insurance agents making recommendations about investments in ERISA-covered plans and IRAs.

The SEC has more recently announced a new custody rule that may also affect retirement assets and cut back on fraud: https://www.sec.gov/news/press-release/2023-30. The rule is intended to enhance protection of customer assets managed by registered investment advisers:

> "the proposed rule would entrust safekeeping of client assets to qualified custodians, including, for example, certain banks or broker-dealers. … properly segregated and held in accounts to protect the assets in the event of a qualified custodian bankruptcy or other insolvency. The proposed rule would also enhance protections for certain securities and physical assets that cannot be maintained by a qualified custodian. Additionally, the proposal retains the current requirement for an adviser with custody of client assets to obtain a surprise examination from an independent public accountant to verify client assets, but it would modify the audit provision to expand the availability of its use, enhance investor protection, and facilitate compliance."

Id.

FINRA devotes a lot of research and energy towards attempting to protect senior investors, many of whom need to survive on retirement assets:

> FINRA views the protection of senior investors, as well as baby boomers who are retired or approaching retirement, as a top priority. Because a large number of American investors are approaching retirement and control a substantial portion of investment assets, FINRA encourages firms to review and, where warranted, enhance their policies, procedures and practices, in light of the special issues common to many senior investors.
>
> For example, a firm's procedures and controls should take into consideration the age and life stage (whether pre-retired, semi-retired or retired) of their customers. Of particular concern to FINRA is the suitability of recommendations to senior investors, communications targeting older investors, and potentially abusive or unscrupulous sales practices or fraudulent activities targeting senior investors.

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

Rollovers & RMD Requirements With Different Tax Implications

Adding to all the issues that can arise in a fiduciary investment account, the tax and penalty issues around rules for required minimum distributions ("RMD"), withdrawals, can be confusing. There may be more than one type of account from which an investor can take RMDs. Decisions on withdrawals from tax deferred or non-tax deferred accounts need to be made.

> You cannot keep retirement funds in your account indefinitely. You generally have to start taking withdrawals from your IRA, SIMPLE IRA, SEP IRA, or retirement plan account when you reach age 72. Roth IRAs do not require withdrawals until after the death of the owner; however, beneficiaries of a Roth IRA are subject to the RMD rules.
>
> Your **required minimum distribution** is the minimum amount you must withdraw from your account each year.
>
> - You can withdraw more than the minimum required amount.
> - Your withdrawals will be included in your taxable income except for any part that was taxed before (your basis) or that can be received tax-free (such as qualified distributions from designated Roth accounts).

https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-required-minimum-distributions-rmds#:~:text=You%20generally%20have%20to%20start,subject%20to%20the%20RMD%20rules.

It is further imperative to effect transfers between custodians under the Internal Revenue Service guidelines:

> Most pre-retirement payments you receive from a retirement plan or IRA can be "rolled over" by depositing the payment in another retirement plan or IRA within 60 days. You can also have your financial institution or plan directly transfer the payment to another plan or IRA.

https://www.irs.gov/retirement-plans/plan-participant-employee/rollovers-of-retirement-plan-and-ira-distributions. This gets tricky when investors have losses recovered in an arbitration or litigation and seek to deposit the same back into an IRA, so as not to suffer tax implications and penalties. It could involve a wrangle with the IRS, never a particularly happy situation to find oneself caught up in.

If an investor and/or their advisor get things right, they can avoid paying unnecessary taxes and penalties, but if they get things wrong, the penalties can be high, even on inherited IRAs that may require distribution before reaching the required minimum distribution age.

> Generally, early withdrawal from an Individual Retirement Account (IRA) prior to age 59½ is subject to being included in gross income plus a 10 percent additional tax penalty. There are exceptions to the 10 percent penalty, such as using IRA funds to pay your medical insurance premium after a job loss. For more information:

https://www.irs.gov/newsroom/what-if-i-withdraw-money-from-my-ira#:~:text=Generally%2C%20early%20withdrawal%20from%20an,premium%20after%20a%20job%20loss. There are certain hardship distributions permitted: https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-hardship-distributions

> Beginning in 2023, the SECURE 2.0 Act raised the age that you must begin taking RMDs to age 73. If you reach age 72 in 2023, the required beginning date for your first RMD is April 1, 2025, for 2024. Notice 2023-23 permits financial institutions to notify IRA owners no later than April 28, 2023, that no RMD is required for 2023.

https://www.irs.gov/retirement-plans/retirement-plan-and-ira-required-minimum-distributions-faqs. The Secure Act requires IRA assets to be paid out on or before December 31st of the 10th calendar year following the death of the IRA owner (the "10-Year Rule"), which applies to inherited IRAs from an IRA owner who died after 2019.

Conclusion

Retirement assets are critically important to the economic well-being of our country. The Federal Reserve in May 2022 reported many important observations related to retirement assets:

> Retirees represent a sizeable portion of the adult population. Twenty-seven percent of adults in 2021 considered themselves to be retired, even though some were still working in some capacity. Fourteen percent of retirees had done some work for pay or profit in the prior month. Consequently, 4 percent of all adults considered themselves retired and were still working. Retirees with more education were slightly more likely to work in retirement.
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> * * * *
>
> Nonetheless, 29 percent said that a health problem was a factor in their decision to retire, and 15 percent said they retired to care for family members. One in 10 said they were forced to retire or that work was not available. Collectively, health problems, caring for family, and lack of work contributed to the timing of retirement for 45 percent of retirees.

* * * *

> Social Security remained the most common source of retirement income, but 79 percent of retirees had one or more sources of private income. This included 57 percent of retirees with income from a pension; 43 percent with interest, dividends, or rental income; and 32 percent with labor income [citation omitted]. Seventy-eight percent of retirees received income from Social Security in the prior 12 months, including 92 percent of retirees age 65 or older.
>
> * * * *
>
> While retirees as a group report a generally high level of financial well-being and life satisfaction, those who were not married and those with a disability reported lower levels for these subjective measures [citation omitted]. In 2021, 81 percent of all retirees said they were doing at least okay financially, and 60 percent reported high levels of life satisfaction. On average, retirees who were not married were not doing as well, with just 68 percent saying that they were doing at least okay financially and 49 percent reporting high levels of life satisfaction. Retirees with a disability, regardless of their marital status, were less likely to report they were doing at least okay financially or that they had high levels of life satisfaction.
>
> * * * *
>
> Although three-fourths of non-retired adults had at least some retirement savings, about one-fourth did not have any [citation omitted]. . . . Among those with retirement savings, these savings were most frequently in defined contribution plans, such as a 401(k) or 403(b), with 55 percent of non-retired adults having money in such a plan. . . . Fifty-two percent of non-retirees had retirement savings outside of formal retirement accounts, up from 48 percent of non-retirees who reported having such accounts in 2020.
>
> * * * *
>
> While most non-retired adults had some type of retirement savings, **only 40 percent of non-retirees thought their retirement saving was on track**. Still, the share of non-retirees who thought their retirement saving was on track increased in 2021, from 36 percent who thought their saving was on track in 2020 and 37 percent who thought their retirement savings were on track in 2019. . . .

https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-retirement.htm (emphasis added).

Planning not only for the good times a retiree wants and deserves to have is important, but it is also fundamentally important to consider the issues (health or otherwise) one will face in retirement, as well as how the assets will be required to be distributed and what to do with them when they are distributed.

Critically important in the mix are the supervision and compliance roles at brokerage and investment advisory firms, as well as the regulatory and self-regulatory policing of investment professionals and firms to ensure that there is a fundamental commitment to the fiduciary duties they hold as an important part of the retirement process.

MEASURING ECONOMIC DAMAGES IN SECURITIES CASES

Brian J. Henderson
Associate Professor of Finance
George Washington University

PIABA Midyear Meeting
April 27, 2023

Background

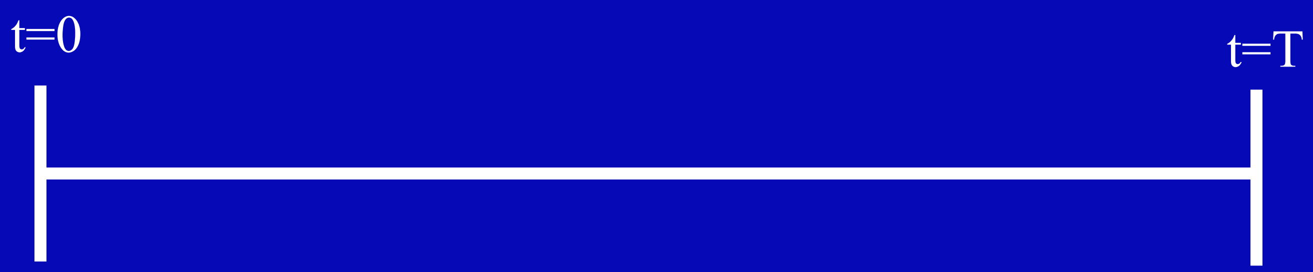
- Professor of Finance, George Washington University
- PhD Finance (University of Illinois at Urbana-Champaign)
- CFA Charter holder.
- Published in leading academic and professional journals on topics including investment management, derivative securities, and investment performance measurement.
- Investment management experience.
- Expert witness in securities and investment cases.

Overview

- Develop a framework for quantifying damages caused to investors in a variety of contexts.
- Flexible and adaptable across a wide range of different types of cases.
- Important to select an appropriate benchmark for quantifying losses.
  - The benchmark should be a neutral reference point for measuring comparison
    - The "appropriate" investment exposure
    - The "actual" risk taken

Capital Gain(Loss)

- How to quantify the harm caused to an investor?
- General framework: investment timeline describing the investor's contribution(s) and sales/held amounts.
- Capital gain (loss) = \$F - \$IO



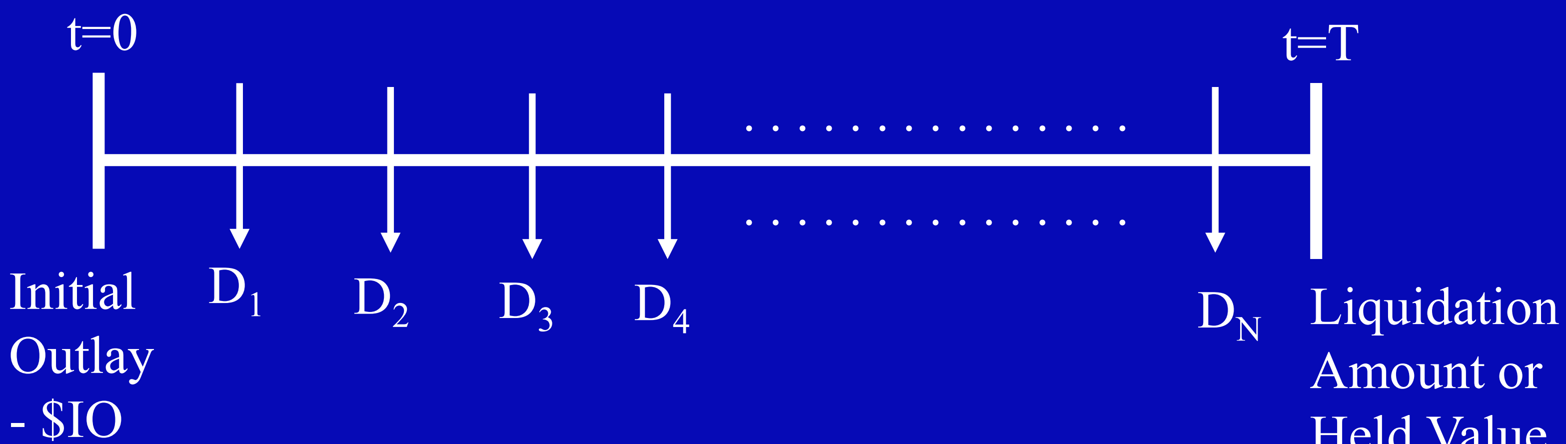
Initial Outlay - \$IO

Liquidation Amount or Held Value +\$F

- Benefit: Direct and straightforward
- Drawbacks:
  - ignores opportunity cost over T-year holding period
  - simplistic: what about interim cash flows?

Net Out of Pocket Amount

- Expand the framework to include all (N) distributions over the investment period:



- Capital gain (loss) = \$F - \$IO
- Net Out of Pocket = \$F - \$IO + $D_1+\ldots+D_N$
- Benefit: Direct and straightforward (total out minus total in)
- Drawback: ignores opportunity cost over T-year holding period. Credits interim cash flows without considering opportunity cost.

Example: Capital Gain, NOP

- Consider an example: Noble Royalty Access Fund VIII
- Investment of $50,000 on July 28, 2010
- Made distributions approximately monthly.
- Held value: assumed to be zero.
  - For non-traded DPPs, held values are notoriously hard to estimate.

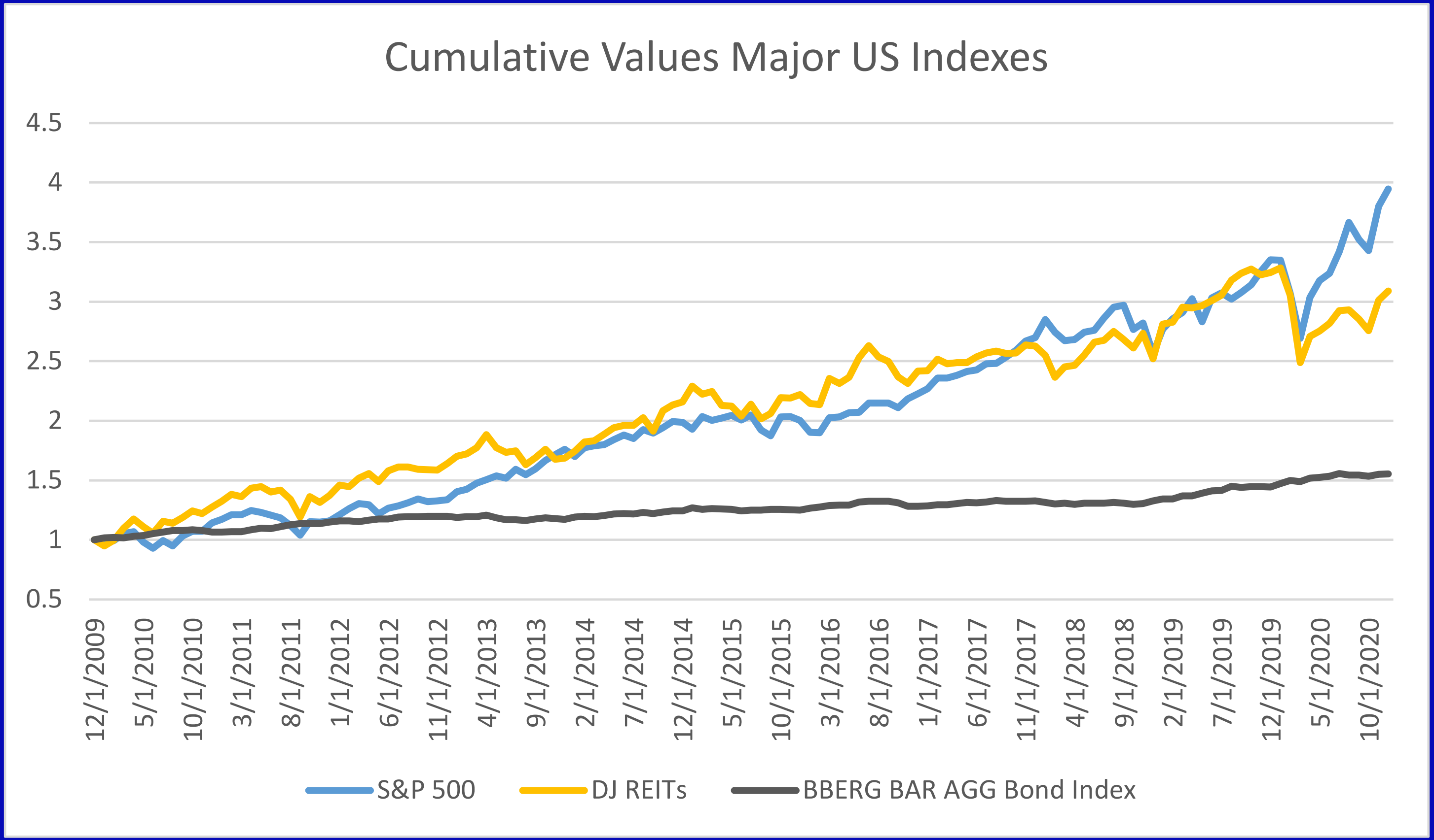
Date	Distribution
12/31/2011	1,458.90
12/31/2012	2,158.41
12/31/2013	2,315.64
12/31/2014	2,280.49
12/31/2015	1,226.20
4/29/2016	227.32
Total	9,666.96

Example: Capital Gain, NOP (continued)

- Capital Gain = Liquidation/Held Value – Capital Invested
  - Capital Gain(Loss) = 0 - \$50,000 = -\$50,000
- Net Out of Pocket Amount = Capital Gain(Loss) + Distributions
  - NOP = -\$50,000 + 9,666.96 = -\$40,333.04
- Negative NOP amount tells us: over the investment period, the investor walks away with \$40,333.04 less than they invested.
- A shortcoming of the NOP amount is that it does not adjust for the amount of time over which the loss was realized.
- Also ignores market conditions during that time (effectively benchmarks investment performance against a "zero benchmark.")

Market Adjusted Damages

How did the capital market reward investment risks during a period of harm?



Market Adjusted Damages

- Market Adjusted Damages build in the opportunity cost incurred by the investor, which is incremental to the direct loss of nominal monetary amount from NOP amounts.
- Quantify the investor harm caused by the deficient investment, as opposed to investing in a well managed portfolio.
- Must carefully evaluate the choice of an appropriate "benchmark" for comparison.
- The benchmark should:
  - Appropriately match the risk exposure of the investment being evaluated.
  - Be objective.
  - Be diversified (not idiosyncratic).
- Should the benchmark reflect the risk of the selected investments or the risk of an appropriate investment?
  - Delineate between inappropriate investments and selecting deficient products.

Example: Market Adjusted Damages

- As an example, return to the Noble Royalty example.
- Considerations when selecting an appropriate benchmark:
  - What is an appropriate match for the risk and investment exposure specific to this 'investment?' Allows us to measure damages based on the risk taken by the investor.
    - Non-traded (highly illiquid), risky investment in oil exploration and production.
    - A good candidate: an investment in a diversified portfolio of companies involved in oil exploration and production. Possibly the Vanguard Energy Fund (VGENX), with the caveat that its not as risky and doesn't match the illiquidity risk of the Noble program.
  - Was the investment appropriate for the investor? If not, what type of investment would have been appropriate? Allows us to measure damages against what would have been appropriate investment selections for the investor.

Example: Market Adjusted Damages (continued)

- Let us select the VGENX for comparison.
- To compute market-adjusted damages, we want to construct a measure that captures the total loss to an investor from the deficient investment relative to what they would have had with a plausible alternative.
- How do we account for periodic distributions?
- IRR is a bad choice of measure!
- The key insight: by assuming the same contributions and withdrawals from the benchmark investment, we can directly compare the ending values for the damages number.

Example: Market Adjusted Damages (continued)

- To compute the market-adjusted damages number, we need to create a hypothetical investment, here VGENX, in the chosen alternative matching the timing and amount.
  - Also match all distributions.

Date	Amount	Action
7/28/2010	(50,000.00)	Purchase
12/31/2011	1,458.90	Distribution
12/31/2012	2,158.41	Distribution
12/31/2013	2,315.64	Distribution
12/31/2014	2,280.49	Distribution
12/31/2015	1,226.20	Distribution
4/29/2016	227.32	Distribution
12/31/2016	-	Liquidation / Held

Example: Market Adjusted Damages

Date	Amount	Action	Well Managed Account	VGENX Total Return Index	VGENX Return	VGENX Cumulative Return
7/28/2010	(50,000.00)	Purchase	50,000.00	86.9		0.0%
12/31/2011	1,458.90	Distribution	58,264.92	103.8	19.4%	19.4%
12/31/2012	2,158.41	Distribution	57,661.36	106.57	2.7%	22.6%
12/31/2013	2,315.64	Distribution	65,804.52	125.9	18.1%	44.9%
12/31/2014	2,280.49	Distribution	54,136.83	107.94	-14.3%	24.2%
12/31/2015	1,226.20	Distribution	41,279.79	84.75	-21.5%	-2.5%
4/29/2016	227.32	Distribution	48,753.15	100.56	18.7%	15.7%
12/31/2016	-	Liquidation / Held	54,677.61	112.78	12.2%	29.8%
	Well Managed Damage =		(54,677.61)			

Example: Damages, Imprudent Retirement Plan Offering

- We can extend these same concepts to ERISA cases.
- Plan sponsor allegedly violated fiduciary duty by selecting or retaining inferior investment choices.
- Fidelity Low Priced Stock Fund (FLPSX)
- Measure Damages against an alternative
- Use an appropriate index fun as neutral reference point.
- Vanguard mid-cap value index fund (VMVAX)

Year	FLPSX	VMVAX	Difference	Investment Balance	Contributions	Replacement Fund Balance	Damages
2013				50,000,000.00		50,000,000.00	
2014	8.8%	13.9%	-5.1%	55,632,996.46	1,250,000	58,180,250.02	(2,547,253.56)
2015	-0.3%	0.8%	-1.1%	56,741,411.17	1,250,000	59,923,875.20	(3,182,464.03)
2016	7.7%	14.6%	-7.0%	62,347,672.14	1,250,000	69,952,085.63	(7,604,413.49)
2017	21.2%	17.1%	4.1%	76,788,835.91	1,250,000	83,134,037.44	(6,345,201.53)
2018	-13.4%	-12.6%	-0.8%	67,713,226.63	1,250,000	73,875,394.35	(6,162,167.72)
2019*	12.7%	16.3%	-3.6%	77,572,629.94	1,250,000	87,155,837.22	(9,583,207.28)

Example: Damages, Excess Fees

- We can extend these same concepts to cases involving excess mutual fund fees where a higher share cost fund is offered although lower cost share class is available.
- For example, the offering of Vanguard Mid-Cap Value Index Fund (VMVAZ) may be prudent, but offering the investor share class (VMVIX) instead of lower cost admiral shares (or even institutional class shares) results in excess fee.

Year	VMVIX	VMVAX	Difference	Investment Balance	Contributions	Replacement Fund Balance	Damages
2013				50,000,000.00		50,000,000.00	
2014	13.7%	13.9%	-0.1%	58,117,190.89	1,250,000	58,180,250.02	(63,059.13)
2015	0.5%	0.8%	-0.4%	59,642,067.26	1,250,000	59,923,875.20	(281,807.94)
2016	15.1%	14.6%	0.5%	69,907,742.10	1,250,000	69,952,085.63	(44,343.52)
2017	16.9%	17.1%	-0.1%	82,993,628.32	1,250,000	83,134,037.44	(140,409.12)
2018	-12.8%	-12.6%	-0.1%	73,647,706.47	1,250,000	73,875,394.35	(227,687.88)
2019*	16.2%	16.3%	-0.1%	86,812,905.70	1,250,000	87,155,837.22	(342,931.52)

Conclusion

- Develop a framework for quantifying damages caused to investors in a variety of contexts.
- By understanding the intuition behind the model, then the model is flexible and adaptable across a wide range of different types of investment activity.
- Stress the importance of selecting an appropriate benchmark for quantifying losses.

PRIMER ON DAMAGES UNDER ERISA

By Jane L. Stafford, Stafford Law Firm LLC

PIABA Mid-Year Meeting: Uncle Stan's Retirement Account Got Blown Up…Now What?
April 27, 2023

This article sets forth some basic considerations on bringing actions under the Employee Retirement and Income Security Act of 1974 (ERISA).[1] It gives an overview of damages that may be claimed and references the governing statutory and regulatory provisions. It does not render an in-depth analysis of ERISA. ERISA can be a complex statute, with frequent changes to its requirements.

1. Introduction

ERISA applies to all employee pension and benefit plans established by an employer or employee organization.[2] It governs retirement plans offered by an employer, such as defined benefit plans, generally known as pension plans; defined contribution plans, such as 401(k) plans; and health and welfare plans. Most sections of the Act do not apply to Individual Retirement Accounts (IRAs) and similar types of accounts. However, ERISA will apply to recommendations to rollover funds from an ERISA plan into an individual retirement account ("IRAs").[3] Otherwise, IRAs are not covered by ERISA as they are not offered by an employer.

The benefits of pleading ERISA emanate from the required standards of care imposed on someone managing retirement accounts and the broader measure of damages than many common law or other statutory claims. The standards of care arise from ERISA's foundation in trust law and the prudent man rule. Any advisor almost automatically becomes a fiduciary in advising a plan, minimizing or negating the "fiduciary" debate. Other incentives exist to plead ERISA, such as a more generous statute of limitations and robust standards on conflicts of interest.

2. Fiduciary Duty Standard

Eliminating any issues regarding whether someone is a fiduciary, ERISA broadly defines a fiduciary:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or

[1] Citations are both to the Sections in ERISA, as well as their codification. Many times reference is made to ERISA's Sections, not their codifications.

[2] Section 3, codified in 29 U.S. Code § 1002 – Definitions *at* 29 U.S. Code § 1002 - Definitions | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu); 29 U.S. Code § 1003 – Coverage, *at* 29 U.S. Code § 1003 - Coverage | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu).

[3] Department of Labor, Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees, 85 FR 24 (Dec. 18, 2020), *at* 2020-27825.pdf (govinfo.gov); U.S. Securities and Exchange Commission, "2. What Recommendations are Covered, Regulation Best Interest, A Small Entity Compliance Guide," at SEC.gov | Regulation Best Interest.

> exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

This definition of fiduciary will cover almost any person who renders advice to a plan. Regulatory guidance on this definition confirms that anyone rendering investment advice is a fiduciary if that person "renders advice to the plan as to the value of securities, . . . or make recommendation [sic] as to the advisability of investing in, purchasing, or selling securities or other property."[4] Once a fiduciary is determined, ERISA sets forth the standards of care with particularity.

3. Standards of Care as Basis for Liability and Damages

In establishing the standard of care, ERISA imposes the "prudent man standard of care,"[5] and requires a fiduciary to do the following:

> To discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and— . . . (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.[6]

The regulations and interpretative guidance issued by the Department of Labor set forth the appropriate investment duties that a fiduciary should fulfill. The fiduciary must give "appropriate consideration" to the following factors, among other considerations:

> (i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks, and
>
> (ii) In the case of employee benefit plans other than participant-directed individual account plans, consideration of the following factors as they relate to such portion of the portfolio:
>
> (A) The composition of the portfolio with regard to diversification;

[4] 29 CFR § 2510.3-21 - Definition of "Fiduciary", *at* eCFR :: 29 CFR 2510.3-21 -- Definition of "Fiduciary."; 29 CFR § 2510.3-21 - Definition of "Fiduciary." | Electronic Code of Federal Regulations (e-CFR) | US Law | LII / Legal Information Institute (cornell.edu).
[5] ERISA Section 404, codified in 29 U.S. Code § 1104(a) - Fiduciary duties, Prudent man standard of care, *at* 29 U.S. Code § 1104 - Fiduciary duties | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu).
[6] *Id.*

(B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and

(C) The projected return of the portfolio relative to the funding objectives of the plan.[7]

These standards provide a clear roadmap to ascertain and prove a breach of fiduciary duty. Someone who causes losses in an account or failed to grow the assets of the plan, i.e., accrued profits, most likely will have violated one of these provisions. Losses routinely result from the failure to adhere to these standards, with a lack of appropriate diversification, liquidity, or required returns, allowing the breach of fiduciary duty to be established.

4. Statutory Liability

29 U.S. Code § Section 1109, also referred to as Section 409 of ERISA, establishes a fiduciary's liability for breach of fiduciary duty. Section 409 expressly provides for liability by a fiduciary for breach of the fiduciary responsibility:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate . . . .[8]

It should be noted that some controversy did exist as to standing to bring suit and on what grounds, and someone may attempt that outdated argument. However, in *LaRue v. Dewolff*,[9] the U.S. Supreme Court resolved any controversy and specifically held that a plan participant may bring an action under Section 502(a)(2), which states:

> (a) **PERSONS EMPOWERED TO BRING A CIVIL ACTION.** A civil action may be brought—
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title. . . .[10]

[7] 29 CFS §2550.404a-1(b)(1) and (2), Investment duties, *Investment prudence duties at* eCFR :: 29 CFR Part 2550 -- Rules and Regulations for Fiduciary Responsibility; 29 CFR § 2550.404a-1 - Investment duties. | Electronic Code of Federal Regulations (e-CFR) | US Law | LII / Legal Information Institute (cornell.edu)

[8] ERISA Section 409 codified in 29 U.S. Code § 1109 - Liability for breach of fiduciary duty, ***at*** 29 U.S. Code § 1109 - Liability for breach of fiduciary duty | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu).

[9] 552 U.S. 248, 128 S.Ct. 1020, 169 L.Ed.2d 847, 8 Cal. Daily Op. Serv. 2160, 42 Employee Benefits Cas. 2857, 76 USLW 4083, 2008 Daily Journal D.A.R. 2505 (2008). *See also* S. Reece, *The Times Are "A-Changing" Towards a Living Statute Jurisprudence in ERISA,* 40 U. Mem. L. Rev. 55 2009-2010 (Fall 2009)

[10] ERISA Section 502 codified in 29 U.S. Code § 1132 - Civil enforcement, *at* 29 U.S. Code § 1132 - Civil enforcement | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu).

Standing may become a fairly complex issue in assessing damages under ERISA, however, and distinction is made among the types of plans for which relief is being sought, such as medical and health plans in comparison to retirement plans. If relief is being sought for retirement plans, in which participants have individual rights, the participant may bring an action individually.[11]

5. Recoverable Losses

Like the securities laws, ERISA is a remedial statute and interpreted accordingly by the courts. Statutorily recoverable losses are extremely broad, including lost profits, prejudgment interests, attorneys' fees, disgorgement, and other remedies authorized under the statutory language of "other equitable or remedial relief as the court may deem appropriate."[12] Courts resolve any uncertainties in fixing damages against the wrongdoer.[13]

The courts ground recovery on common law principles of trust and defer to those principals in determining a measure of damages.[14] Under trust law, a trustee must manage the trust "as a prudent person would by considering the purposes, terms, distributional requirements and other requirements," and by using "reasonable skill, care and caution."[15] A trustee with special skills or expertise must use those special skills and expertise.[16] knowledge Similarly under ERISA, fiduciaries must discharge their duties with prudence.[17]

The courts measure damages resulting from a breach of the required standards in terms of what the value of an appropriately managed account would be, an analysis grounded in trust law. Section 1002 of the Uniform Investor Act, deemed part of the Uniform Trust Act, states:

> (a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:
>
> (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
>
> (2) the profit the trustee made by reason of the breach.[18]

[11] *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), cited in *LaRue v. Dewolff,* supra note 8 at 552 U.S. 250.
[12] ERISA Section 409 *supra* note 8.
[13] *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2nd Cir. 1985), *citing* Leigh *v. Engle*, 727 F.2d 113, 138 (7th Cir.1984); *McMerty v. Herzog*, 710 F.2d 429, 431 (8th Cir.1983).
[14] *Id*. at 1105. See, e.g., *Schoenholtz v. Doniger*, 657 F.Supp. 899, 907 (S.D. N.Y. 1987).
[15] Section 805, Prudent Administration, National Conference of Commissioners on Uniform State Laws, Uniform Trust Act at Trust Code - Uniform Law Commission (uniformlaws.org)
[16] Section 806. Trustee Skills, Uniform Trust Act, *supra* note 15.
[17] *Ramos v. Banner Health*, 1 F.4th 769, 778 (10th Cir. 2021).
[18] Section 1002, Damages for Breach of Trust, National Conference of Commissioners on Uniform State Laws, Uniform Prudent Investor Act, at Prudent Investor Act - Uniform Law Commission (uniformlaws.org)

a. Well Managed Portfolio

The courts have no difficulty imposing liability for lost profits or based on a well-managed portfolio. "One appropriate remedy in cases of breach of fiduciary duty is the restoration of the trust beneficiaries to the position they would have occupied but for the breach of trust."[19] In other words, damages are based on what a well-managed portion would have made.[20]

The courts recognize that losses are not delimited in any manner under ERISA. They review losses in terms of the required conduct and the harm resulting from the failure to fulfill that conduct.[21] If a fiduciary fails to fulfill his duties, the losses are measured by what the value of the funds would be if the fiduciary had fulfilled his duties and responsibilities.

b. Restoration of Lost Opportunity, Prejudgment Interest

Demonstrative of the extent to which courts will fashion remedial damages, in *Ramos v. Banner Health*, the court upheld an award of prejudgment interest. It justified its decision as "in lieu of and to approximate the lost investment opportunity of funds that would have otherwise remained in the Plan."[22]

c. Attorneys' Fees

The courts have further availed themselves of the language in Section 409 allowing for "other equitable relief"[23] to award attorneys' fees.[24] In doing so, the courts delineate five factors:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting in similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.[25]

d. Disgorgement

The language allowing restoration of profits made by the fiduciary through use of the assets becomes acutely important with proprietary products or other products in which a conflict of interest exists.[26] For proprietary products, all the compensation of the fiduciary from the proprietary product comes into play as recoverable. If the fiduciary used the assets of the plan to fill quotas, then the extra compensation from meeting the quota becomes recoverable. Finally, to

[19] *Donovan v. Bierwirth*, *supra* note 13 at 1056, *citing* Restatement (Second) of Trusts Sec. 205(c) (1959); *Eaves v. Penn*, 587 F.2d 453, 463 (10th Cir.1978).
[20] *Schoenholtz v. Doniger*, 657 F.Supp. 899, 903 (S.D. N.Y. 1987)
[21] *Donovan v. Bierwirth*, *supra* note 13 at 1052.
[22] *Ramos supra* note 16 at 783.
[23] Section 409 *supra* note 8.
[24] *Carpenters Southern California Administrative Corp. v. Russell*, 726 F.2d 1410, 1415 (9th Cir. 1984)
[25] *Id. at* 1415, *citing Hummell v. S.E. Rykoff & Co*., 634 F.2d 446, 453 (9th Cir.1980).
[26] *See, e.g.*, 29 CFS §2550.404a-1(c), Investment duties, *Investment loyalty duties*, *supra* note 7.

the extent that the broker-dealer uses the compensation received to fund operations in general or to alleviate losses, the profits of the broker-dealer become an item to consider.

6. Rollover Requirements

Both the Department of Labor and FINRA have recognized that recommendations regarding rollovers out of retirement plans constitute regulated and actionable conduct and should be given careful consideration. In many instances, the better course is for an employee to leave funds with a well-managed, lower-cost employer sponsor plan instead of rolling them over to a less qualified advisor, with investments bearing much greater expenses.

a. DOL: Rollover Advice is Covered Fiduciary Advice

The Department of Labor specifically states:

> Advice to roll assets out of a plan is advice as to the sale, withdrawal, or transfer of plan assets and, therefore, is covered as fiduciary advice to the extent that the other conditions of the 1975 fiduciary advice definition are satisfied.[27]

Because of the broad scope of this fiduciary duty standard, the Department of Labor issued a prohibited transaction exemption that sets forth the basis for rollover recommendations not to be a breach of fiduciary duty.[28]

b. FINRA: Rollover Advice is a "Recommendation"

Similarly, FINRA Regulatory Notice 13-45 provides: "A broker-dealer's recommendation that an investor roll over retirement plan assets to an IRA typically involves securities recommendations subject to FINRA rules."[29] The Notice added:

> A recommendation concerning the type of retirement account in which a customer should hold his retirement investments typically involves a recommended securities transaction, and thus is subject to Rule 2111. For example, a firm may recommend that an investor sell his plan assets and roll over the cash proceeds into an IRA. Recommendations to sell securities in the plan or to purchase securities for a newly opened IRA are subject to Rule 2111.

[27] U.S. Department of Labor Employee Benefits Security Administration, *New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions* p. 3 (April 2021), *at* New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions (dol.gov).

[28] Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees, At Federal Register :: Prohibited Transaction Exemption 2020-02 (Dec. 17, 2020), Improving Investment Advice for Workers & Retirees

[29] FINRA Regulatory Notice 13-45 (Rollovers to Individual Retirement Accounts, FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers) (Dec. 2013), *at* Regulatory Notice 13-45 | FINRA.org.

The Notice identified the following factors that member firms should consider in advising clients on rollovers: investment options, fees and expenses, services, penalty-free withdrawals, protection for creditors and legal judgments, required minimum distributions, and employer stock.

Regulatory Notice 13-45 especially noted the potential for conflicts of interest that can occur in advising investors as to whether to roll over their portfolios from a plan:

> Firms and their registered representatives that recommend an investor roll over plan assets to an IRA may earn commissions or other fees as a result. In contrast, a recommendation that an investor leave his plan assets with his old employer or roll the assets to a plan sponsored by a new employer likely results in little or no compensation for a firm or a registered representative. . ..
>
> FINRA urges broker-dealers to review their retirement services activities to assess conflicts of interest. Firms must supervise these activities to reasonably ensure that conflicts of interest do not impair the judgment of a registered representative or another associated person about what is in the customer's interest and that they neither confuse investors nor interfere with important educational efforts.

Some documentation should exist if an advisor recommends rolling over plan assets. The advisor should have some knowledge of the plan to make a recommendation, and that due diligence should be documented.

7. Miscellaneous

A few additional matters should be considered in any action alleging ERISA violations, in terms of jurisdiction, statute of limitations, and publicly available information available in Form 5500's.

a. Exclusive Federal Court Jurisdiction

ERISA provides that, with limited exceptions, actions for enforcement must be brought in the United States District Courts.[30] Notwithstanding, the Federal Arbitration Act will cause a controversy to be submitted to arbitration if such an agreement exists.[31]

b. Statute of Limitations

ERISA actions must be brought within the earlier of six years after the breach or violation or within three years of the date on which the plaintiff obtained actual knowledge of the breach or violation. However, in line with its remedial nature, ERISA allows for tolling of the statute in

[30] 29 U.S.C. § 1132, *at* 29 U.S. Code § 1113 - Limitation of actions | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu).

[31] 9 U.S. Code § 4 - Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination, at 9 U.S. Code § 4 - Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu).

cases of fraud or concealment, in which case the action may be brought within six years of the discovery of the breach or violation.[32]

c. Form 5500

Employers are required to file a Form 5500 to satisfy annual reporting requirements under Title I and Title IV of ERISA and under the Internal Revenue Code. The Form 5500 contains basic information on a plan, financial information, and compliance questions. Online searches may be conducted to obtain copies of the Form 5500.[33] It acts as a valuable tool to obtain information without discovery, and which would most likely be withheld without controversy.

8. Conclusion

In providing an underlying framework to protect retirees and their pensions, ERISA provides stronger remedial measures and better damage provisions. With ERISA protected 401(k) plans becoming the most used type of account for retirement savings, it becomes essential to understand claims by these plans.[34] While ERISA and its regulations can be complex, the guidance and interpretive materials may also be very helpful.[35]

[32] 29 U.S.C. § 1113, *at* 29 U.S. Code § 1113 - Limitation of actions | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu)
[33] Form 5500 Search (dol.gov)
[34] Statistica, "Most popular accounts for retirement savings in the United States in 2021," *at* U.S. accounts used for retirement savings | Statista
[35] *See* Employee Benefits Security Administration, U.S. Department of Labor, "Resources, Retirement," at Resource Center | U.S. Department of Labor (dol.gov).

SUMMARY OF WELL MANAGED PORTFOLIO DAMAGES AKA "MARKET ADJUSTED DAMAGES"

Thomas D. Mauriello

1. WHAT ARE WELL MANAGED PORTFOLIO DAMAGES?

"Well-managed portfolio damages" are also sometimes referred to as properly-managed account damages, market adjusted damages, *Miley* damages, and lost profits damages. To some including this author, the term "well-managed portfolio damages" is favorable because the term itself connotes prudent management and recommendations as compared to the actual portfolio at issue that by definition and outcome was *poorly managed.*

Well-managed portfolio damages use industry benchmarks to compute what an investor would have received had the portfolio been invested properly. The benchmark may be a well-known index such as the S&P 500, the Dow Jones Industrial Average, or the Bloomberg US Aggregate Bond Index, or a more customized index or blend of indexes. Alternatively, it can be the investment(s) that the investor had been invested in *before* the advisor or broker recommended switching to the investment(s) that caused the losses.

A simple way of calculating these damages is to take the investor's account value immediately before the fraud, unsuitable investment, or other misconduct began, and calculate the ending value of a hypothetical investment of that same amount, over the same time period, had it been invested in an ***appropriate*** investment.

This damages methodology usually generates higher damages than under a net out of pocket ("NOP") damages calculation.

II. LEGAL BASES FOR WELL MANAGED PORTFOLIO DAMAGES

A. *Case Law*

In *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155 (1972), the Supreme Court employed well managed portfolio damages in a federal securities fraud case:

> In our view, the correct measure of damages under § 28 of the Act, 15 U.S.C. § 78bb (a), is the difference between the fair value of all that the [plaintiff] received and the fair value of what he would have received had there been no fraudulent conduct . . . .

Such damages have been approved by federal appeals courts as well.

> It is and has been clear that, in theory, the plaintiff is entitled to recover the difference between what he would have had if the account has been handled legitimately and what he in fact had at the time the violation ended with the transfer of the account to a new broker.

*   *   *

> In order to approximate the trading losses caused by the broker's misconduct, it is necessary to estimate how the investor's portfolio would have fared in the absence of the such misconduct.

Miley v. Oppenheimer Co., Inc, 637 F.2d 318, 327, 328 (5th Cir. 1981), abrogated by *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

The Ninth Circuit, relying on *Miley*, rejected arguments that damages were limited to out of pocket losses and adopted well managed portfolio damages in churning cases, stating as follows:

> [W]hen a securities broker engages in excessive trading in disregard of his customer's investment objectives for the purpose of generating commission business, the customer may hold the broker liable for churning without proving loss causation. The investor may recover excessive commissions charged by the broker, and the decline in value of the investor's portfolio resulting from the broker's fraudulent transactions. The recoverable decline in portfolio value is "the difference between what [the plaintiff] would have had if the account ha[d] been handled legitimately and what he in fact had at the time the violation ended." The finder of fact "must be afforded significant discretion to choose the indicia by which such an estimation is made, based primarily on the types of securities comprising the portfolio."

Hatrock v. Edward D. Jones & Co., 750 F.2d 767, 773-74 (9th Cir. 1984)(citations omitted). *See also Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 906 F.2d 1206, 1218 & n.13 (8th Cir. 1990) (upholding award of well managed portfolio damages where the investor made a profit despite churning); "*Twomey v. Mitchum*, *Jones & Templeton*, *Inc*. (1968) 262 Cal.App.2d 690, 732 ("most rational approach" in certain cases "may well be a comparison of the actual experience with a theoretical properly managed account).

Finally, as noted in Jane Stafford's presentation and her paper on ERISA, the courts facing ERISA claims have no difficulty imposing liability for lost profits or based on a well-managed portfolio. "One appropriate remedy in cases of breach of fiduciary duty is the restoration of the trust beneficiaries to the position they would have occupied but for the breach of trust." *Donovan v. Bierwirth*, 754 F.2d 1049 at n. 13, *citing* Restatement (Second) of Trusts Sec. 205(c) (1959); *Eaves v. Penn*, 587 F.2d 453, 463 (10th Cir.1978). In other words, damages are based on what a well-managed portion would have made. *Schoenholtz v. Doniger*, 657 F.Supp. 899, 903 (S.D. N.Y. 1987).

B. *The FINRA Arbitrator's Guide*

The FINRA Arbitrator's Guide includes well managed portfolio damages among the options for arbitrators to award:

> Depending upon the relief parties request, there are several types of remedies arbitrators may consider. If the panel is satisfied by a preponderance of the evidence that the respondent is liable for the alleged loss, the panel should determine an appropriate remedy. Remedies may include:

*   *   *

Well-Managed Portfolio Account

This measure of damage allows the claimant to recover the difference between what the claimant's account made or lost versus what a well-managed account, given the investor's objectives, would have made during the same time period.

FINRA Dispute Resolution Services Arbitrator's Guide, https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf

This statement may not be expansive or elaborate. But it is an accurate and succinct description of well managed portfolio damages. And whatever it lacks in enthusiasm, detail, or word count, it endorses the propriety of these damages without ambiguity.

III. PRACTICAL TIPS

A. Use of Experts. Either prior to filing a claim, or as counsel further investigates the case leading up to arbitration hearing, a profit and loss analysis containing well managed portfolio damages will be useful.

In presenting such damages at the arbitration hearing, it is often helpful to have an expert opine as to the suitability of a particular index or benchmark on which to base well managed portfolio damages. This is true particularly where it may be a combination of more than one index, such as where a portfolio should have been invested in "X" % stocks and "Y" % bonds. This testimony will assist the panel in ascertaining that the index is a suitable one for the investor's investment objectives and also will help to establish that the damages are not speculative.

B. Use Reasonable Benchmarks. The Court in *Hatrock* recognized that the specific benchmark or index used to calculate well managed portfolio damages will vary depending on the nature of the account and the investments at issue: "The finder of fact 'must be afforded significant discretion to choose the indicia by which such an estimation is made, based primarily on the types of securities comprising the portfolio.'" *Hatrock*, 750 F.2d at 774 (citation omitted).

As a result, the persuasiveness of an argument for well-managed portfolio damages is only as good as the portfolio underlying it. The hypothetical portfolio that is applied must be suitable and *reasonable* for the particular investor. Selecting an inapplicably aggressive index will be seen as over-reaching and thus likely to be unpersuasive. For example, if the client is a 90-year-old widow with modest assets and a fixed income, do not use the S&P 500 as your benchmark index.

MARKET ADJUSTED DAMAGES IN THE FINRA FORUM

Philip M. Aidikoff, Robert A. Uhl,
Ryan K. Bakhtiari, and Katrina M. Boice

I. INTRODUCTION

Investors open accounts with brokerage firms to increase the value of their principal consistent with their time horizon, investment objectives and risk tolerance. It is logical for a client to seek and recover market adjusted damages when a brokerage firm recommends securities or pursues strategies that are inconsistent with the client's objectives.

Market adjusted damages utilize industry benchmarks to compute what an investor would have received had the portfolio been properly invested. These damages compensate an investor for losses caused by wrongful conduct in both a rising and falling market by adding or reducing return according to the actual performance of the market.[1]

This article discusses how an award of market adjusted damages should be pursued in the FINRA forum by a review of FINRA guidance, case law and practical application. This article concludes that market adjusted damages are an accurate and fair measure of compensation that appropriately reflects the harm caused to the investor adjusted for actual market performance.

II. ASSET ALLOCATION AND DIVERSIFICATION

"A review of historical data and empirical studies provides strong support for the contention that the asset allocation decision is a critical component of the portfolio management process."[2] In fact, it has been recognized that "… the most important part of [investment] policy determination is asset allocation."[3] Studies have demonstrated that 90% or

1. "Market adjusted damages" are known by many names, including, *inter alia*, properly-managed account damages, well-managed account damages, *Miley* damages, and lost profits damages. For purposes of this article we will refer to them as market adjusted damages.

2. FRANK K. REILLY & KEITH C. BROWN, INVESTMENT ANALYSIS AND PORTFOLIO MANAGEMENT 57 (8th ed. 2005).

3. ZVI BODIE, ALEX KANE & ALAN J. MARCUS, INVESTMENTS 946 (6th ed. 2005).

more of the performance in an investment portfolio returns are driven by the asset allocation decision.[4]

Courts have recognized that a brokerage firm can manage the inherent risk of the market through asset allocation amongst negatively correlated asset classes and diversification within each class.[5] It has been held that stockbrokers have fiduciary duties including full and fair disclosure of all material facts regardless of whether or not an investor is sophisticated or unsophisticated:[6]

> Twomey remains the controlling statement of the law applicable to this case. Contrary to appellants' position the relationship between a stockbroker and his or her customer is fiduciary in nature; the distinction between a "sophisticated" investor and an "unsophisticated" one is not controlling in this regard.[7]

Additionally, brokers and brokerage firms have an independent duty to investigate securities to determine whether they are consistent with a client's investment objectives and risk tolerance:

> Brokers and salesmen are 'under a duty to investigate, and their violation of that duty brings them within the term 'willful' in the Exchange Act. Thus, a salesman cannot deliberately ignore that which he has a duty to know and recklessly state facts about matters of which he is ignorant. He must analyze sales literature and must not blindly accept recommendations made therein. The fact that his customers may be sophisticated and knowledgeable does not warrant a less stringent standard. Even where the purchaser follows the market activity of the stock and does not rely upon the salesman's statements, remedial sanctions may be imposed since reliance is not an element of fraudulent misrepresentation in this context.[8]

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4. *E.g.,* Gary Brinson et al., *Determinants of Portfolio Performance II: An Update*, FIN. ANALYSTS J. (May-June 1991); Roger G. Ibbotson & Paul D. Kaplan, *Does Asset Allocation Policy Explain 40, 90, or 100 Percent of Performance?*, FIN. ANALYSTS J. (Jan.-Feb. 2000).

5. A private cause of action for failure to diversify has been recognized. *See* Liss v. Smith, 991 F. Supp. 278, 301 (S.D.N.Y. 1998).

6. *See* Duffy v. Cavalier, 215 Cal. App. 3d 1517, 1533 (Cal. Ct. App. 1981).

7. *Id.*

8. Hanly v. Sec. & Exch. Comm'n, 415 F.2d 589, 595-96 (2d Cir. 1969) (footnotes omitted).

A brokerage firm that fails to invest a customer's portfolio with an appropriate asset allocation among negatively correlated asset classes and diversification within each class may be held responsible for a breach of duty. This conduct may also constitute a failure to comply with the standard of care in the financial services industry.

III. FINRA GUIDANCE ON AWARDING MARKET ADJUSTED DAMAGES

FINRA recognizes the importance of asset allocation and managing investment risk:

> In big-picture terms, managing risk is about the allocation and diversification of holdings in your portfolio. So when you choose new investments, you do it with an eye to what you already own and how the new investment helps you achieve greater balance. For example, you might include some investments that may be volatile because they have the potential to increase dramatically in value, which other investments in your portfolio are unlikely to do.
>
> Whether you're aware of it or not, by approaching risk in this way—rather than always buying the safest investments—you're being influenced by what's called modern portfolio theory, or sometimes simply portfolio theory. While it's standard practice today, the concept of minimizing risk by combining volatile and price-stable investments in a single portfolio was a significant departure from traditional investing practices.
>
> In fact, modern portfolio theory, for which economists Harry Markowitz, William Sharpe, and Merton Miller shared the Nobel Prize in 1990, employs a scientific approach to measuring risk, and by extension, to choosing investments. It involves calculating projected returns of various portfolio combinations to identify those that are likely to provide the best returns at different levels of risk.[9]

Additionally, the FINRA Dispute Resolution Arbitrator's Guide in explaining different remedies available, recognizes that well-managed account damages (*i.e.,* market adjusted damages) can be awarded:

9. FINRA, *Managing Investment Risk, Modern Portfolio Theory*, http://www.finra.org/Investors/SmartInvesting/AdvancedInvesting/ManagingInvestmentRisk/ (last visited May 8, 2014).

WELL-MANAGED PORTFOLIO ACCOUNT

> This measure of damage allows the claimant to recover the difference between what the claimant's account made or lost versus what a well-managed account, given the investor's objectives, would have made during the same time period.[10]

FINRA's well managed portfolio remedy is consistent with FINRA's know your customer and suitability rule:

2090. KNOW YOUR CUSTOMER

> Every member shall use reasonable diligence, in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer.[11]

2111. SUITABILITY

> (a) A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.[12]

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10. FINRA Dispute Resolution Arbitrator's Guide 63 (Feb. 2014 ed), http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p009424.pdf (last visited May 8, 2014).

11. FINRA Rule 2090 (Know Your Customer), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9858(last visited May 8, 2014).

12. FINRA Rule 2111 (Suitability), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9859 (last visited May 8, 2014).

IV. CASE LAW AWARDING MARKET ADJUSTED DAMAGES

For years, courts have explored awarding market adjusted damages in securities cases involving churning and unsuitable portfolios. The accepted practice in securities cases involving churning and unsuitable portfolios is to calculate damages based on net economic loss or market indexing (such as the Barclays Aggregate Bond Index, Vanguard Total Bond Fund, S&P 500, Dow Jones Industrial Average, or similar benchmarks), regardless of whether state or federal law applied.

The Second Circuit in *Rolf v. Blyth, Eastman Dillon & Co., Inc.,* provided a road map for calculating damages using market indexing.[13] In that case, an investor brought an action against his broker and the brokerage firm seeking damages for stock market losses.[14] Rolf's long term advisor retired and his account was reassigned to a broker and an investment advisor who would collectively manage his accounts.[15] The investor's long term investments goals and strategy emphasized preservation and growth of capital for which he executed an authorization giving his broker full trading authority.[16] Over the course of a year, the value of the investor's portfolio dropped by approximately 70% as the result of purchasing risky securities.[17] The District Court for the Southern District of New York found the broker and brokerage firm liable.[18] The court reasoned that the broker owed a fiduciary duty to the investor which he breached which aided and abetted the investment advisor's fraud.[19] Additionally, the court found the brokerage firm liable under the doctrine of "respondeat superior or the securities law doctrine of controlling person liability."[20] The court then limited the damage award and failed to take into account market adjusted damages.[21] The broker and brokerage firm appealed the decision and the investor cross-appealed the

13. Rolf v. Blyth Eastman Dillon & Co., 570 F.2d 38, 49 (2d Cir. 1978), *cert. denied*, 439 U.S. 1039 (1978), *modifying*, 637 F.2d 77 (2d Cir. 1980).

14. *Id*. at 38, 41.

15. *Id*. at 41-42.

16. *Id*. at 42.

17. *See id*. at 42.

18. *Id*. at 38, 41.

19. *Rolf*, 570 F.2d at 43.

20. *Id.*

21. *Id.*

district court's measure of damages.[22] The Court of Appeals for the Second Circuit affirmed the broker and brokerage firm's liability and remanded the damage calculation back to the district court.[23] The Second Circuit acknowledged that while it was not capable of measuring the investor's damages, it disagreed that the damages should be limited to those arising in a churning case *(i.e.*, commissions).[24] Therefore, the Second Circuit set forth the following guidelines for the district court to follow when calculating damages on remand:

> First, the district court should determine as near as possible the time when [the broker] began to aid and abet [the investment advisor's] fraud and compute the market value of [the investor's] portfolio on that date. Second, the district court should subtract the value of the portfolio on the date when [the broker's] participation in and assistance to the fraudulent scheme ceased from the value on the date when [the broker] became and aider and abettor. This amount is [the investor's] gross economic loss. The district court should then reduce [the investor's] gross economic loss by the average percentage decline in the value of the Dow Jones Industrials, the Standard & Poor's Index, or any other well recognized index of value, or combination of indices, of the national securities markets during the period commencing with [the broker's] aiding and abetting and terminating with its cessation.[25]

The court further explained the investor's gross economic loss calculation as follows:

> Here [the broker's] participation in [the investment advisor's] fraud infected [the investor's] portfolio during a specific period of time to be determined on remand. In a sense the portfolio will be deemed sold as of the last day of the aiding and abetting period in order to determine what the resale price would have been if the portfolio had been liquidated on that day.[26]

22. *Id*. at 38, 41.

23. *Id*. at 38, 41, 48, 49-50.

24. *Id.* at 48.

25. *Id.* at 49 (citations omitted); *see also In re* Drexel Burnham Lambert Group, Inc. 161 B.R. 902, 909 (S.D.N.Y. 1993) (the measure of damages for unsuitability claims is the plaintiff's gross economic loss, adjusted for the overall market's performance citing *Rolf v. Blyth Eastman Dillon & Co*).

26. 570 F.2d at 49, n.21.

The court also acknowledged that the use of the market indices does not hold the broker and brokerage firm responsible for the general decline in the market:

> [the investor's] portfolio, even if it had not been fraudulently mismanaged, would have declined in value during the bear market of the aiding and abetting period. [The broker] and [brokerage firm] have no responsibility for the general decline in economic conditions.[27]

Shortly thereafter, in *Miley v. Oppenheimer & Company, Inc.,* the Court of Appeals for the Fifth Circuit approved the market adjusted damage calculation utilized in *Rolf*.[28] In *Miley*, an investor sought to recover damages based on federal securities law, common law and statutory law against his brokerage firm and two of its registered representatives for the churning of his account.[29] The District Court for the Northern District of Texas found that the brokerage firm and registered representatives breached their fiduciary duties to the investor and awarded actual and punitive damages.[30] The brokerage firm and registered representative appealed.[31] On appeal, the Fifth Circuit affirmed the district court's decision and discussed damages at length.[32] The court found, *inter alia*, that the investor was "entitled to recover the difference between what he would have had if the account had been handled properly and what he in fact had at the time the violation ended with the transfer of the account to a new broker.[33] In making these findings the Fifth Circuit reasoned:

> The investor is harmed by the decline in the value of his portfolio - the "spilt milk" of the churning violation - as a result of the broker's having intentionally and deceptively concluded transactions, aimed at generating fees, which were unsuitable for the investor. The intentional and deceptive mismanagement of a client's account, resulting in a decline in the value of that portfolio,

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27. *Id.* at 49, n.22.

28. Miley v. Oppenheimer & Co., 637 F.2d 318, 318 (5th Cir. 1981), *abrogated by* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985).

29. *Id.*

30. *Id.* at 318, 325.

31. *Id*.

32. *Id.* at 326-29.

33. *Id.* at 327.

> constitutes a compensable violation of both the federal securities laws and the broker's common law fiduciary duty, regardless of the amount of the commissions paid to the broker. In sum, once a jury finds that the broker has churned an investor's account, it may also find that the investor would have paid less commissions and that his portfolio would have had a greater value had the broker not committed the churning violation...[34]

The Fifth Circuit recognized that although calculation of market adjusted damages may not be exact, "... neither the difficulty of the task nor the guarantee of imprecision in results can be a basis for judicial abdication from the responsibility to set fair and reasonable damages in a case."[35] Additionally, "a refusal by a court to estimate the amount of trading losses caused by the churning of an account could only yield a certain windfall for either the investor or the broker."[36] Therefore, the court stated:

> In order to approximate the trading losses caused by the broker's misconduct, it is necessary to estimate how the investor's portfolio would have fared in the absence of [sic] such misconduct. The trial judge must be afforded significant discretion to choose the indicia by which such estimation is to be made, based primarily on the types of securities comprising the portfolio. However, in the absence of either a specialized portfolio or a showing by either party that a different method is more accurate, it seems that the technique discussed [in *Rolf*]… and employed by [the district court judge] in this case is preferable… This mode of estimation utilizes the average percentage performance in the value of the Dow Jones Industrials or the Standard and Poor's Index during the relevant period as the indicia of how a given portfolio would have performed in the absence of the broker's misconduct.[37]

Further the Fifth Circuit acknowledged that market adjusted damages "attempt to prevent a windfall to either the injured investor or the wrongdoer, regardless of whether the misconduct at issue is viewed as federal or state law violation."[38]

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34. *Miley*, 637 F.2d at 326 (footnote omitted).

35. *Id.* at 327.

36. *Id.* at 328.

37. *Id.* (footnote and citations omitted).

38. *Id.* at 329. *See also* Donovan v. Bierwirth, 754 F.2d 1049 (2d Cir. 1985), which adopted the market index approach where a breach of fiduciary duty was found under ERISA:

The Ninth Circuit in *Hatrock v. Edward D. Jones & Co.* adopted the *Miley* analysis for market adjusted damages in churning cases.[39] In that case, customers brought suit against their broker and brokerage firm for misrepresentations and churning in the District Court of Idaho.[40] A jury returned a verdict in favor of the investors and awarded compensatory damages, punitive damages and attorneys' fees against the broker.[41] Thereafter, the broker and brokerage firm appealed and the investors cross-appealed.[42] In affirming the lower court's ruling, the Ninth Circuit addressed the damages an investor can recover for churning as follows:

> …when a securities broker engages in excessive trading in disregard of his customer's investment objectives for the purpose of generating commission business, the customer may hold the broker liable for churning without proving loss causation. The investor may recover excessive commissions charged by the broker, and the decline in value of the investor's portfolio resulting from the broker's fraudulent transactions. The recoverable decline in portfolio value is "the difference between what [the plaintiff] would have had if the account ha[d] been handled legitimately and what he in fact had at the time the violation ended." The finder of fact "must be afforded

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> One appropriate remedy in cases of breach of fiduciary duty is the restoration of the trust beneficiaries to the position they would have occupied but for the breach of trust.... [w]e hold that the measure of loss applicable under ERISA section 409 requires a comparison of what the Plan actually earned on the Grumman investment with what the Plan would have earned had the funds been available for other Plan purposes.
>
> In determining what the Plan would have earned had the funds been available for other Plan purposes, the district court should presume that the funds would have been treated like other funds being invested during the same period in proper transactions. Where several alternative investment strategies were equally plausible, the court should presume that the funds would have been used in the most profitable of these. The burden of proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of their duty. Any doubt or ambiguity should be resolved against them.

Id. at 1056.

39. Hatrock v. Edward D. Jones & Co., 750 F.2d 767, 773-74 (9th Cir. 1984).

40. *Id*. at 767-70.

41. *Id.*

42. *See Id*.

> significant discretion to choose the indicia by which such an estimation is made, based primarily on the types of securities comprising the portfolio."[43]

Likewise, the District Court of New Hampshire in *Winer v. Patterson* found *Miley* and its progeny persuasive for the computation of damages in a churning case. [44] In *Winer*, the investor brought suit against his former stockbroker for violations of federal and state securities law and common law.[45] The broker moved for summary judgment or for an order *in limine* regarding the proper measure of damages.[46] In denying the broker's motion for partial summary judgment or, in the alternative, for an order *in limine*, the court reasoned:

> The Court finds the analysis in *Miley v. Oppenheimer*, *supra*, and its progeny to be persuasive and accordingly holds that should churning liability be established, plaintiff is entitled to recover the difference between the value of his account after the churning and what its value would have been absent the violation. Given that this is the proper standard, the Court can conceive of no reason to exclude recovery of the profits plaintiff's account would have earned absent the churning, provided that plaintiff meets his burden of establishing that this would have occurred and in what amount. While the Court is aware that some uncertainties in establishing these damages are unavoidable, plaintiff will have to present testimony to support his claim that he has lost profits in the amount of "at least $21,952.00." To this end, plaintiff must establish that comparison of the performance of his account to that of the DJIA would be an accurate measure of how his portfolio would have fared; the Court is not willing to blindly accept such a comparison as the proper method to measure lost profits. Moreover, given that the Court finds that plaintiff is entitled to collect damages so as to put him in the position in which he would have been but for the alleged churning, there is no support for plaintiff's claim that he is entitled to twice recover the excess commissions paid.[47]

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43. *Id*. at 773-74 (citations and footnotes omitted).

44. Winer v. Patterson, 644 F. Supp. 898, 900-01 (D.N.H. 1986), *order vacated in part on reconsideration*, 663 F. Supp. 723 (D.N.H. 1987).

45. *Id.* at 898-99.

46. *Id.*

47. *Id*. at 900-01 (citations and footnotes omitted).

The theory of market adjusted damages has also been adopted in the District Court for the Western District of New York. In *Medical Associates of Hamburg, P.C. v. Advest, Inc.*,[48] the parties brought competing motions for summary judgment regarding the appropriate measure of damages to be awarded.[49] Relying on the Second Circuit's opinion in the *Rolf* case, the district court rejected the brokerage firm's argument that the market index approach was appropriate only when the overall market declined during the relevant time period.[50] In rejecting the brokerage firm's approach to damages, the court reasoned:

> The defendants' distinction is untenable. *Rolf* laid no stress on the direction of the shift of the stock market in fashioning its market adjusted damage formula, and the defendants have not advanced a reasoned basis for enabling this Court to do so. Obviously, as in *Rolf*, where the securities market is in decline over the relevant period, a decline in a plaintiff's particular portfolio is partially attributable to market forces (instead of the defendant's fraud) and the plaintiff's recovery should thus be reduced accordingly to reflect his "actual damages." By the same token, as in this case, where a plaintiff's portfolio declines in value notwithstanding an overall rise in the market, such plaintiff's actual injury is not limited to the simple decline in value of his securities but encompasses also damages occasioned by the failure of such securities to keep pace with the market - as they otherwise generally would have.[51]

Accordingly, the court denied the brokerage firm's motion for summary judgment and granted the investor's request for the use of market adjusted damages.[52]

The Eighth Circuit in *Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* upheld an award of market adjusted damages where the investor made a profit despite churning.[53] In *Davis*, the investor brought suit against the brokerage firm for violations of federal securities law, common-law fraud

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48. Medical Associates of Hamburg, P.C. v. Advest, Inc*.*, No. CIV–85–837E, 1989 WL 75142, at *1 (W.D.N.Y. July 5, 1989).

49. *See id.*

50. *Id.*

51. *Id.* at *2 (citations omitted).

52. *Id.* at *3.

53. Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 906 F.2d 1206, 1218 & n.13 (8th Cir. 1990).

and breach of fiduciary duty. In the first trial, the jury awarded compensatory damages and punitive damages.[54] The brokerage firm then filed post-trial motions for judgment notwithstanding the verdict, new trial or remittitur.[55] The district court granted the brokerage firm's motion for remittitur (reducing the punitive damage claim) on the condition that the investor accepts remittitur or a new trial would be granted on the issue of damages.[56] The investor refused remittitur and a second trial followed wherein the jury again awarded compensatory and punitive damages.[57] On appeal, the Eighth Circuit addressed, *inter alia*, the award of compensatory damages as follows:

> We disagree with [the brokerage firm's] argument that no actual damages were sustained because after deducting the unauthorized commissions, the account nevertheless realized a cumulative net profit of over $53,000 during the period it was churned. The implications of this argument are disturbing. If we were to adopt [the brokerage firm's] view, securities brokers would be free to churn their customers' accounts with impunity so long as the net value of the account did not fall below the amount originally invested. Churning is not excused by the fact that the account realizes a new profit. In *Nesbit*, 896 F.2d at 386, the Ninth Circuit refused to offset the gains in portfolio against the losses in commissions. The court held that allowing securities customers to recover compensatory damages in the amount of excess commissions even when the account realizes a profit will have the salut[a]ry deterrent effect of "inform [ing] the brokerage community that churning is a fraud that will violate the securities laws, regardless of the ultimate condition of the client's portfolio." *Id.* We agree. Churning is a species of fraud prohibited by Section 10(b) and Rule 10b(5) regardless of whether the account's profits or its principal is misappropriated. Under the law of this circuit, if an account earned $50,000 but would have earned $100,000 if it was not churned, the customer has sustained actual damages in the amount of $50,000 plus excess commissions paid. Because [the investor] paid over $40,000 in commissions and would have earned over $50,000 more

54. *Id.* at 1210-12.

55. *Id*.

56. *Id*.

57. *Id.*

> than she did had her account not been churned, it is nonsensical to argue that she did not suffer actual damages as a result of the churning.[58]

More recently, in *Scalp & Blade, Inc. v. Advest, Inc.*, the Supreme Court, Appellate Division, Fourth Department, New York, held that gross economic loss adjusted for the market's performance is an appropriate measure for damages in cases involving churning, unsuitability, or unauthorized trading wherein a fiduciary duty was breached.[59] In that case, investors brought suit against a broker and brokerage firm for the mismanagement, including churning, of their trust fund held in an investment account.[60] In *Scalp*, the investors were a non-profit corporation that administered a scholarship program which was funded through income/gains from a trust fund held in an investment account.[61] The investors alleged that the broker failed to diversify assets and engaged in an excessive number of unsuitable transactions while in the course of his employment, with and under the supervision of, the brokerage firm.[62] Further, the investors alleged that as a consequence of the broker's wrongful conduct the trust fund fell approximately 50% in value during a time period in which the trust could have doubled in value had it been invested in suitable securities as measured

58. *Id.* at 1218-19; *see also* Levine v. Frutransky, 636 F. Supp. 899, 900 (N.D. Ill. 1986) (the district court held "that plaintiffs suffered damages even though the investment portfolios incurred a net gain. Plaintiffs may be entitled to recover the difference between the losses incurred on the sale of the speculative securities and the greater amount plaintiffs would have received had they not been defrauded and the more conservative securities had been bought and sold") (quoting Affiliated Ute Citizens v. United States, 406 US 128, 155 (1972) (holding that plaintiff should be awarded the difference between the "fair market value of all received and the fair value of what he would have received had there been no fraudulent conduct")); Smith v. Fahnestock & Co., Inc., No. 00 CIV. 9691, 2002 WL 334511 (S.D.N.Y. Mar. 1, 2002) (the court denied summary judgment and rejected the brokerage firm's argument that since "plaintiff's account showed an overall profit, and therefore, under the *Rolf* measure of damages, plaintiff could not recover based on losses in specific stocks."); Laney v. American Equity Inv. Life Ins. Co. 243 F.Supp.2d 1347, 1355 (M.D. Fla. 2003) (which recognized that the *Miley* and *Rolf* methods of calculating damages can be extended to cases where an investor made money).

59. Scalp & Blade, Inc. v. Advest, Inc. 309 A.D.2d 219, 232 (N.Y. App. Div. 2003).

60. *Id.* at 219-20.

61. *See id.* at 220-21.

62. *See id.* at 221-22.

by the S&P 500 index.[63] In response to the investors' allegations, the broker and brokerage firm moved for an order precluding the investors from offering proof of market adjusted damages at trial which was granted.[64] In reaching its holding, the appellate court dismissed the broker and brokerage firm's argument that the "only proper and nonspeculative measure of damages is the value of the capital actually lost by the [investors]:"[65]

> Based on the foregoing, we hold that in a case such as this, involving claims of churning, investment unsuitability, or other acts of unauthorized trading by defendants, an appropriate measure of damages is plaintiffs' "gross economic loss, adjusted for the overall market's performance". We thus conclude that the court erred in foreclosing plaintiffs as a matter of law from recovering market index or other like lost appreciation damages. Plaintiffs are not necessarily limited to recovering the value of their lost capital, and might well recover compensatory damages calculated in part on the basis of general market performance. Plaintiffs have alleged a necessary predicate for such recovery, namely, a breach of fiduciary duty extending beyond mere negligent retention of the portfolio's holdings and violation of a duty to sell or diversify. Indeed, plaintiffs have alleged deliberate and flagrant self-dealing and dishonesty on the part of defendants, namely, their unauthorized trading of the fund and speculative and otherwise unsuitable investment decisions with regard to it, transactions allegedly engaged in for defendants' own benefit. To employ the metaphor used in *Miley*, the "spilt milk" of defendants' alleged overtrading and inappropriate investment of the fund may include both plaintiffs' lost capital and plaintiffs' lost opportunity to realize generalized market appreciation or gain.[66]

V. PRACTICAL APPLICATION

Consistent with FINRA guidance and the law, arbitration panels have recognized and awarded market adjusted damages in asset allocation cases as

63. *See id.*

64. *Id.* at 219-20, 222.

65. *Scalp & Blade, Inc.*, 309 A.D.2d at 222.

66. *Id.* at 220, 232 (citations omitted).

well as product cases.[67]

Prior to filing a Statement of Claim, it is useful to have a profit and loss analysis prepared which includes market adjusted comparisons (*i.e.,* appropriate asset allocation percentages modeled to determine how a properly managed account would have performed). Broad indices as proxies for both fixed income and equities might include the Barclays Aggregate Bond Index, Vanguard Total Bond Fund and the S&P500 Index. This provides the practitioner with an understanding of damages and damage defenses that a brokerage firm might plead in an answer. By incorporating the damage analysis into the Statement of Claim it alerts the brokerage firm that the claimant will be seeking market adjusted damages at the hearing.

Additionally, it is imperative to propound relevant document requests during the discovery phase of the arbitration. This allows the practitioner the opportunity to adjust the initial profit and loss analysis upon receipt of further responsive models and other documents. By way of example, the following categories of documents should be requested:

1. All income and/or growth asset allocation models prepared or used by Respondent;
2. All conservative, moderate and speculative investment asset allocation models prepared or used by Respondent;
3. All documents which mention relate or pertain to how the Investment at Issue or investment strategy was marketed to Claimants;
4. All documents which concern the suitability of securities purchased on Claimants' behalf by Respondent; and
5. All documents which concern any research of securities undertaken in connection with any transaction in the Accounts.

In presenting market adjusted damages at the arbitration hearing, courts have recognized that expert opinions on market adjusted damages help to reduce speculation:

> [The expert's] approach ... was one of fiscally sound, conservative, active management of the trust estate. His alternative to the Bank's investment in [a concentrated stock position] was to concentrate the assets in the Standard and Poor's 500 index and in fixed income treasury bills. Although the Bank argues strenuously that [the expert's] approach was speculative and mere hindsight, the trial court had substantial evidence upon which to base its conclusion

67. It is important to note than many FINRA panels do not describe the award as market adjusted damages. Rather, the awards reflect a compensatory damage amount in excess of net out of pocket damages but based on a market adjusted calculation.

> that [the expert's] approach was a responsible investment alternative to the Bank's management method.[68]

It is important to explain to the panel that market adjusted damages are based on historical data (*i.e.,* benchmarks) and therefore are not the product of speculation or guesswork.

Asset allocation cases that have awarded market adjusted damages typically involve an over concentration in equities which was inconsistent with the client's risk tolerance and investment objectives. By way of example, in the case of an elderly client who had conservative investment objectives which included principal protection and a need for income, an 80% fixed income/cash and 20% equities allocation might be appropriate to evidence what the portfolio should have earned over the same time period.

Product cases that have awarded market adjusted damages have included a security that Citigroup sold to its clients as a fixed income alternative that would generate tax-free returns between 6-9%. In truth, the security was high risk and speculative. In their presentation to clients, Citigroup brokers failed to disclose, *inter alia*, the high risk and speculative nature of the security to its clients, continued to misrepresent the product and continued to mismanage the security until its implosion in 2008. Again, since Citigroup represented the security as a fixed income alternative, a 100% fixed income proxy was a consistent bench mark to establish market adjusted damages.

VI. CONCLUSION

In conclusion, market adjusted damages are an accurate and fair measure of compensation that appropriately reflects the harm caused to the investor adjusted for actual market performance.

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68. First Alabama Bank of Huntsville v. Spragins, 515 So.2d 962, 966 (Ala. 1987) (market adjusted damages are "the amount of the loss [calculated] by weighing the actual value of the trust principal against what the value would have been had it been prudently managed." *Id.* at 964); *see also* McCoy v. Goldberg, [1992-1993] Fed. Sec. L. Rep. (CCH) ¶97,314 (S.D.N.Y. 1993) (on claim of breach of fiduciary duty, the court allowed recovery of interest the investor would have earned on "risk-free" investment in Treasury bonds in addition to losses incurred in purchase of units of limited partnerships).

CHARACTERISTICS OF A WELL-CONSTRUCTED AND WELL-MANAGED INVESTMENT PORTFOLIO

Michael B. Engdahl, JD, MS, CFP®[1]

INTRODUCTION

Attorneys representing investors often allege that a financial advisor breached his or her legal duty to the client by unsuitably or imprudently recommending, constructing, and/or managing an investment portfolio. Of course, in order to effectively represent his or her client, an attorney will need to prove to a court or arbitration panel that the client's investment portfolio was, in fact, improperly constructed and/or managed. Therefore, knowledge of the basic characteristics of a well-constructed and well-managed portfolio is crucial.

This article will list and describe ten basic characteristics of a well-constructed and well-managed investment portfolio. In particular, the article will explain that a well-constructed and well-managed investment portfolio (1) should have proper asset allocation, (2) should be properly diversified, (3) should have proper asset location, (4) should have a reasonable withdrawal rate when in the retirement distribution phase, (5) should not include stock market timing strategies, (6) should have low fees and expenses, (7) may be simple, (8) may or may not include foreign securities and alternative investments, (9) should ultimately increase in value for long-term investors, and (10) should not accelerate the depletion of the investor's money when in the retirement distribution phase. Support for these characteristics from creditable sources, such as regulatory agencies, academics, and financial journalists will be referenced.

1. Michael B. Engdahl, JD, MS, CFP® is an Associate Professor of Financial Services and Business Law at Edinboro University, a "fee-only" CERTIFIED FINANCIAL PLANNER™ certificant, and an attorney, who represents investors in their disputes with brokerage firms and the financial services industry. He holds a Juris Doctor degree from the State University of New York at Buffalo and a Master of Science in Personal Financial Planning degree from the College for Financial Planning. Michael has an office in Jamestown, NY and can be reached at (716) 485-6913 or mengdahl@edinboro.edu.

A WELL-CONSTRUCTED AND WELL-MANAGED INVESTMENT PORTFOLIO SHOULD HAVE PROPER ASSET ALLOCATION

Asset allocation involves the determination of the portion of an investment portfolio that should be allocated to various asset classes, such as stocks and bonds. It is often viewed as the first step in constructing an investment portfolio. Proper asset allocation should be determined after careful analysis of an investor's investment time horizon and risk tolerance.

In her book, titled *Making the Most of Your Money Now*, well-respected personal finance author, Jane Bryant Quinn, reported the results of her findings from her study to determine how often investors made money in major U.S. stocks from year 1926 through year 2008. Her findings are summarized below:

HOW OFTEN DID INVESTORS MAKE MONEY IN MAJOR U.S. STOCKS?*

	The Percentage of Times Stocks Made Money			
Holding Period	**0-10% Gain**	**10-20% Gain**	**Over 20% Gain**	**The Percentage of Time Stocks Lost Money**
1 year	16%	18%	37%	29%
5 years	28%	47%	11%	14%
10 years	43%	52%	1%	4%
15 years	38%	62%	0%	0%
20 years	33%	67%	0%	0%

*Standard & Poor's 500-stock average, 1926-2008, compounded annually with dividends reinvested.
Source: Ibbotson Associates, a Morningstar subsidiary.[2]

Based on her analysis of the data gathered in her study, Quinn concluded the following regarding investing in the stock market:

1. In any one-year holding period, stocks are dicey.
2. Over five-year holding periods, one's chance of loss is small.

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2. JANE BRYANT QUINN, MAKING THE MOST OF YOUR MONEY NOW 697 (2010).

3. Over 15- and 20-year periods, one's chance of loss is zero, provided that dividends are reinvested.
4. The longer one holds stocks, the greater one's chance of making money and the smaller one's chance of losing it.
5. The longer one holds stocks, the greater one's chance of earning an average return rather than a spectacular one.[3]

Although Quinn's conclusions presuppose that future returns will be similar to past returns (which may or may not be the case), her data, findings, and conclusions provide some guidance regarding the percentage of one's portfolio that should be allocated to stocks based on investment time horizon.

It is important to note that an investor's time horizon is not the only factor to be considered when determining proper asset allocation. The investor's risk tolerance also needs to be considered. Therefore, it is possible that a portfolio with a 20-year time horizon heavily invested in the stock market may be suitable or prudent for an investor with a high-risk tolerance but unsuitable or imprudent for an investor with a low-risk tolerance.

A WELL-CONSTRUCTED AND WELL-MANAGED INVESTMENT PORTFOLIO SHOULD BE PROPERLY DIVERSIFIED

A well-constructed and well-managed portfolio needs to have proper asset allocation. It is also important to note that a well-constructed and well-managed investment portfolio should contain proper asset allocation both ***across*** asset classes and ***within*** asset classes. In other words, a well-constructed and well-managed investment portfolio should be properly diversified. Diversification can help to reduce the overall risk of an investment portfolio.

For example, investing the overwhelming majority of an investment portfolio with a one-year time horizon in the stock market may be unsuitable or imprudent since the asset allocation across asset classes (i.e., stocks, bonds, or cash and cash equivalents) is improper. Also, investing in only a handful of stocks or one narrow sector of stocks (i.e., technology stocks) within an investment portfolio with a 20-year time horizon may be unsuitable or imprudent since the asset allocation within the stock asset class is improper.

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3. *Id* at 698.

The minimum number of investments within a particular asset class that is necessary to achieve proper diversification is a subject of considerable debate. After Enron Corporation's bankruptcy, the Financial Industry Regulatory Authority (FINRA) issued an Investor Alert that provides some insight into what FINRA considers to be an overly concentrated stock position.

Enron Corporation's bankruptcy focused the country's attention on the peril of investing too heavily in company stock. Approximately 58% of Enron employees' 401(k) assets were invested in Enron stock when it plunged almost 99%.[4] In 2007, FINRA issued an Investor Alert, titled "Putting Too Much Stock in Your Company – A 401(k) Problem." FINRA issued the Investor Alert out of concern that many people were concentrating too much of their retirement savings in a single security. Of particular concern to FINRA were employees who held all or most of their 401(k) account assets in their employer's stock.[5]

In the Investor Alert, FINRA states that "the general consensus among financial experts is that an adequately diversified portfolio should have no more than 10 to 20 percent of the total investments in company stock." Also, in the Investor Alert, FINRA states that holding more than 10 to 20 percent of one's portfolio in company stock may expose an investor to more risk than he or she should bear.[6] Although the Investor Alert references "company" stock, FINRA is conveying a message that, in its opinion, holding a position of more than 10% to 20% of one's investment portfolio in any one stock may result in an overly concentrated stock position and an improperly diversified portfolio.

A WELL-CONSTRUCTED AND WELL-MANAGED INVESTMENT PORTFOLIO SHOULD HAVE PROPER ASSET LOCATION

If an investor has both tax-deferred accounts (e.g., IRAs, 401(k) plan accounts) and taxable accounts, careful consideration must also be given to proper ***asset location***. Proper asset location involves determining the most

4. FINRA, Investor Alert, *Putting Too Much Stock in Your Company—A 401(k) Problem* (Feb. 9, 2013), http://finra.org/investors/alerts/putting-too-much-stock-your-company-a-401k-problem.

5. *Id*.

6. *Id*.

tax-efficient placement of investments (e.g., stocks, bonds, etc.) in tax-deferred and taxable accounts.

For example, assume that an investor's portfolio totals $1,000,000 and is equally divided between a tax-deferred IRA and a taxable individual account. (Therefore, $500,000 is the value of the IRA, and $500,000 is also the value of the taxable account.) Further assume that the investor's asset allocation target is 50% stocks and 50% bonds. Finally, assume that the investor's financial advisor is trying to determine which account(s) should hold the stocks and which account(s) should hold the bonds in order to ensure tax-efficiency. Below are three possibilities:

1. The IRA holds $500,000 of stocks. The taxable account holds $500,000 of bonds.
2. The IRA holds $500,000 of bonds. The taxable account holds $500,000 of stocks.
3. The IRA and taxable account each hold $250,000 of stocks and $250,000 of bonds.

According to the article, titled "Asset Location for Taxable Investors," by Colleen M. Jaconetti, CPA, CFP® of Vanguard Investment Counseling & Research, the most tax- efficient asset location strategy for the investor is most likely for the IRA to hold $500,000 of bonds and the taxable account to hold $500,000 of stocks.[7] It is important to note that this asset location strategy assumes that the investor's stock portion consists of broad-market index equity mutual funds, broad-market index equity exchange traded funds (ETFs), or tax-managed stock mutual funds.

According to Jaconetti, "purchasing broad-market index equity funds/ETFs or tax-managed equity funds in taxable accounts has several advantages. First, it maximizes annual after-tax returns. . . Second, it allows for the "shelf space" in tax-deferred accounts to be filled with taxable bond funds. . . Finally, upon the death of the owner, the taxable assets that remain (the stock funds in the taxable account) will receive a step-up in cost basis." In addition, Jaconetti states that broad-market index funds/ETFs or tax-managed funds are tax-efficient in taxable accounts since they "provide minimum long-term capital gain distributions and little (or no) short-term capital gains."[8]

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7. Collen M. Jaconetti, *Asset Location for Taxable Investors*, VANGUARD INVESTMENT COUNSELING & RESEARCH, (2007), *available at* https://personal.vanguard.com/pdf/s556.pdf.

8. *Id*.

Placing the stock fund in the taxable account, rather than the IRA, also can facilitate the employment of tax harvesting in order increase the portfolio's tax efficiency. A taxpayer may deduct capital losses to the extent of capital gains if the capital loss occurred in a taxable account. If capital losses exceed capital gains, the taxpayer is also allowed a deduction from ordinary income up to $3000 per year. If the taxpayer still has a net capital loss after taking the deduction from ordinary income, the net capital loss will be carried forward indefinitely into future tax years.

For example, suppose that an investor owns a stock mutual fund in his or her taxable account that has a cost basis of $300,000 and a current value of $210,000. The investor could sell the stock mutual fund, take the $90,000 capital loss, use the capital loss to offset capital gains for the year, take a $3,000 deduction from ordinary income assuming the investor's net capital loss before taking the deduction is at least $3,000, and carry forward any remaining net capital loss into future tax years.[9] This is true even if the sale proceeds were immediately used to purchase a new stock mutual fund provided that the new stock mutual fund purchased is not "substantially identical" to the stock mutual fund that was sold.

However, if the new stock mutual fund purchased is substantially identical to the stock mutual fund sold, the investor will run afoul of the wash sale rules, and his or her capital loss may be disallowed. The wash sale rules state that if an investor sells a capital asset, such as a mutual fund, at a loss and purchases the same capital asset or one that is substantially identical within 30 days before or after the sale, he or she cannot deduct the loss for tax purposes.[10] Unfortunately, the wash sale rules tend to be somewhat ambiguous since the I.R.S. does not completely define the phrase "substantially identical."

It is important to note that, although placing stock investments in taxable accounts and fixed income investments in tax-deferred accounts to the extent possible may be suitable or prudent for many investors, it may not be suitable or prudent for all investors. However, all well-constructed and well-

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9. MICHAEL A. DALTON, ET AL., PERSONAL FINANCIAL PLANNING THEORY AND PRACTICE 613 (9th ed. 2016).

10. U.S. Securities and Exchange Commission Office of Investor Education and Advocacy, *Wash Sale,* SEC.GOV (Nov. 17, 2016), https://sec.gov/answers/wash.htm. For more information about wash sales, *see* I.R.S., *Investment Income and Expenses (Including Capital Gains and Losses),* PUBLICATION 550 (Apr. 9, 2018), *available at* https://www.irs.gov/pub/irs-pdf/p550.pdf.

managed investment portfolios should contain a well thought out strategy for enhancing the tax efficiency of the portfolio.

A WELL-CONSTRUCTED AND WELL-MANAGED INVESTMENT PORTFOLIO SHOULD HAVE A REASONABLE WITHDRAWAL RATE WHEN IN THE RETIREMENT DISTRIBUTION PHASE

More than two decades ago, Bill Bengen, a financial planner in Southern California, attempted to answer the following question: How much can a retiree withdraw from his or her investment portfolio each year without running out of money? After spending a considerable time on his computer, Bengen determined that "retirees who withdrew 4% of their initial retirement portfolio balance, and then adjusted that dollar amount for inflation each year thereafter, would have created a paycheck that lasted for 30 years."[11] The portfolio Bengen tested was split evenly between stocks and bonds, and he tested every 30-year period dating from 1926.

Bengen's findings became known as the "4% rule" and have been replicated, expanded, and refined. His original question has also been more recently answered using sophisticated computer programs such as Monte Carlo models. These models are powerful statistical tools that allow retirees to examine the potential performance of their portfolios under hundreds or thousands of different scenarios and, thus, increase the accuracy and reliability of financial projections. Monte Carlo models don't offer a simple thumbs up or thumbs down on an retiree's systematic withdrawal plan. Instead, the models focus on how *probable* it is that a retiree will deplete his or her investment portfolio before the end of his or her withdrawal period.[12]

Many subsequent studies have confirmed that Bengen's original findings were either correct or close to correct and concluded that, in order to reduce the risk of prematurely depleting one's retirement portfolio early, one's initial withdrawal rate should be around 4%, and he or she should invest in a diversified portfolio consisting of both stocks and bonds. Also, in its 2006 Investor Alert, titled "Look Before Your Leave: Don't Be Misled By Early Retirement Pitches That Promise Too Much," FINRA states that, since

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11. Tara S. Bernard, *New Math Rule for Retirees and the 4% Withdrawal Rule*, N.Y. TIMES, May 8, 2015, *available at* https://nytimes.com/2015/05/09/your-money/some-new-math-for-the-4-percent-retirement-rule.html.

12. Jonathan Clements, *Retirement Models That Let Reality Bite*, WALL ST. J., Feb. 20, 2001, *available at* http://wsj.com/articles/SB98261836195546061.

"many experts recommend initial withdrawal rates of no more than 3% to 5% per year," one should be skeptical of claims that a retiree can withdraw a high percentage of his or her investment portfolio each year and never run out of money.[13] Therefore, it is possible that a portfolio in the retirement distribution is unsuitable or imprudent if its initial withdrawal rate exceeds 5%.

In addition, it is important to include portfolio fees and expenses when calculating the true withdrawal rate. For example, if an investor receives $40,000 this year from his or her $1,000,000 investment portfolio and has $20,000 deducted this year for mutual fund expenses and investment advisory fees, his or her true withdrawal rate is 6%.

A WELL-CONSTRUCTED AND WELL-MANAGED INVESTMENT PORTFOLIO SHOULD NOT INCLUDE STOCK MARKET TIMING STRATEGIES

Due to the significant volatility of the stock market over the past two decades, many investors are turning to "professional" financial advisors for advice on how to manage their investment portfolios. Unfortunately, some financial advisors lure new clients with promises that they can time the stock market. Timing the stock market has been proven by a large number of academic studies to be imprudent and counterproductive. For example, in the 2012 edition of his classic book, titled *A Random Walk Down Wall Street: The Time Tested Strategy for Successful Investing*, respected Princeton University economics professor Dr. Burton Malkiel stated the following:

> Many professional investors move money from cash to equities to long-term bonds on the basis of their forecasts of fundamental economic conditions. Indeed, this is one reason many brokers give in support of their belief in professional money management. The words of John Bogle, founder of The Vanguard Group of Investment Companies, are closest to my views on the subject of market timing. Bogle said, "In 30 years in this business, I do not know anybody who has done it successfully and consistently, nor anybody who knows anybody who has done it successfully and consistently. Indeed, my impression is that trying to do market timing is likely, not only to not

13. FINRA, Investor Alert, *Look Before You Leave: Don't Be Misled By Early Retirement Pitches That Promise Too Much* (Sept. 14, 2006), *available at* https://www.finra.org/file/alert-dont-be-misled-early-retirement-investment-pitches.

> add value to your investment program, but to be counter-productive."[14]

In his book, Dr. Malkiel also revealed the following:

> Over a fifty-four year period, the market has risen in thirty-six years, been even in three years, and declined in only fifteen. Thus, the odds of being successful when you are in cash rather than stocks are almost three to one against you… The professors [in a respected academic study concluded] that a market timer would have to make correct decisions 70 percent of the time to outperform a buy-and-hold investor. I've never met anyone who can bat .700 in calling market returns.[15]

Therefore, investors should be wary of any financial advisor claiming to be able to successfully and consistently time the stock market. Such a financial advisor is likely either dishonest or delusional. Dr. Malkiel provides significant compelling evidence on why attempting to time the stock market is imprudent and counterproductive in his widely popular classic book on investing.

A WELL-CONSTRUCTED AND WELL-MANAGED INVESTMENT PORTFOLIO SHOULD HAVE LOW FEES AND EXPENSES

It is imprudent to ignore the fees associated with buying, owning, and selling investments within an investment portfolio**.** According to the U.S. Securities and Exchange Commission (SEC), "an investment with high costs must perform better than a low-cost investment to generate the same returns for you."[16] In addition, the SEC recommends that "just like shopping around for the best price on any other product or service, you should consider how much you are paying for investing services."[17]

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14. BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET: THE TIME-TESTED STRATEGY FOR SUCCESSFUL INVESTING 185 (2012).

15. *Id.* at 186.

16. U.S. Securities and Exchange Commission, *Understanding Fees*, https://www.investor.gov/research-before-you-invest/research/understanding-fees (last visited May 24, 2018).

17. U.S SECURITIES AND EXCHANGE COMMISSION OFFICE OF INVESTOR EDUCATION AND ADVOCACY, UPDATED INVESTOR BULLETIN: HOW FEES AND EXPENSES AFFECT YOUR INVESTMENT PORTFOLIO (Sept. 8, 2016), *available at* https://www.investor.

On September 8, 2016, the SEC's Office of Investor Education and Advocacy issued an updated bulletin, titled "Updated Investor Bulletin: How Fees and Expenses Affect Your Investment Portfolio." The SEC issued the updated bulletin to educate investors about how the fees paid for investment services and products can impact the value of investment portfolios.

According to the SEC, "as with anything you buy, there are fees and costs associated with investment products and services. These fees may seem small, but over time they have a major impact on your investment portfolio."[18] To illustrate this point, the SEC estimated the ending value of three portfolios. Each portfolio had a beginning value of $100,000 and earned a 4% annual return for 20 years. However, one portfolio had an ongoing fee of 0.25%, a second portfolio had an ongoing fee of 0.50%, and a third portfolio had an ongoing fee of 1.00%. The SEC estimated that, in 20 years, 0.50% in annual fees reduced the portfolio by $10,000 as compared with a 0.25% annual fee. The SEC also estimated that, in 20 years, 1.00% in annual fees reduced the portfolio by nearly $30,000 as compared with a 0.25% annual fee.[19]

Furthermore, the SEC reported the output of another illustration in which it estimated the impact of a 1.00% ongoing fee on a $100,000 investment portfolio that grows 4% annually over 20 years. According to the SEC's findings, in 20 years, the total amount paid for a 1.00% annual fee adds up to almost $28,000 for a $100,000 initial investment. In addition, the SEC states that "if you were able to invest the $28,000, you would have earned an additional $12,000."[20] Examples of ongoing fees include mutual fund annual operating expenses and annual fees charged by some investment advisors.

Additional research supporting the position that a well-constructed and well-managed investment portfolio should have low fees and expenses comes from distinguished scholars such as Dr. William Sharpe. Dr. Sharpe was the 1990 recipient of the Nobel Prize in Economic Sciences and is a professor emeritus of finance at Stanford University. He has been conducting research on mutual fund expenses since the 1960s and, in a 1966 article, wrote that

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gov/additional-resources/news-alerts/alerts-bulletins/updated-investor-bulletin-how-fees-expenses-affect.

18. *Id*.

19. *Id*.

20. *Id*.

"all other things being equal, the smaller a fund's expense ratio, the better the results obtained by its stockholders."[21]

A few years ago, Dr. Sharpe had an article, titled "The Arithmetic of Investment Expenses," published the *Financial Analysts Journal*. In his article, Dr. Sharpe concluded that "a person saving for retirement who chooses low-cost investments could have a standard of living throughout retirement more than 20% higher than that of a comparable investor in high-cost investments."[22]

Furthermore, John Bogle, founder and former chief executive of the Vanguard Group and president of the Bogle Financial Markets Research Center agrees with most of Dr. Sharpe's findings. However, Bogle has concluded that Dr. Sharpe ***underestimated*** the gap in favor of low-cost investments. According to Bogle, when additional expenses, such as fund transaction costs, sales loads, and cash drag, are considered in addition to fund expense ratios, over time, no-load, low-expense mutual funds create extra wealth of 65% for retirement plan investors.[23]

A WELL-CONSTRUCTED AND WELL-MANAGED INVESTMENT PORTFOLIO MAY BE SIMPLE

It is possible to properly construct an investment portfolio with only a couple of carefully selected no-load, low-expense index mutual funds or exchange-traded funds (ETFs). According to Consumer Reports and John Bogle, owning too many funds may actually decrease portfolio diversification and increase investment costs.

In an April 2015 *Consumer Reports Money Adviser* article, Consumer Reports explained the risk of owning a large number of stock funds as opposed to only one or two broadly diversified stock funds. According to Consumer Reports, the risk of owning a large number of stock funds "is that when there are so many equity funds in one portfolio, the investor is almost guaranteed to end up with a portfolio with similar holdings." In addition,

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21. William F. Sharp, *Mutual Fund Performance*, 39 J. BUS. 137 (Jan. 1966).

22. William F. Sharp, *The Arithmetic of Investment Expenses*, 69 FIN. ANALYSTS J. 34 (Mar./Apr. 2013), *available at* https://www.cfapubs.org/doi/pdf/10.2469/faj.v69.n2.2.

23. John C. Bogle*, The Arithmetic of "All-In" Investment Expenses*, 70 FIN. ANALYSTS J. 13 (Jan./Feb. 2014), *available at* https://www.cfapubs.org/doi/pdf/10.2469/faj.v70.n1.1.

Consumer Reports stated that "the thing to remember about being properly diversified is that it has little to do with quantity. Some of the most tried-and-true portfolios, with clever names such as 'couch potato' and less clever monikers such as '60/40 portfolio,' can be built with as few as two or three funds."[24]

The idea of adhering to the principle of simplicity when building a prudent investment portfolio is not new. As a matter of fact, in a 1999 speech, titled "Investing with Simplicity," John Bogle stated that many investors would fare well with a portfolio consisting of only two no-load, low-expense, broad based index mutual funds.[25] In addition, Bogle's belief regarding a simple two fund portfolio was recently summarized by Laura Dogu in her *Forbes* article, titled "Vanguard Founder John C. Bogle – In Person With The Bogleheads." According to Dogu, "Mr. Bogle believes that a simple portfolio including only two funds, the Vanguard Total Stock Market Index Fund and Total Bond Market Index Fund would be sufficient for many investors."[26]

Recently, I studied and evaluated Bogle's simple two fund portfolio approach and reported my conclusions. In my May 2015 *Silver* article, titled "Simplifying, Balancing, and Reducing the Costs of Investment Portfolios," I stated that "putting Bogle's principals of simplicity, balance, and cost reduction into practice yields impressive results.[27] For example, if one invested 60% of his or her portfolio in the Vanguard Total Stock Market Index Fund Admiral Shares, a broad-based U.S. stock index mutual fund, and 40% of his or her portfolio in the Vanguard Total Bond Market Index Fund Admiral Shares, a broad-based U.S. investment-grade bond index mutual fund, the portfolio would have the following characteristics.

24. Michael B. Engdahl, *The Advantages of Keeping an Investment Portfolio Simple*, SILVER, Jan. 2016, at 7.

25. John C. Bogle, *Investing With Simplicity*, The Personal Finance Conference, WASH. POST, Jan. 30, 1999, *available at* https://www.vanguard.com/bogle_site/lib/sp19990130.html.

26. Laura Dogu, *Vanguard Founder John C. Bogle – In Person with The Bogleheads*, FORBES (Oct. 23, 2011), https://forbes.com/sites/thebogleheadsview/2011/10/23/vanguard-founder-john-c-bogle-in-person/2/#2eface156d89.

27. Michael B. Engdahl, *Simplifying, Balancing, and Reducing the Cost of Investment Portfolios*, SILVER, May 2015, at 9.

1. The portfolio would contain almost 11,000 underlying investments. The stock mutual fund would be comprised of approximately 3,800 stocks, and the bond mutual fund would be comprised of over 7,100 bonds.
2. The weighted average expense ratio would be only 0.062%. ($62 per year per $100,000 invested). The average mutual fund has an expense ratio of approximately 1% ($1,000 per year per $100,000 invested).
3. The portfolio's one-year, five-year, and ten-year average annual rates of return would be 9.6%, 10.6%, and 7.1% respectively (as of 03/31/15).
4. In 2008, when the U.S. stock market declined by approximately 37%, the portfolio would have declined by only 20.13%. Also, in 2009, the portfolio would have increased by 19.72%."[28]

However, it is important to point out that financial advisors who create a well-diversified two fund portfolio for their clients will still need to properly select the portfolio's asset allocation in order for the portfolio to be suitable or prudent. As previously stated, proper asset allocation is largely determined by an investor's expected investment time horizon and risk tolerance.

A WELL-CONSTRUCTED AND WELL-MANAGED INVESTMENT PORTFOLIO MAY OR MAY NOT INCLUDE FOREIGN SECURITIES AND ALTERNATIVE INVESTMENTS

Those who adopt a Bogle two-fund investment portfolio philosophy may not need to be concerned that alternative investments are included in the portfolio. According to Consumer Reports, "when we add alternative investments to a 'vanilla' portfolio, such as commodities, international bonds, and real estate investment trusts (REITs), it doesn't always boost overall returns, and when it does, the difference isn't appreciable."[29]

Due to the recent lackluster performance of the foreign stock markets, many people are questioning whether an investment portfolio should include any foreign stocks or foreign stock mutual funds. U.S. stocks (as measured by the S&P 500 Index) have outperformed foreign stocks (as measured by the MSCI EAFE [Europe, Australasia, and Far East] Index) in seven of the past ten years. Below is the yearly return of each index over the past decade:

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28. *Id*.

29. Michael B. Engdahl, *The Advantages of Keeping an Investment Portfolio Simple*, SILVER, Jan. 2016, at 7.

Year	S&P 500	MSCI EAFE
2017	21.83%	25.03%
2016	11.96%	1.00%
2015	1.38%	- 0.81%
2014	13.69%	- 4.90%
2013	32.39%	22.78%
2012	16.00%	17.32%
2011	2.11%	- 12.34%
2010	15.06%	7.75%
2009	26.46%	31.78%
2008	- 37.00%	- 43.38%

The debate regarding whether or not to include foreign stocks in investment portfolios is not new. Almost two decades ago, Jonathan Clements authored an article, titled "Investing Legends Clash on the Merits of Foreign Stocks," which was published in *The Wall Street Journal* on May 18, 1999. In the article, Clements summarized the views of Dr. Burton Malkiel and John Bogle regarding investing in foreign stocks.[30] At the time, Malkiel was an economics professor at Princeton University and Bogle was the senior chairman of Vanguard Group.

Malkiel argued that investors should have as much as one-third of their stock portfolio in foreign stocks. Specifically, Malkiel stated that "you can add a risky investment [like foreign stocks] and reduce your overall portfolio risk."[31] The justification for including a small percentage of one's stock portfolio in foreign stocks has, for years, been documented in Malkiel's book, titled *A Random Walk Down Wall Street*. In a recent edition of the book, Malkiel illustrated how, from January 1970 – December 2009, a stock portfolio invested 83% in the S&P 500 Index and 17% in the MSCI EAFE Index produced a higher average annual return ***and*** experienced less volatility than a stock portfolio invested entirely in the S&P 500 Index.[32]

However, Bogle argued that investors should not invest any more than 20% of their stock portfolio in foreign stocks and that a zero weighting in foreign stocks is fine. Clements stated that what worried Bogle was "the risks involved in venturing overseas. He frets about currency swings, which

30. Jonathan Clements, *Investing Legends Clash on the Merits of Foreign Stocks*, WALL ST. J. (May 18, 1999), https://www.wsj.com/articles/SB926984938371768 78.

31. *Id*.

32. Malkiel, *supra* at 209.

makes foreign stocks behave so erratically. He also worries about the less-favorable political and legal environment found abroad."[33]

Bogle was not persuaded by evidence that including a small amount of foreign stocks in one's stock portfolio can reduce the overall volatility of his or her stock portfolio. Specifically, Bogle reminded investors that, when they add a small amount of foreign stocks to their stock portfolio, they are "only reducing volatility by a very small amount." Therefore, according to Bogle, including foreign stocks may be pointless.[34]

A WELL-CONSTRUCTED AND WELL-MANAGED INVESTMENT PORTFOLIO SHOULD ULTIMATELY INCREASE IN VALUE FOR LONG TERM INVESTORS

Recently, I gave a presentation to attorneys as part of a continuing legal education program held at the Robert H. Jackson Center in Jamestown, NY.[35] My presentation, in part, focused on the fact that prudent investment portfolios should ultimately increase in value for long-term investors. To illustrate this point, I provided performance data for three portfolios beginning on January 1, 2008. I picked January 1, 2008 my starting date since the U.S stock market declined approximately 37% that year as a result of the 2008 Financial Crisis. The 2008 Financial Crisis is considered by many economists to be the worst financial crisis since the Great Depression. It began with a crisis in the subprime mortgage market and later developed into a full-scale international banking crisis.

The three portfolios used in my illustration included an index mutual fund that seeks to replicate the U.S. stock market, an index mutual fund that seeks to replicate the U.S. investment-grade bond market, and a portfolio that invests 50% in each of the aforementioned mutual funds. The stock mutual fund used in my illustration was the Vanguard Total Stock Market Index Fund Admiral Shares (TS). The fund invests in approximately 3,600 U.S. stocks and has an expense ratio of 0.05%. The bond mutual fund used in my illustration was the Vanguard Total Bond Market Index Fund Admiral Shares

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33. Clements, *supra.*

34. *Id*.

35. Michael B. Engdahl*, Investment Losses - Does Your Client Have a Legal Claim?*, Robert H. Jackson Center (Oct. 20, 2015), presentation may be viewed at http://youtube.com/watch?v+egpUAvmBzLk (last visited Jan. 28, 2018).

(TB). The fund invests in approximately 8,700 U.S. investment-grade bonds and has an expense ratio of 0.06%.

Below are the annual returns of each of the three portfolios from 2008 through 2017:

Annual Returns

Year	TS	TB	50/50
2008	-36.99%	5.15%	-15.92%
2009	28.83%	6.04%	17.44%
2010	17.26%	6.54%	11.90%
2011	1.08%	7.69%	4.39%
2012	16.38%	4.15%	10.27%
2013	33.52%	-2.15%	15.69%
2014	12.56%	5.89%	9.23%
2015	0.39%	0.40%	0.40%
2016	12.66%	2.60%	7.63%
2017	21.17%	3.56%	12.37%

Below are the year-end values of a $100,000 original investment in each of the three portfolios from 2008 through 2017:

Year-End Values ($100,000 Original Investment)

Year	TS	TB	50/50
2008	$63,010	$105,150	$84,080
2009	$81,176	$111,501	$96,339
2010	$95,187	$118,793	$106,990
2011	$96,215	$127,928	$112,072
2012	$111,975	$133,237	$122,606
2013	$149,509	$130,373	$139,941
2014	$168,287	$138,052	$153,170
2015	$168,943	$138,604	$153,783
2016	$190,332	$142,208	$165,516
2017	$230,625	$147,271	$188,948

A review of the above year-end values, allowed me to make the following observations:

1. Investing all of one's portfolio in the U.S. total stock market index fund at the beginning of 2008 would have caused the investor's portfolio to decline significantly by the end of 2008. However, the portfolio would have more than doubled by the end of 2017.
2. Investing 50% of one's portfolio in the U.S. total stock market index fund and the other 50% in the U.S. investment-grade bond index fund would have caused the investor's portfolio to decline by the end of 2008. However, the portfolio would have increased by over 88% by the end of 2017.
3. Investing all of one's portfolio in the U.S. investment-grade bond index fund would have caused the investor's portfolio to *increase* in 2008. Also, the portfolio would have increased by over 53% by the end of 2017.

A review of the above year-end values reveals that long-term investors with well-constructed and well-managed investment portfolios should have experienced significant portfolio value increases from January 1, 2008 through December 31, 2017. If this was not that case for an investor, as I stated in my CLE presentation, "it is likely that something went awry."[36] Of course, the specific asset allocation chosen for an investor is determined by several factors including the investor's expected investment time horizon and risk tolerance.

It is important to note that the U.S. stock market experienced unprecedented growth since its significant decline in 2008. Therefore, it is not reasonable to expect that U.S. stocks will experience such an expedited recovery after a future market decline. However, well-constructed and well-managed portfolios should always ultimately increase in value for long-term investors. The values of such portfolios may go down from time to time. However, their values should never permanently stay down.

A WELL-CONSTRUCTED AND WELL-MANAGED INVESTMENT PORTFOLIO SHOULD NOT ACCELERATE THE DEPLETION OF AN INVESTOR'S MONEY WHEN IN THE RETIREMENT DISTRIBUTION PHASE

Although a well-constructed and well-managed investment portfolio should ultimately increase in value for long term investors, it may ultimately

36. *Id*.

decrease in value for investors in the retirement distribution phase. Many retirees do not desire complete protection of their principal during the retirement distribution phase. Instead, they simply do not want to run out of money before they pass away. As previously stated, following the 4% rule and investing in a low-cost, well-diversified, and balanced portfolio has helped to reduce the risk of premature portfolio depletion during the retirement distribution phase.

However, it is important to note that a well-constructed and well-managed investment portfolio should not accelerate the depletion of a portfolio in the retirement distribution stage. For example, assume that a new retiree has $1,000,000 and desires to take withdrawals of $40,000 per year. If the retiree places his or her $1,000,000 in a non-interest-bearing checking account and withdraws $40,000 per year, his or her money will last for exactly 25 years ($1,000,000 / $40,000 = 25). However, if the money is invested and depletes prior to 25 years, the portfolio may be imprudently constructed and managed since it accelerated the depletion of the investor's money.

CONCLUSION

Having adequate knowledge of the basic characteristics of a well-constructed and well-managed investment portfolio can greatly assist an attorney with effectively representing an investor. It is important to note that it is possible a particular well-constructed and well-managed investment portfolio contains more or less characteristics than the ten described in this article. However, if a portfolio lacks several of the characteristics described in this article, there is a strong probability it is neither well-constructed nor well-managed.

DAMAGE CONTROL

Frederick Rosenberg

In the typical customer claim Respondents assert that damages are limited to Net-out-of-Pocket ("NOP") losses, the historical measure of damages for trading losses, and a standard in Mediation where the parties agree on the numbers and concur on the issues. Claimants assert Well Managed Account ("WMA") or Market Adjusted Damages ("MAD"), terms that are often used interchangeably. The math to calculate both is identical, but WMA is based upon Market Allocation while MAD is based upon Market Adjustments. Understanding the distinction is essential when preparing damage calculations.

MAD and WMA are offered in opposition to Net-Out-Of-Pocket damages ("NOPs") that penalize retirees for taking distributions and are inadequate to make them whole. For many retirees and seniors and depending on the markets, WMA or MAD damages may also understate actual losses leaving many prevailing claimants with inadequate awards and impaired retirement income. Benefit of the Bargain damages however, sets a baseline for damages in retirement cases and provides substantiation for both lost principal and lost income that is not based upon market adjustments. This article will discuss the strengths and weaknesses of BOB, MAD and WMA damages, where they work, how they compare, where they fail, and why. The presumption for this article is that a Panel has found liability and is considering the damage claims for the award.

Miley v. Oppenheimer & Co., 637 F.2d 318 (5th Cir. 1981) is perhaps the most cited case in support of Market Adjusted Damages. Miley was a churning case and the question was whether in addition to disgorgement of commissions and fees the decline in portfolio value caused by the costs and excessive trading was also recoverable. It was based on Market Adjusted Damages. [1] Miley, however, cannot be seen to adopt a re-allocation strategy such as a Well Managed Account, but a Market-Value adjustment for the impact of trading abuses on returns in churning claims.

Currently, "Well Managed Account" is cited in the Arbitrator's Manual as one of several damage methodologies and its adoption and acceptance on non-churning cases seems de facto established. In fact, most claims based upon unsuitable recommendations use some form of Well Managed Account

1. Miley v Oppenheimer & Co., Inc., 642 F.2d 1210, 326-329 (5th Cir. 1981).

methodologies to calculate Claimant's loss based upon suitably allocated portfolios consistent with the Customer's objectives and financial condition.

Depending on market performance, WMA and MAD damages may not reflect true losses. Instead such damage models ratify a market adjusted solution that may be inadequate or even unsuitable and is intended to provide a lump sum solution that leaves some investors only partially better off but not whole. Well Managed Account calculations ignore the present value of promised future benefits, the principal objective of income investors seeking sustainable future distributions and portfolio stability. It also presumes a market-based solution for income loss to the exclusion of better and available alternatives in many instances.

WMAs and MADs work well and are appropriate for market-based claims for growth accounts not taking regular distributions. In rising markets WMA's, if accepted by the panel, can also produce an adequate remedy even for accounts in distribution. Too often however, attorneys use general allocation formulas like 60/40 or 40/60 in damage claims even when the allocation should be 100% SP 500. In a recent claim with a 7-figure award [2], I presented MAD damages based solely on the SP 500, Spy, and was cross examined extensively on the allocation because it increased damages well beyond 60/40. The panel apparently accepted my argument that I was only looking at a portion of the total holdings allocated to riskier investments and that the SP 500 was an appropriate analog for those investments. To reallocate towards bonds would under-allocate growth in the overall portfolio and understate damages. The same situation applies with non-conventional investments, if it's a high-risk portfolio component then the analog for WMA or MAD should be a comparable risk index, not a 60/40 portfolio.

WMA damages:

1. Mirror market performance. In 2009 -2011 Respondents relied on Market Adjusted Damages to limit awards well below NOPs for claims based on the 2008 crash;
2. Are based on cash flow in and out of the account like NOPs;
3. Fund distributions via liquidation of securities, not dividends;
4. Treat all distributions on a cash basis;
5. Presumes the basic driver of growth is market appreciation;

2. Barlow et. al. v. Morgan Keegan, Finra 17-01630. Total damages included interest and punitive damages and some claimant claims were denied. The compensatory awards were based on the surviving claims in a multi-claimant suit. MAD damages were based solely on the SP500 and presented monthly to afford the panel the opportunity to fix a point of loss, beyond which statutory interest would apply.

6. Uses index analogs that exclude dividends;
7. Are based often on allocations that may still be unsustainable for accounts in distribution;
8. Are viable primarily when there is substantial time between the eligible claim and the filing date on growth accounts.

For Income investors, retirees, and seniors, WMA and MADs can be inadequate when sustainability of income is the primary customer objective. This is because both methodologies treat the years of withdrawals on a cash basis against market performance potentially resulting in damages short of full restoration of original principal. Consequentially, a senior investor may be left with inadequate funds to provide the anticipated and promised distributions to meet budgeted retirement needs and suffers permanent injury. This is due in part to the low dividend and interest environment that has dominated the markets over the past several decades and countered by recommendations for market equities with high average growth rates to offset the 4%- 7% drag of withdrawals and costs on declining balances and shares.

Non-Conventional Investments (NCI): In the current era of low interest rates and dividends, brokers have recommended several types of non-conventional investments with forecasts of high sustainable distributions and return of principal. However, oil and gas, equipment leasing, unit trusts, some MLPs, Ginnie Maes, and mortgage backed securities are all self-liquidating investments with a relatively short 7-12 year life. Most require sinking funds for reinvestment of returned principal to achieve retirement sustainability, something most investors are unaware of and do not budget for. A review of TICs and non-public REITs seems to show that by the end of 10 years, most have failed to return original investments, while the planned for residuals fall well below expectations or disappear entirely for a spectrum of reasons from fraud and defalcations, overleverage, credit collapse of the sponsor and foreclosures. Commonly, the 7-10% annual distribution turn out to be nothing more than returned principal spent as income with long-term devastating effect.

Absent forecasts of high distributions with principal safety, most NCIs could never be recommended or sold. Projected high distributions and market risk avoidance are in fact the principal drivers behind most income investors with NCIs in their portfolio. When distributions cease, the budgets built upon them will require painful and unanticipated cutbacks and permanent reductions in lifestyle. The remedy for an income deficiency spanning a lifetime needs to be adequate and the pleadings need to be clear on that issue.

Another common claim in income cases arises out of the drag of distributions and cost on equities portfolios, which over several years causes the premature depletion of assets to levels incapable of sustaining distributions. Sequence risk remains an early concern. In the typical case that I see, investors having suffered early market declines are forced, reluctantly, to reduce automatic withdrawals in the 3rd or 4th year to levels that still exceed 7-10% on the remaining assets and too late to restore distributions and rebuild value.

The outcomes are often similar for both NCIs and Equity portfolios in distribution; between 7 and 10-years NCI residual values often are unable to sustain falling distributions and may actually result in a loss. Worse, the NCI could chug on for years with little or no distribution or value. Stock portfolios often show the effects of withdrawals that reduced principal values by 20% - 30% on a fatal trajectory to premature depletion.

Using market adjustments for losses in non-market NCIs intended to produce income and principal safety presumes the investor should be invested in the same markets they wanted to avoid, markets that admittedly do not produce the level of income promised by the NCI, and are therefore, subject to market risk. Consequently, MAD-WMA calculations may show only marginal improvement against a comparative index particularly if the outflows have been in the 6-8% range.

The loss of a lifetime income is not a NOP problem. To date the investment choices given investors are typically binary, invest in income instruments that yield 2-3% and live on less or assume market risk to grow the assets sufficiently to allow larger distributions of 4%-7% albeit at market risk to principal and sequence risk to sustainability.

The issue then is how to measure injury to income investors who, in addition to principal decay and reduced distributions, have lost a lifetime of sustainable income? Income investors rely on recommendations based upon illustrations or representations offering a promise of sustainable distributions and the preservation of sufficient principal to meet income objectives over a lifetime. Claimants who treated distributions as the income required to cover budgeted expenses are uniformly shocked to first learn from Respondents that their distributions were no more than returned principal. "Can they do that?" one claimant asked me. In short, if distributions are treated as principal, ("they got their money back", NOP defense), then the claim must be for the lost income. If the distributions are treated as income, then the claim should be for the restoration of principal. If you don't demand damages based upon the loss of sustainable distributions, you'll not get it.

A Benefit of the Bargain analysis is the first step to establishing the baseline of promised performance in income cases. It is not a market adjusted methodology and consequently market performance does not figure into the calculation. For income investor claims, BOB quantifies what the client reasonably expected when relying on a Respondent's recommendations and provides substantiation for damages. Importantly, BOB calculations are the most effective illustration of the inadequacy of NOPs in income claims.

A Benefit of the Bargain (BOB) Analysis accounts for both Principal Loss and Income Loss. Distributions are treated as income and principal transactions are accounted for separately and reconciled with actual performance. It is the essential demonstrative tool to focus on the significance of income to the claimant as distinguished from appreciation. While BOB calculations establish an important baseline a Panel should consider, whether BOB is accepted as damages depends upon reasonable reliance over years of withdrawals usually pursuant to recommendations to stay the course. BOB damages, however, should always be sufficient to continue distributions at the agreed upon level, or at a minimum, provide full restoration of original principal and any income deficiency.

Defenses to BOB claims rest primarily on impossibility, that absent substantial market risk, the levels of distributions were not sustainable and unrealistic using stocks and bonds, hence, reliance was unreasonable while market risk was essential. Respondents often point out that even distributions of 4%-5% per year require a growth component and market risk and by that measure the portfolio achieved that growth rate and, in many cases, showed profit even as the balances were being depleted. For NCIs the defense is assumption of risk and the prospectus defense in an attempt to pass the responsibility for suitability determination to the customer[3].

The illustration below is for a client who invested $836,000 in an Income Investment in January 2015 that projected $5,769 in monthly distributions and return of principal in 10 years, an 8.25% return. The deal fell apart and the proceeds liquidated in September 2018 with the client having received a total of $299,823 for a NOP loss of ($536,835). Under BOB, over that same period the client should have received $260,639 in distributions plus the return of $836,658 principal for a total of $1,097,297,which after deducting the actual withdrawals leaves a BOB deficiency of $797,474, well in excess of the NOPs' and only $40,000 less than original investment.

But that is only part of the claim because the claimant was promised $5,763 monthly distributions for 10 years but collected substantially less over 4.5 years. The original income distribution may not be replaceable in 2019. Consequently, where 5.5 years of future revenues are also lost, that should be

3. Brokers are obliged to determine suitability as a condition of making the recommendation, not the customer. Finra Rule 2111 "Suitability" note "(02) *Disclaimers*. *A member or associated person cannot disclaim any responsibilities under the suitability rule***".**

made clear in your pleadings with the present value of any net income deficiency over 5.5 years added to the claim.

Statement P& L					Benefit of Bargain Comparison		
7/16/2019							proj return/mo
8:50:19 PM		Withdrawn	ann	Deposit	Open bal	Prin Withdrawn	8.25%
Mon/Yr	Report'd Bal	299,823	%	836,658	-	$ -	0.69%
Jan-15	262,343		0.00%	261,564	$ 261,564	$ -	$ 1,798
Feb-15	806,750		0.00%	575,094	$ 836,658	$ -	$ 5,752
Mar-15	813,228	5,769	8.51%	-	$ 836,658	$ -	$ 5,752
Apr-15	818,562	5,769	8.46%	-	$ 836,658	$ -	$ 5,752
May-15	805,260	5,769	8.60%	-	$ 836,658	$ -	$ 5,752
Jun-15	779,130	5,879	9.05%	-	$ 836,658	$ -	$ 5,752
Jul-15	775,448	5,769	8.93%	-	$ 836,658	$ -	$ 5,752
Aug-15	792,306	4,487	6.80%	-	$ 836,658	$ -	$ 5,752
Mar-16	695,392	4,487	7.74%	-	$ 836,658	$ -	$ 5,752
Apr-16	702,831	4,487	7.66%	-	$ 836,658	$ -	$ 5,752
May-16	649,136	4,487	8.29%	-	$ 836,658	$ -	$ 5,752
Jun-16	630,140	4,487	8.54%	-	$ 836,658	$ -	$ 5,752
Jul-16	624,004	4,487	8.63%	-	$ 836,658	$ -	$ 5,752
Aug-16	571,977	4,487	9.41%	-	$ 836,658	$ -	$ 5,752
Sep-16	469,770	4,487	11.46%	-	$ 836,658	$ -	$ 5,752
Oct-16	435,668	4,487	12.36%	-	$ 836,658	$ -	$ 5,752
Nov-17	346,000	2,564	8.89%	-	$ 836,658	$ -	$ 5,752
Dec-17	311,400	2,564	9.88%	-	$ 836,658	$ -	$ 5,752
Jan-18	280,260	2,564	10.98%	-	$ 836,658	$ -	$ 5,752
Feb-18	252,234	2,564	12.20%	-	$ 836,658	$ -	$ 5,752
Mar-18	227,011	2,564	13.55%	-	$ 836,658	$ -	$ 5,752
Apr-18	204,310	2,564	15.06%	-	$ 836,658	$ -	$ 5,752
May-18	183,879	2,564	16.73%	-	$ 836,658	$ -	$ 5,752
Jun-18	165,491	2,564	18.59%	-	$ 836,658	$ -	$ 5,752
Jul-18	148,942	2,564	20.66%	-	$ 836,658	$ -	$ 5,752
Aug-18	134,047	2,564	22.95%	-	$ 836,658	$ -	$ 5,752
Sep-18		134,047	#DIV/0!	-	$ 836,658	$ -	$ 5,752
Oct-18			#DIV/0!	-	$ 836,658	$ -	$ 5,752
		299,823		836,658		$ -	$ 260,639
					Projected Inc	260,639	
		Contribution		(836,658)	Return of Principal	836,658	-
		Withdrawals		299,823	Bargained for	1,097,297	Oct-18
		Gain(Loss) nop		(536,835)	Withdrawals	(299,823)	BOB Dams
		Residual Value			Deficiency	797,474	797,474

Rescission for NCI's is the common damages model, e.g. original investment, plus statutory simple interest from the date of investment less distributions. However, depending on applicable interest rates and the level of cash distributions, rescission may also be inadequate to restore anticipated distributions promised by the NCI. Furthermore, partial damage awards that leave the investor still holding a dead albatross even at reduced basis only exacerbates the income impairment and perpetuates the abuse.

In the following illustration the claimant anticipated a 6% return, $1,750/month, but the investment tanked and reduced payout. It had a published book value of $98,026 in July 2019 but no market. If the investment were returned, the monetary damages under the state rescission statute would be $364,483, but if forced to hold the investment, the monetary award would be $266,457 and the investor would still be left holding a questionable asset. Furthermore, by crediting a dubious residual against losses, damages are reduced, and impairment continues. If you are claiming rescission and the investment is still held, give it back and take the money.

	Rescission Substantiation						
			350,000	Statutory			
	rate	/mo	Balance	Interest		Retd C/F	Held
Jan-16	6.00%	0.50%	350,000	1,750		1,750	1,750
Feb-16	6.00%	0.50%	350,000	1,750		1,750	1,750
Mar-16	5.50%	0.46%	350,000	1,604		1,750	1,750
Apr-16	5.50%	0.46%	350,000	1,604		1,750	1,750
May-16	5.50%	0.46%	350,000	1,604		1,750	1,750
Jun-16	5.50%	0.46%	350,000	1,604		1,750	1,750
Jul-16	5.50%	0.46%	350,000	1,604		1,750	1,750
Aug-16	5.50%	0.46%	350,000	1,604		1,750	1,750
Sep-16	5.50%	0.46%	350,000	1,604		1,750	1,750
Oct-16	4.75%	0.40%	350,000	1,385		1,500	1,500
Nov-16	4.75%	0.40%	350,000	1,385		1,500	1,500
Dec-16	4.75%	0.40%	350,000	1,385		1,500	1,500
Jan-17	4.75%	0.40%	350,000	1,385		1,500	1,500
Feb-17	4.75%	0.40%	350,000	1,385		1,500	1,500
Mar-17	4.75%	0.40%	350,000	1,385		1,500	1,500
Apr-17	4.75%	0.40%	350,000	1,385		875	875
Aug-18	4.75%	0.40%	350,000	1,385		875	875
Sep-18	4.75%	0.40%	350,000	1,385		875	875
Oct-18	4.75%	0.40%	350,000	1,385		875	875
Nov-18	4.75%	0.40%	350,000	1,385		875	875
Dec-18	4.75%	0.40%	350,000	1,385		875	875
Jan-19	4.75%	0.40%	350,000	1,385		875	875
Feb-19	4.75%	0.40%	350,000	1,385		875	875
Mar-19	4.75%	0.40%	350,000	1,385		875	875
Apr-19	4.75%	0.40%	350,000	1,385		400	400
May-19	4.75%	0.40%	350,000	1,385		400	400
Jun-19	4.75%	0.40%	350,000	1,385		400	400
Jul-19	4.75%	0.40%	350,000	1,385		400	400
					Residual		98,026
			Principal	Interest	SubTotal	distrib	Damages
Investment Held			**350,000**	**61,833**	**411,833**	**(47,350)**	**266,457**
Investment Returned			**350,000**	**61,833**	**411,833**	**(47,350)**	**364,483**

To summarize to this point, NCI damages have typically been based on WMA-MADs or Rescission, but very rarely on BOB. Yet, most NCIs are recommended as asset-based, non-market, income generators and BOB damages should be presented.

Immediate Annuity Baseline Analysis: There is an ignored fourth methodology that also belongs in every analysis in claims for seniors and retirees, the Immediate Annuity baseline. Immediate Annuities (IA) are a much-maligned investment due in great part to the very low, 2%, growth rates underlying the payout.[4] But depending on the age and sex of the annuitant, growth rate becomes irrelevant and payout rate ascends in importance. For example, a 70-year-old male with $1,000,000 will likely be advised that supportable distributions are conservatively, 4% per year ($40,000), to contain portfolio depletions from annual liquidations and market volatility. That same 70-year-old male could buy an immediate annuity for life with a 6.13% per year constant payout ($61,344) , guaranteed for a minimum of 20 years. That is $21,344 more per year than safe distributions out of the portfolio, which if reinvested at 4% would grow to $650,000 over the guarantee period. Total guaranteed annuity payout $1,226 million. A 75-year-old male payout would be 8.17% per year ($81,768) guaranteed for a minimum 10 years, an excess of $41,768 per year for a minimum of 10 years and continuing until death. The payout rate for an 80-year-old male is 9.39% per year ($93,996) for a minimum of ten years an excess of $53,996 annually. Actuarily, men's payouts are higher than women of the same age.

An alternative IA strategy for seniors would be to simply replace the 4% distribution with an immediate annuity reserving the balance for growth and reserves. The premium for a $40,000 annual income for life, with a guaranteed return of premium would be $615,256 for a 70-year-old male leaving $384,744 still available. For a 75 year-old the cost drops to $545,000 and at age 80 the cost drops to $475,000 leaving $455,000 and $525,000 available respectively.

Immediate Annuities convert cash to a guaranteed income stream of which only 10-15% would be taxable. It is a peace-of-mind investment. Depending on the age of the annuitant however, the limitations of immediate annuities are offset by higher payouts, lifetime guarantees and no market or enterprise risk. Annuities are also prime collateral for emergencies and may produce sufficient excess cash for reserves. Payouts are guaranteed for life, require no sinking

4. Charles Schwab, Income Annuity Estimator, https://www.schwab.com/public/schwab/investing/accounts_products/investment/annuities/income_annuity/fixed_income_annuity_calculator (last visited August 26, 2019).

fund, eliminate reinvestment risk, and compare favorably with equipment leasing, oil and gas, unit trusts, and leveraged real estate securities with declining asset values and principal distributions over several years. Immediate Annuities are viable and suitable recommendations and should factor into damage calculations in lost income claims for retirees.

Annuity Damage calculations are relatively straight forward, and premiums for an annuity that will produce the promised income are available on-line. The premium to replace the income will decrease with increasing age. Also, in situations where the monthly distributions have been impaired or reduced, the deficiency can also be supplemented with an immediate annuity. The Statement of Claim must articulate this claim or it won't be available.

In most cases involving retirees and late-term income investors, Immediate Annuities are entirely absent from the alternatives presented despite offering payouts well above the recommended withdrawal percentage with safety and certainty. Instead, Deferred Annuities with low paying life-time income guarantees, market risk, and high costs are often recommended but are equally problematic for reasons delved into in my last Article, *Variable and Fixed Annuities, What Attorneys Need to Know.*[5] The Immediate Annuity however, stands as the baseline for comparisons, especially for seniors and in retirement cases that require systematic or automatic withdrawals to meet budgeted living expenses throughout a lifetime.

Finally, there is the Orphan Income Problem:

- What are the Damages and Where is the income? The facts are:
    - $100,000 Invested for dividends and capital preservation
    - Earns 4%/year, $4,000/yr., 10-year total, $48,024, all reinvested, (DRIP)
    - Account grows to $148,024 by the end of 10 years increasing shares by 50% in a trading range between $9 and $11/ share.
    - 4% distributions rise to $5,920/yr with principal safety.
    - Broker culpably loses on a questionable NCI yr. 11 with a balance remaining.
        - If Acct Closed $100,024 = $24 profit
        - If Acct Closed $ 90,000, = ($10,000) NOP
    - Under a BOB analysis
        - $100,000 Principal +$48,024 Income = $148,024 (the expected account value)
        - $90,000 realized = ($58,024) lost Principal & Income

5. 26 PBJ 31 (2019)

Not all equity portfolios are growth equities, some are value stocks, and others dividend stocks that offer price stability with dividends reinvested to build share positions, cost averaging and compounding returns growing a base for future withdrawals. Risk profiles vary depending on investment style as does return. Dividend stocks provide market stability, not growth. But, under a NOP analysis, 10 years of accumulated DRIPs could simply vanish as a result of broker mismanagement and there will be no accounting whatsoever for the $48,024 of "orphan income" accumulated over a decade.

NOPs not only mask losses but substantially impair future distributions expected to meet living expenses throughout retirement forcing many seniors back into the workforce at minimum wage. For a 70-year-old retiree, a reduction of $1,000/month over a 20-year retirement discounts back to a substantial loss if you make the case. Practitioners need to offer the discounted present value of the income deficiency as damages, which is essentially the cost of an immediate annuity, to make up the deficiency.

Account depletion and unsustainability are predictable outcomes of automatic monthly withdrawals of fixed dollar amounts, sequence risk, and share liquidations over the long term, not Portfolio Allocation or short-term market gyrations. Market loss damage models, however, can leave retirees with insufficient compensation to restore the original distribution stream they expected over a lifetime, potentially stretching 20+ years, a revenue stream that was possible in many cases with an Immediate Annuity. Panels must be brought to the understanding that the Claimant is not simply claiming losses adjusted for market performance, but for the income stream promised to meet his or her defined and budgeted financial needs over a lifetime. NOP's are simply and provably inadequate in income claims, a fact that should be clear to an arbitration panel by the end of Claimant's case.

PIABA Mid-Year Meeting, April 27, 2023

Non-Economic Costs of Fraud on Elders and Retirees

Stacey A. Wood, Ph.D., Molly Mason Jones Professor of Psychology,
Scripps College, Claremont, 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

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.

Setting the Stage

- Fraud victims are often TARGETED by perpetrators through affiliation, or through other interactions with financial service providers.
- Understanding vulnerabilities that were present PRIOR to victimization can be very helpful including relationship with perpetrator.
- Tell the story of how individuals were impacted in terms of quality of life, emotional distress, etc.

Case Example: Mr. & Mrs. J.

Mr. and Mrs. J are a couple in their mid 70's.

Mr. J worked as an engineer. He later started his own company with assets in the $8 million range.

Mrs. J. worked as a realtor. They have 2 adult children, and hope they will take over the company. They enjoy golfing and travel.

Mr. J viewed himself as an experienced investor with some tolerance for risk. His wife was more conservative and preferred money market type investments. He was invited to join an investment club through his long-time accountant with a pool of individuals. The scheme was ultimately revealed to be a Ponzi scheme. Total losses over 3 years were $5 million. Plus he learned he owed the IRS an addition 2 million secondary to accountant deceit.

Case Example: Mr. & Mrs. J.

Since Mr. J learned of the deception he has been psychologically devastated. He has high blood pressure, poor sleep and frequent intrusive thoughts of the day he learned that his investments were lost. He blames himself and has become increasingly depressed. He no longer has the "can do" attitude and confidence that he was famous for. Even worse, he recommended the investment pool to close friends and family. For the first time in his adult life, he is in debt. He reported considering suicide when he first learned of the fraud.

Mrs. J. was shocked and devastated. She had grown up in a poor family and thought she had escaped poverty and financial worries. She is reporting high levels of anxiety and worry, worse sleep, and worse relationships with family.

3905A. Physical Pain, Mental Suffering, and Emotional Distress

(Noneconomic Damage)

[Insert number, e.g., “1.”] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/ inconvenience/grief/ anxiety/humiliation/emotional distress/[insert other damages]].

No 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.

[To recover for future [insert item of pain and suffering], [name of plaintiff] must prove that [he/she/nonbinary pronoun] is reasonably certain to suffer that harm.

For future [insert item of pain and suffering], determine the amount in current dollars paid at the time of judgment that will compensate [name of plaintiff] for future [insert item of pain and suffering]. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]

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 FINRA (2015) Non-traditional costs of financial fraud.

- There is an emotional side of fraud. Per FINRA (March 2015) nearly 2/3 of victims report at least ONE non-financial cost of serious fraud.

- 50 % Severe Stress
- 44 % Anxiety
- 38 %. Difficulty Sleeping
- 35 % Depression

Other Key Findings (FINRA, 2015)

Individuals who lose large amounts of money are more likely to experience a greater number of non-financial costs / emotional distress.

Victims confused about details of the fraud are far more likely to report experiencing non-financial costs to a serious degree.

47 % of Victims of financial fraud blame themselves for being defrauded (guilt, humiliation, lack of confidence).

61 % report feel that they were defrauded for being too trusting which can result in less trust of other moving forward. For example, Mrs. J reported thay had some assets, but did not truat their own judgment regarding what to do with them.

More evidence: 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.

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. Catastrophic financial stressor.**

- 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.

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.**
- **Medical record reviews can be important.**

Premorbid Vulnerabilities Increase Risk of Emotional Distress

- Ganzini et al. (199) 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.

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 Impact
  - 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.

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.

Literature Review

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- 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: Physcological, 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
- https://www.drstaceywood.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

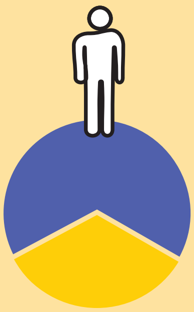
While the non-economic impacts of financial exploitation are well-established, recognizing and effectively addressing them isn’t always as simple. However, with a coordinated and compassionate effort from loved ones, knowledgeable attorneys armed with the most power elder protection statutes, and supporting professionals, a senior who has experienced these impacts will have significantly greater odds of recovery.

FINANCIAL FRAUD in THE UNITED STATES

The Non-Traditional Costs of Financial Fraud

$50 BILLION per year is lost to fraud...but that's not the whole story.

There is an **emotional side of fraud** that is not often talked about.



NEARLY **2/3** of victims reported experiencing at least one non-financial cost of fraud to a serious degree.

50%	Severe stress
44%	Anxiety
38%	Difficulty sleeping
35%	Depression

Beyond emotional costs, nearly half of fraud victims reported **incurring indirect financial costs** associated with fraud.

25% paid late fees

23% paid fees for bounced checks

9% reported declaring bankruptcy

29% of victims who incurred indirect costs **paid more than $1,000**

Almost half of the victims **blame themselves** for being defrauded. But there are ways you can protect yourself and **avoid becoming a financial fraud victim**.

Visit SaveAndInvest.org/FraudCenter to learn more about fraud–and how to spot and avoid it.

Source: FINRA Investor Education Foundation research report, *Non-Traditional Costs of Financial Fraud* (2015). Study and methodology available online at SaveAndInvest.org.

SaveAndInvest.org

NON-TRADITIONAL COSTS OF FINANCIAL FRAUD

REPORT OF SURVEY FINDINGS

PREPARED FOR

FINRA INVESTOR EDUCATION FOUNDATION

BY

APPLIED RESEARCH & CONSULTING LLC

MARCH 2015

Applied Research & Consulting LLC

320 West 13th St. • Seventh Floor • NY, NY 10014
Tel: 212.226.1007 • Fax: 212.226.0240
Email: Arc@ArcLLC.com

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OBJECTIVES

Typically, estimates of fraud costs focus primarily on the direct financial costs, specifically the amount of money lost in the fraudulent incident. The FINRA Investor Education Foundation commissioned Applied Research & Consulting LLC (ARC) to conduct a study to explore **non-traditional costs of financial and investment fraud**, including:

- indirect financial costs, such as legal fees, fees for bounced checks, opportunity costs, lost wages, etc.; and

- non-financial costs, such as stress, depression, frustration, anger, other psychological consequences, sleep deprivation, health issues, lost time, etc.

The study focused on financial and investment fraud in which the victim played an active role. Consumer frauds (e.g., fake weight loss programs, "work at home" scams) and other types of financially related fraud in which the victim did not agree to invest his/her money (e.g., identity theft, credit/debit card fraud) were not included in the research.

It is also important to note that this study was not intended to address the issue of fraud prevalence. All participants were self-reported victims of financial fraud, therefore the research does not provide a measure of how often financial fraud occurs in the general population, or which types of fraud are more prevalent.

Instead, this study offers an in-depth look at financial fraud from the victim's perspective—how victims experienced the incident, their reactions to the fraud and the potential indirect financial costs and non-financial consequences of having been victimized.

METHODOLOGY

To achieve the objective outlined above, ARC conducted a nationally distributed online survey of 600 self-reported fraud victims.

- All respondents were screened to meet the following criteria:
  - Men and women ages 25 or older who have primary or shared decision-making responsibility for their household's financial investments.
  - Lost money in a fraudulent or potentially fraudulent incident.
- Quotas were set so that the sample would be evenly split among men and women (300 each), but all other demographic variables were allowed to fall freely in order to provide a natural representation of the demographics of financial fraud victims. Additional details on sample demographics are provided in the Appendix.
- Sample for the survey was provided by SSI (Survey Sampling International).
- The survey was conducted in August 2014.

KEY FINDINGS

- Non-financial costs of fraud (e.g., stress, health problems, etc.) are widespread among victims of financial fraud. Nearly two-thirds (65 percent) report experiencing at least one type of non-financial cost to a serious degree.

- Stress is the most commonly cited non-financial cost, with 50 percent of respondents reporting they had experienced severe stress due to being defrauded. Nearly two in five (38 percent) reported difficulty sleeping, and more than one third (35 percent) reported experiencing depression due to the fraudulent incident.

- Fraud victims who lose larger amounts of money are more likely to experience a greater number of non-financial costs.

- Victims who are confused about the details of the fraud are far more likely to report experiencing non-financial costs to a serious degree.

- Non-financial costs are more common than indirect financial costs. Slightly less than half of respondents (47 percent) report incurring some type of indirect financial cost (e.g., late fees, legal fees, etc.) as a result of fraud.

- Among those who have experienced indirect financial costs, 29 percent estimated the cost to be more than $1,000.

- The most frequently reported types of indirect costs are late fees/interest (25 percent) and fees for bounced checks (23 percent), suggesting that the loss of money due to fraud interfered with the victim’s ability to pay bills and make ends meet.

- Only a minority of respondents (15 percent) report having a great deal of interaction with the perpetrator of the fraud (e.g., communicating many times, filling out paperwork, etc.).

- Victims of financial fraud place a good deal of responsibility on themselves for the incident. Just under half (47 percent) blame themselves for being defrauded, and 61 percent feel that they were defrauded because they were too trusting.

- Financial fraud victims report a variety of negative emotional reactions to the fraudulent incident, with anger being the most common (74 percent), followed by regret (70 percent), feeling victimized (69 percent) and feeling betrayed (68 percent).

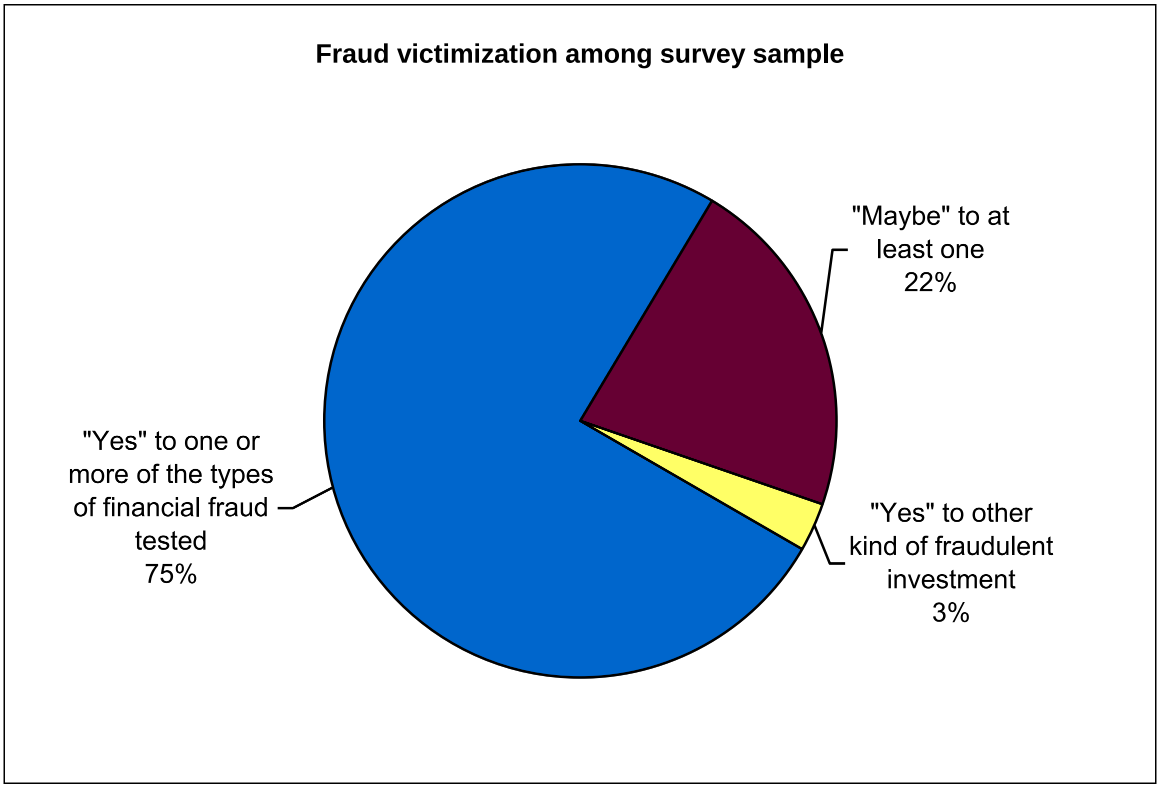
FINDINGS IN DETAIL

FRAUD EXPERIENCE

Fraud Victimization in the Survey Sample

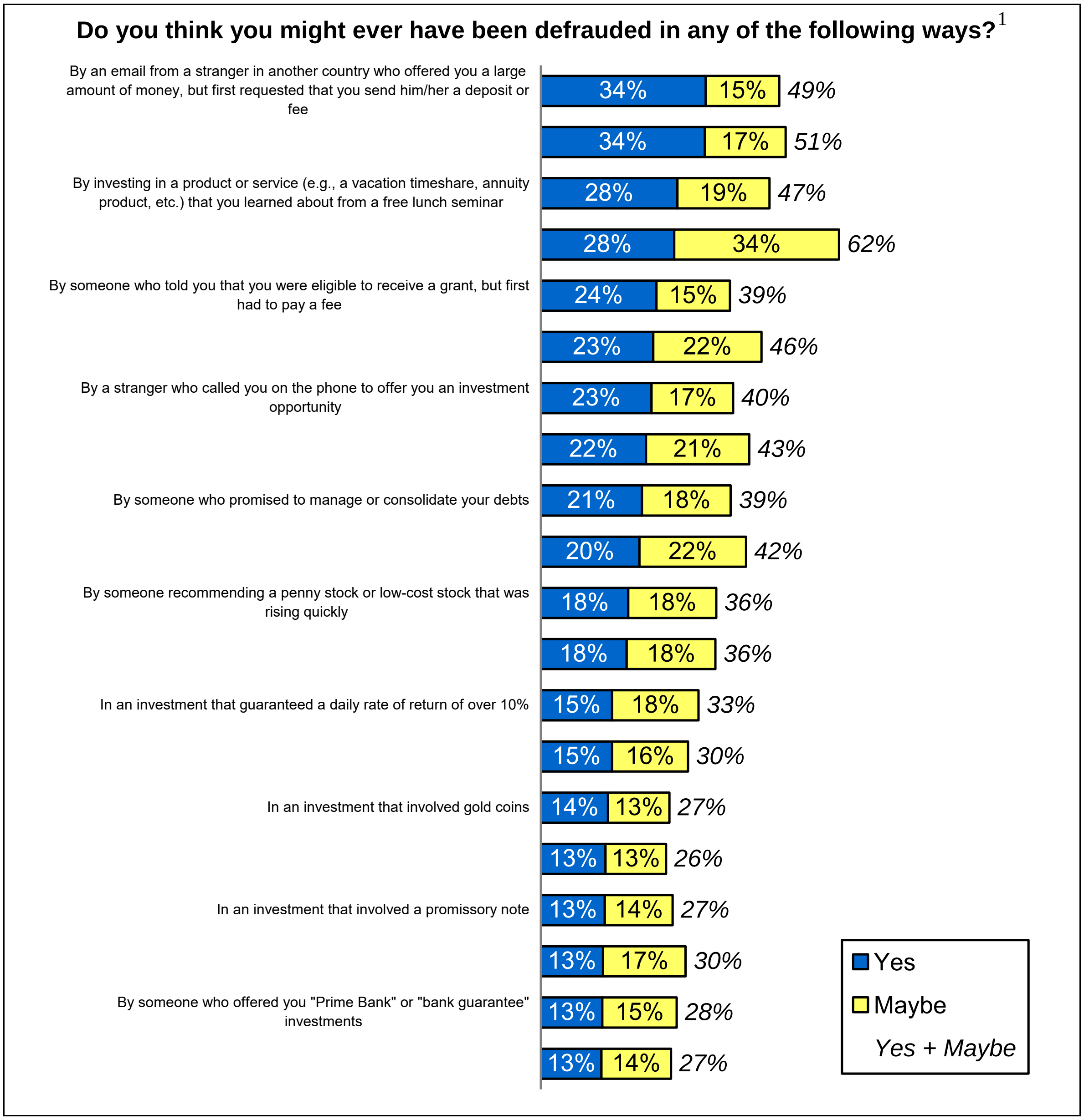
Respondents were given a list of 20 scenarios of financial fraud and asked whether they thought they may have been defrauded in any of these ways (the specific types of fraud are discussed separately below). Because cases of fraud are not always clear-cut and victims may be unsure whether they have been defrauded (or whether their loss was due to legitimate reasons), the study included respondents who felt they might have been defrauded as well as those who reported that they definitely had been defrauded.

Overall, three quarters of the sample indicated they had been defrauded by answering "yes" to at least one of the 20 specific types of financial fraud tested. An additional 22 percent did not say "yes" to any of the financial fraud types, but did say "maybe" to at least one. The remaining 3 percent reported that they had lost money in another kind of fraudulent investment. Note that these percentages are not representative of the general public, as respondents who were not self-reported fraud victims were excluded from the survey.



Types of Financial Fraud

Self-reported fraud victims were most likely to say “yes” to having been defrauded by advance fee email scams and lottery scams. They were most likely to say “maybe” to charity-related fraud.



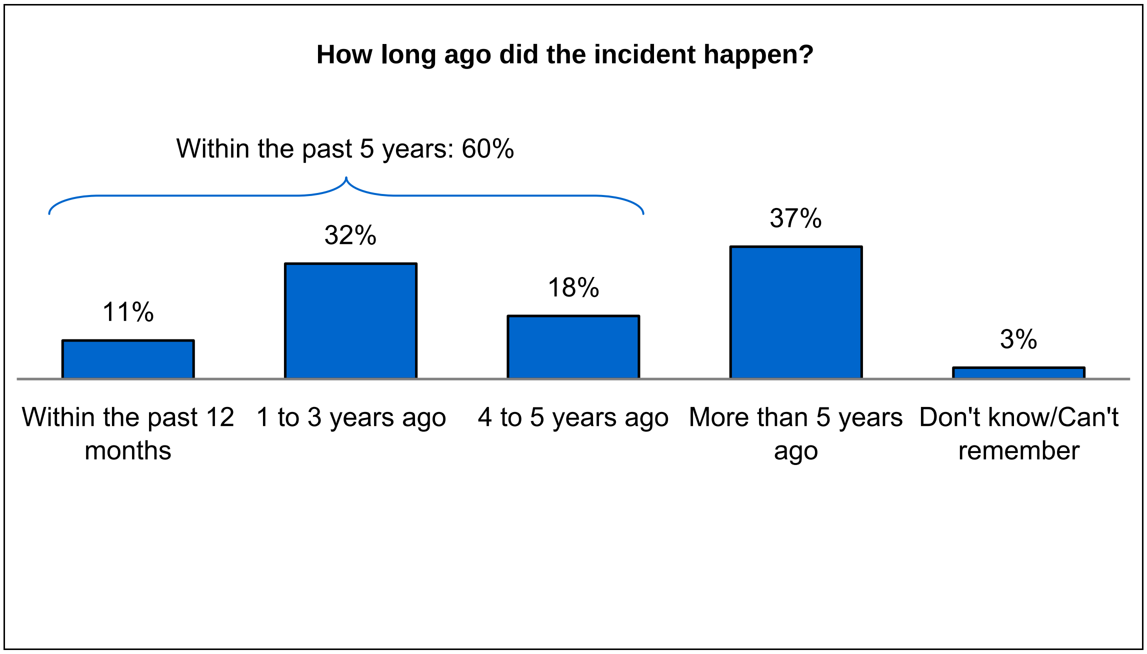
Do you think you might ever have been defrauded in any of the following ways?[1]

[1] Note: All respondents in this study were self-reported fraud victims; therefore, these percentages are not indicative of the incidence of fraud among the general population.

Details of the Fraudulent Incident

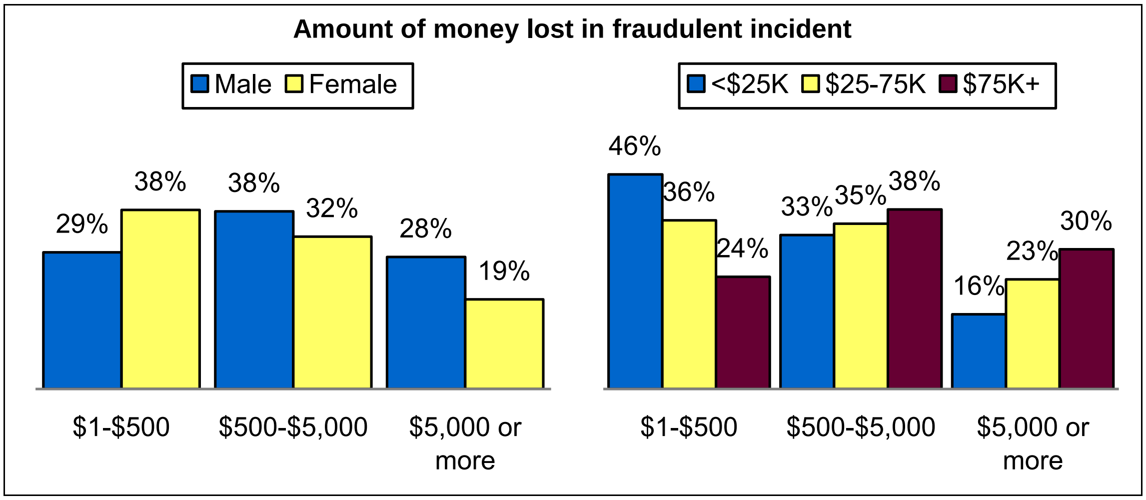
For the remainder of the survey, respondents were asked to think about the fraudulent incident they experienced that they considered to be the most serious.

The majority of respondents (60 percent) indicated that the fraudulent incident was fairly recent (within the past 5 years).



The amount of money lost varied considerably, with about a third of respondents (34 percent) who lost less than $500, about the same proportion (35 percent) who lost between $500 – $5,000 and 24 percent who lost $5,000 or more.

Men were more likely to have lost a greater amount of money than women, and respondents with higher incomes ($75K+) were more likely to have lost more than those with lower incomes. There were no substantial differences by age in the amount of money lost in the fraudulent incident.



As far as degree of involvement in the fraud, only a minority of respondents (15 percent) reported having a great deal of interaction with the perpetrator of the fraud (e.g., communicating many times, filling out a great deal of paperwork, etc.). The plurality (46 percent) said they had a moderate level of interaction (e.g., communicating back and forth a few times), and 33 percent reported having very little interaction (e.g., simply responding to the initial call or contact).

Respondents who lost smaller amounts of money were more likely to report having less interaction, while those who lost greater amounts also reported greater levels of interaction. There were no demographic differences in level of personal involvement.

		Amount lost in fraud		
How much interaction did you have with the person or entity that defrauded you?	**Total**	**$1-$500**	**$500-$5,000**	**$5,000 or more**
Very little (e.g., you just responded to the initial call or contact)	35%	43%	30%	28%
Moderate (e.g., you communicated back and forth a few times)	46%	43%	50%	46%
A great deal (e.g., you communicated many times, filled out a great deal of paperwork, etc.)	15%	10%	16%	24%
Don't know	4%	4%	3%	2%

When asked how they initially came into contact with the fraud perpetrator, respondents most frequently cited introductions through a friend or family member.

How were you introduced to the person or entity that defrauded you?	Total
Through a friend or family member	18%
Through a professional contact	13%
From an unsolicited email	12%
From an unsolicited telephone call	12%
From an Internet advertisement (including Craigslist)	9%
From a newspaper or magazine advertisement	6%
Though a social networking website (Facebook, LinkedIn, Twitter, Google+)	6%
Through a social setting such as a place of worship or school	5%
Other	11%
Don't know/Can't remember	9%

Respondents ages 25 – 34 were more likely than those 55+ to cite social networks as a method of initial contact (9 percent vs. 3 percent, respectively). Respondents with $75K+ income were more likely than those with <$25K income to cite professional contacts (18 percent vs. 3 percent, respectively) and less likely to mention unsolicited emails (6 percent vs. 23 percent, respectively). There were no gender differences in method of initial contact with the fraud perpetrator.

Reporting the Incident

While over two-thirds of respondents (68 percent) told friends or family members about the incident, far fewer (35 percent) reported the incident to the authorities. Men were more likely than women to have reported the incident. Younger respondents (25 – 34) were more likely than those 35 and older to report the incident. There were no differences by income in likelihood to report the incident.

		Gender		Age		
	Total	Male	Female	25-34	35-54	55+
Reported the incident to the authorities	35%	41%	29%	48%	33%	31%

Among those who reported the incident, law enforcement was the most frequently cited entity to which they reported.

Entity to whom incident was reported	Among respondents who reported the incident
Law enforcement	47%
Better Business Bureau (BBB)	28%
My bank or credit card company	27%
An attorney	25%
State regulatory agency	16%
Federal Trade Commission (FTC)	16%
The firm that sold the investment	14%
The city, county or state Consumer Affairs office	12%
Securities and Exchange Commission (SEC)	11%
NASD or FINRA	5%
Other	5%
Don't know/Can't remember	1%

Among those who did not report it, the most common reason mentioned was that it "wouldn't have made a difference."

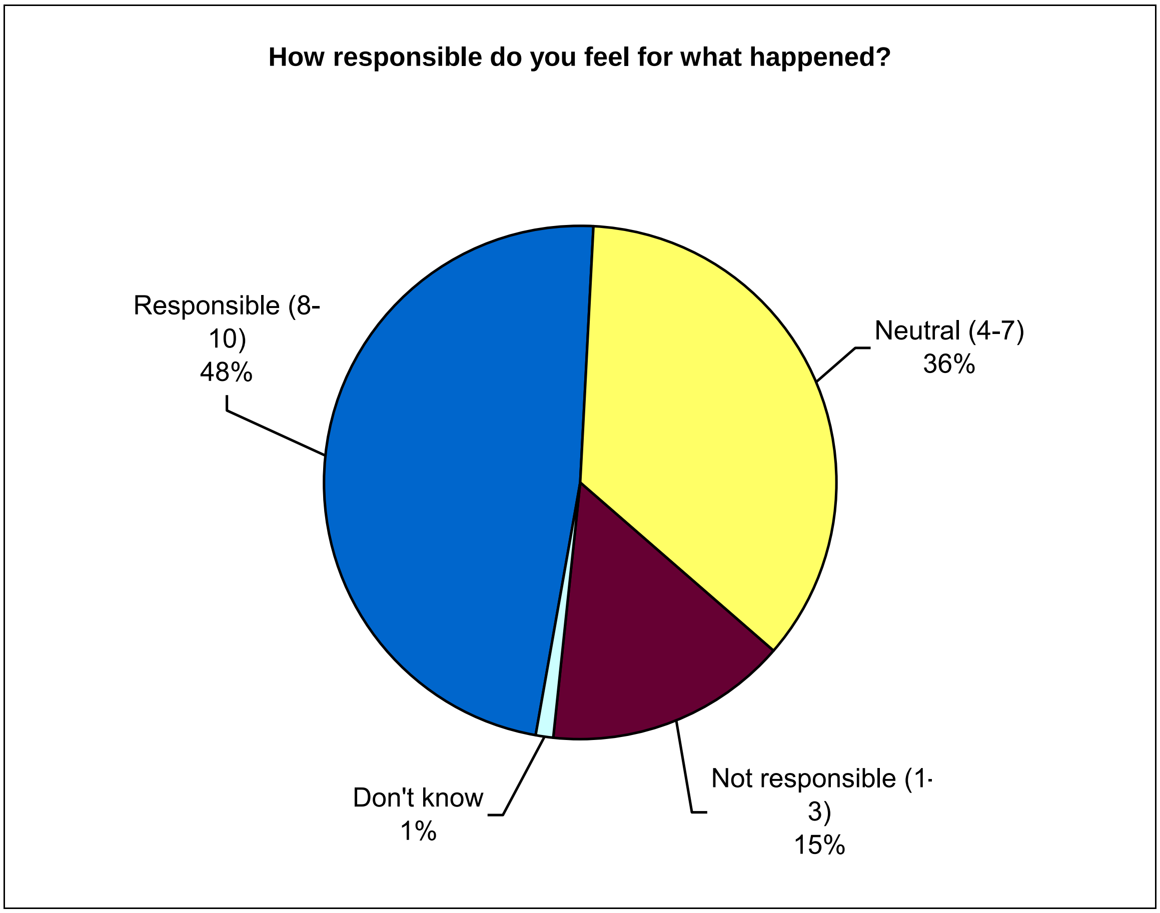
Reasons for not reporting the incident	Among respondents who did not report the incident
Wouldn't have made a difference	48%
Wanted to put it behind me	35%
Was embarrassed	29%
Didn't know where to turn	26%
Didn't have time	6%
Other	14%
Don't know	3%

PERCEPTIONS OF AND ATTITUDES TOWARD THE FRAUDULENT INCIDENT

The survey included a series of questions to assess respondents' perceptions, attitudes and feelings about the fraudulent incident.

Sense of Responsibility

Overall, a considerable proportion of respondents appeared to take personal responsibility for the fraudulent incident. When asked directly how responsible they felt for what happened, nearly half gave a top-three box response; i.e., 8, 9 or 10 on a 10-point scale from least to most responsibility. There were no demographic differences in perceived level of responsibility for the fraud.



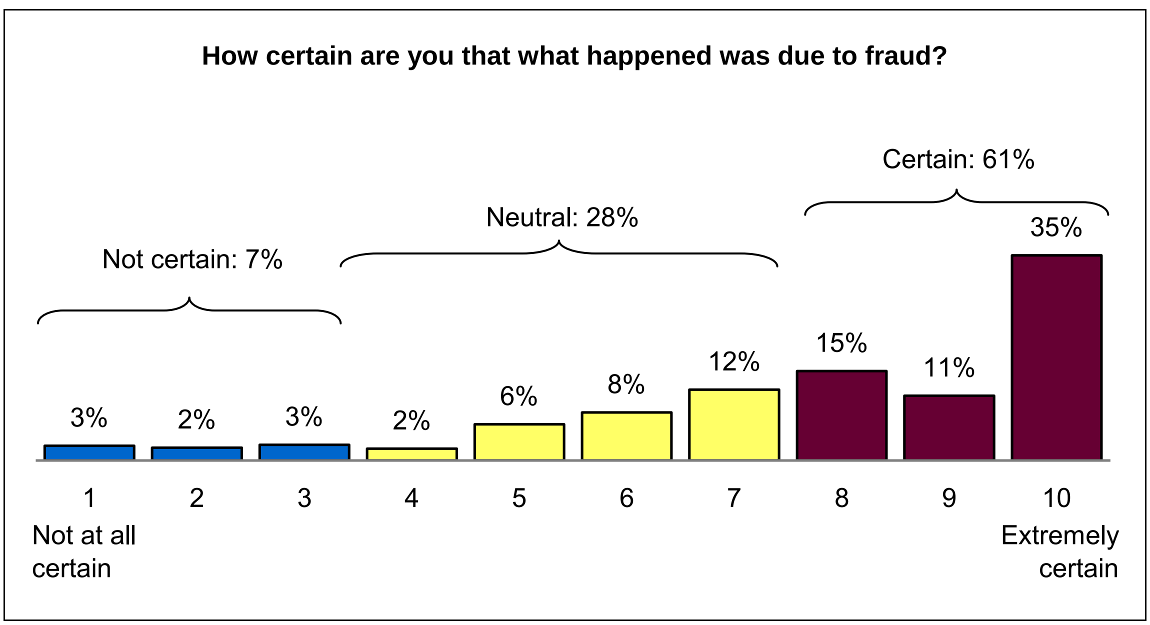
In addition, 61 percent agreed with the statement "I was defrauded because I was too trusting," and 51 percent with the statement "The offer seemed too good to be true. I should have trusted my instincts." Nearly half (47 percent) blame themselves for being defrauded. There were no demographic differences in agreement with these statements.

	% Agree (top 3 box)
"I was defrauded because I was too trusting."	61%
"The offer seemed too good to be true. I should have trusted my instincts."	51%
"I blame myself for being defrauded."	47%

Confusion About the Fraudulent Incident

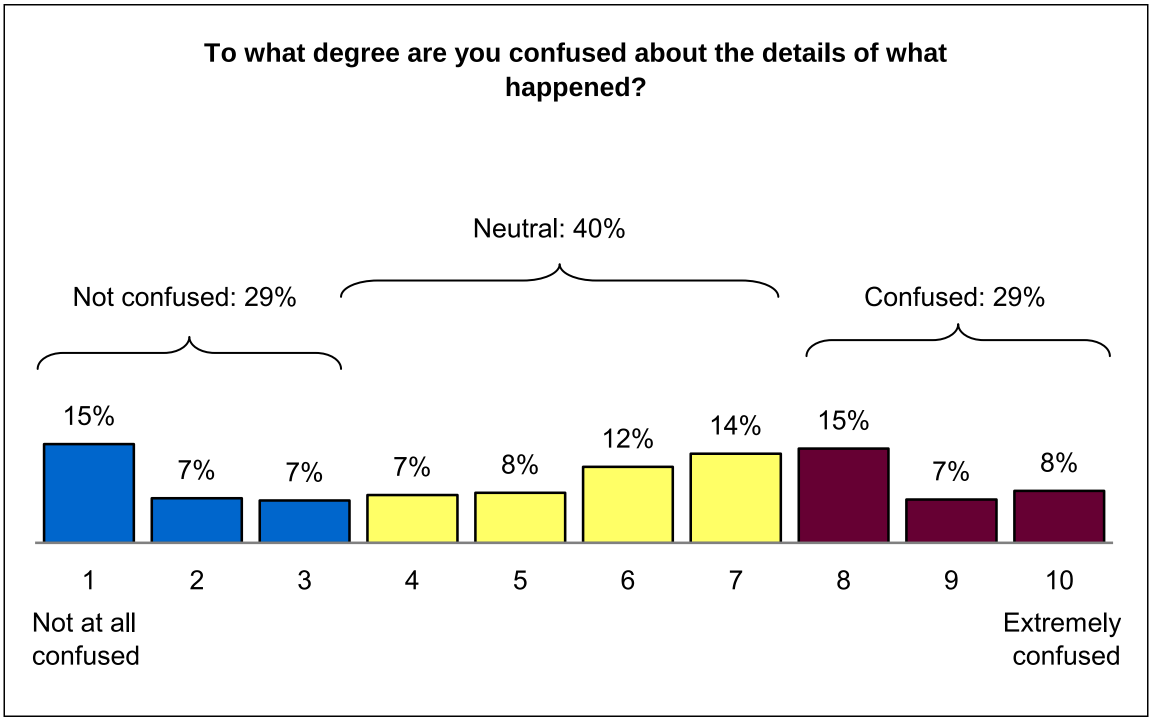
We hypothesized that fraud victims would exhibit varying levels of confusion about the fraudulent incident (e.g., whether it was really fraud, what actually happened to them, etc.)

Contrary to expectations, we found that the majority of respondents were not confused about whether their loss was actually due to fraud. Over three-fifths indicated that they were certain the incident was due to fraud (top-three box on a 10-point scale), and more than a third (35 percent) were "extremely certain" (10 on a 10-point scale). There were no demographic differences in level of certainty.



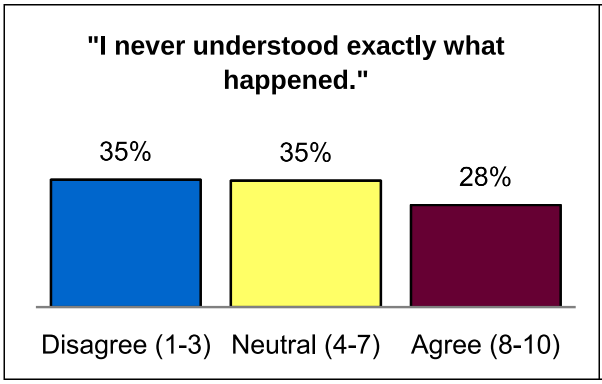
[Individual percentages may not add up to aggregated percentages due to rounding.]

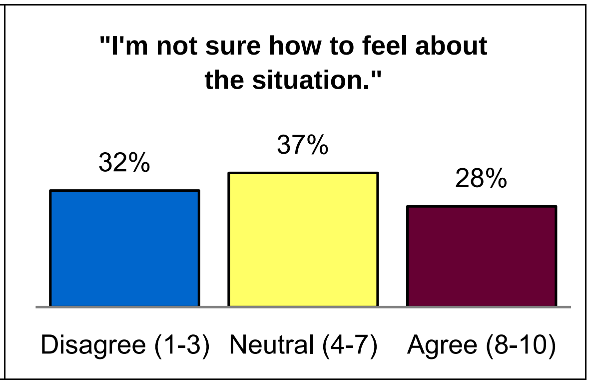
However, consistent with initial hypotheses, the degree of confusion about the details of the fraud varied, with equal numbers being confused and not confused (29 percent each). Respondents 25 – 34 were more likely to be confused than those 55+ (42 percent vs. 18 percent respectively). There were no gender or income differences in level of confusion.



[Individual percentages may not add up to aggregated percentages due to rounding.]

In line with these findings, 28 percent of respondents agreed with the statement "I never understood exactly what happened," and 28 percent were confused about how to feel about the situation.

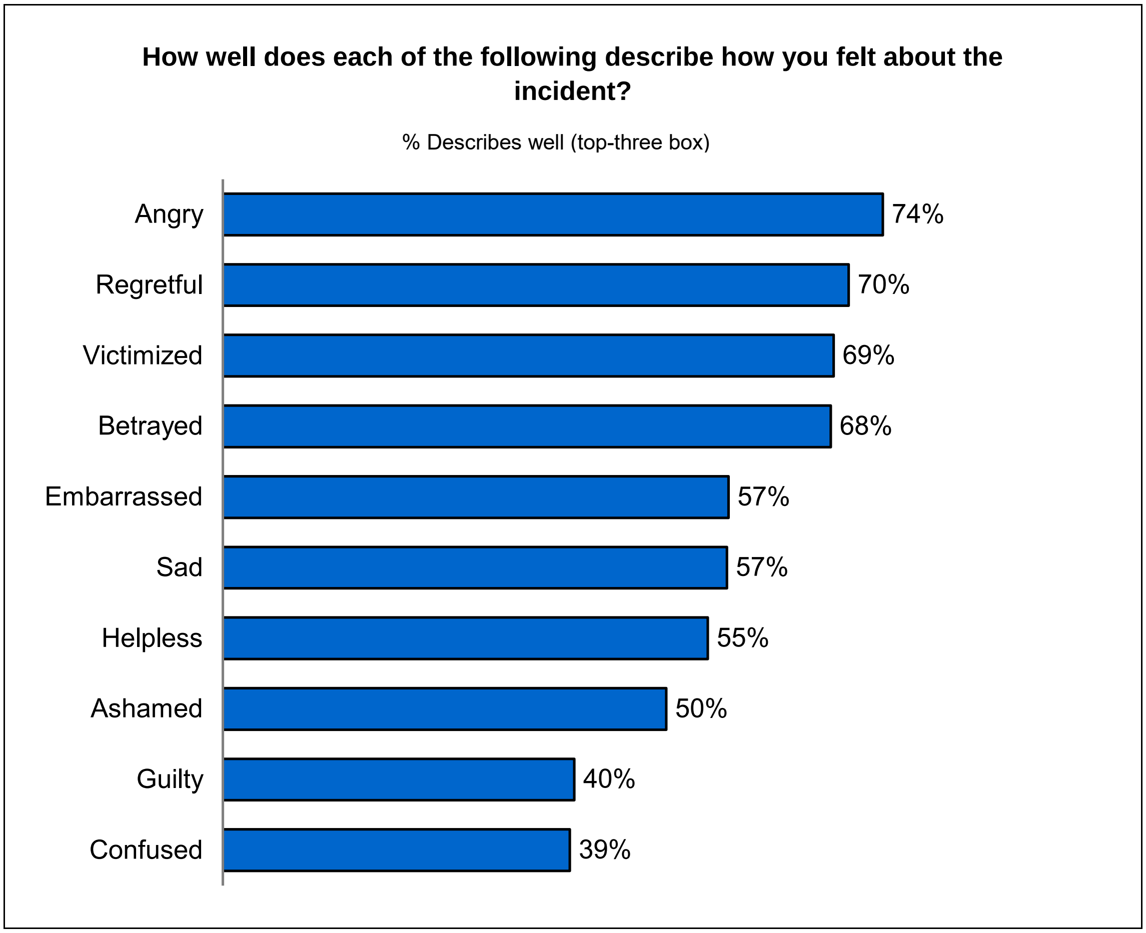




Younger respondents were more likely than older respondents to be confused about how to feel (40 percent among those ages 25 – 34, vs. 27 percent among those 35 – 54 and 22 percent among those 55+).

Emotional Response

Respondents reported a variety of negative feelings about the fraudulent incident, with anger being the most common, followed by regret, feeling victimized and feeling betrayed.



Women were more likely than men to feel regret (75 percent vs. 66 percent), while respondents ages 25 – 34 were more likely than those 55+ to feel ashamed (58 percent vs. 43 percent), guilty (47 percent vs. 31 percent) and confused (52 percent vs. 31 percent). There were no differences by income in how respondents felt about the fraudulent incident.

On a positive note, nearly three quarters of respondents (74 percent) agreed with the statement "I feel like I learned something from the experience." Respondents 55 and older were more likely than those 25 – 34 to agree (81 percent vs. 64 percent, respectively). There were no differences by gender or income.

NON-TRADITIONAL COSTS OF FRAUD

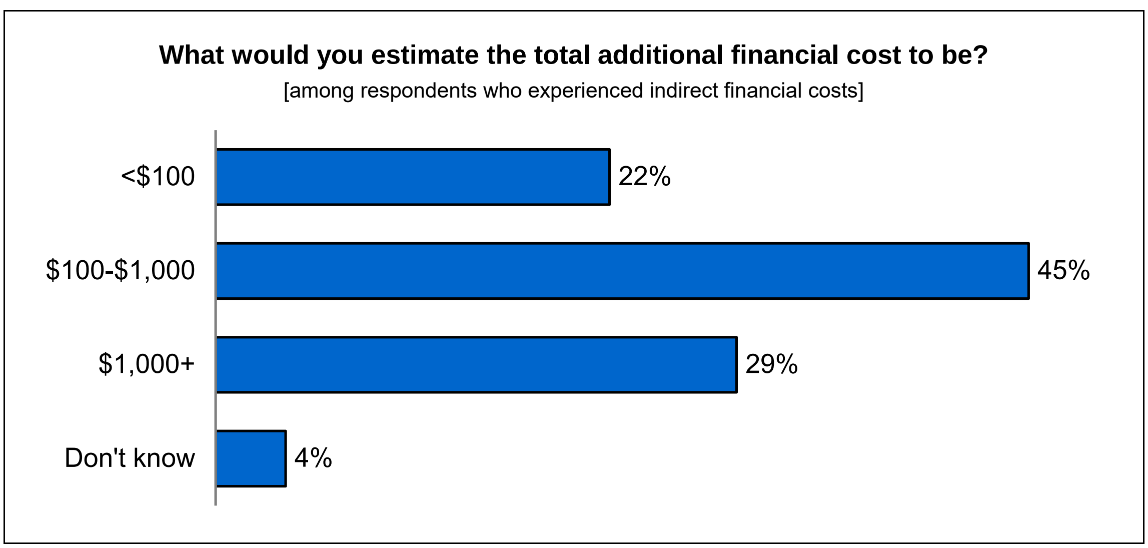
Indirect Financial Costs

The survey asked whether respondents had experienced additional financial costs resulting from fraud, such as late fees, legal fees, medical fees, etc. (full list shown separately below). Nearly half of respondents (47 percent) reported incurring at least one form indirect financial cost as a result of the fraudulent incident they considered to be the most serious.

Indirect financial costs appeared to be inversely correlated with age, such that they were most frequent among the youngest respondents and least frequent among the oldest respondents. Not surprisingly, those who lost more than $500 in the fraudulent incident itself were more likely to have also incurred indirect financial costs. There were no gender or income differences in likelihood to have incurred indirect financial costs.

		Age			Amount lost in fraud		
	Total	**25-34**	**35-54**	**55+**	**$1-$500**	**$500-$5,000**	**$5,000 or more**
Incurred at least one form of indirect financial cost	47%	65%	51%	33%	34%	58%	55%

Estimates of the amount of indirect financial costs varied greatly. Among those who have experienced indirect financial costs, 22 percent lost less than $100, while 29 percent reported losing over $1,000. The median amount lost was approximately $500.



The types of indirect financial costs most commonly cited were late fees/interest and fees for bounced checks, suggesting that the loss of money from the fraud interfered with the victim's ability to pay bills and make ends meet.

Men were more likely than women to have had legal fees (24 percent vs. 14 percent), lost work time/wages (22 percent vs. 13 percent) and fees for a private detective (15 percent vs. 10 percent). Respondents with household incomes of $75K+ were more likely than those with $25K – $75K incomes to have had fees for prescription medications (19 percent vs. 10 percent). Younger respondents were more likely than older respondents to have incurred all types of indirect financial costs.

Types of indirect financial costs incurred as a result of fraudulent incident	Total	Age 25-34	Age 35-54	Age 55+
Late fees/interest	25%	37%	27%	16%
Fees for bounced checks	23%	32%	23%	16%
Legal fees	19%	30%	21%	11%
Lost work time/Lost wages	18%	35%	17%	8%
Fees for consulting a private detective or investigator	13%	26%	13%	4%
Fees for prescription medications	12%	25%	13%	4%
Fees for consulting a medical or mental health professional	11%	23%	11%	3%

Overall, 9 percent of respondents reported declaring bankruptcy as a result of the fraudulent incident. Younger respondents (under 55) were more likely than those 55+ to have declared bankruptcy. There were no gender or income differences in bankruptcy rates.

	Total	Age 25-34	Age 35-54	Age 55+
Have declared bankruptcy as a result of the fraudulent incident	9%	12%	13%	4%

Non-Financial Costs

In addition to indirect financial costs of fraud, respondents were asked whether they had experienced non-financial costs, such as stress, health problems, negative relationship consequences, etc., and if so, how severe were the symptoms.

The data revealed that non-financial costs of fraud were more common than indirect financial costs. Almost two thirds (65 percent) of respondents reported experiencing at least one type of non-financial cost to a serious degree (8 to 10 on a 10-point scale) as a result of their fraudulent incident.

Stress was the most frequently cited non-financial cost. Half of respondents reported that they had experienced a serious degree of stress due to being defrauded.

Types of non-financial costs experienced as a result of fraudulent incident (self-report)	% Experienced to a serious degree (top 3 box)
Stress	50%
Anxiety	44%
Difficulty sleeping	38%
Loss of personal confidence	38%
Depression	35%
Lost personal time	32%
Loss of respect from others	25%
Physical health problems	24%
Negative relationship consequences (e.g., divorce, separation)	21%

The likelihood to experience non-financial costs appears to be inversely correlated with age, such that respondents 25 – 34 experienced an average of about four serious symptoms, while those 55+ experienced an average of two serious symptoms. Not surprisingly, non-financial costs are positively correlated with the amount of money lost in the fraudulent incident itself. There were no gender or income differences in the number of non-financial costs experienced to a serious degree.

		Age			Amount lost in fraud		
	Total	25-34	35-54	55+	$1-$500	$500-$5,000	$5,000 or more
Number of symptoms experienced to a serious degree	3.25	4.15	3.61	2.31	1.96	3.60	4.74

Confusion and Non-Financial Costs

We hypothesized that higher levels of confusion about the details of the fraud might correlate with greater emotional distress and increased non-financial costs.

The survey data seem to support this hypothesis. Respondents who indicated they were confused about the mechanism of their loss (8 to 10 on a 10-point scale) were more likely than those who were not confused (1 to 3 on a 10-point scale) to report severe problems with all of the symptoms tested.

Non-financial costs experienced to a serious degree	Among respondents who were confused	Among respondents who were not confused
Stress	69%	33%
Anxiety	65%	27%
Difficulty sleeping	63%	18%
Loss of personal confidence	62%	20%
Depression	57%	20%
Lost personal time	54%	19%
Physical health problems	47%	9%
Loss of respect from others	46%	12%
Negative relationship consequences (e.g., divorce, separation)	41%	9%
Average number of serious symptoms	5.40	1.74

In addition, those who were confused experienced an average of 5.4 of the 10 symptoms severely, compared to only 1.7 severe symptoms among those who were not confused.

APPENDIX A: SAMPLE DEMOGRAPHICS

Age	Total
25-34	21%
35-54	43%
55+	36%

Gender	Total
Male	50%
Female	50%

[Note: Quotas were set so that the sample was evenly split by gender]

Household income	Total
<$25K	17%
$25-75K	45%
$75K+	32%
Don't know	1%
Prefer not to say	6%

Employment	Total
Self-employed	10%
Work full-time for an employer	42%
Work part-time for an employer	9%
Homemaker	6%
Full-time student	1%
Permanently sick, disabled or unable to work	4%
Unemployed or temporarily laid off	6%
Retired	21%
Prefer not to say	1%

Education	Total
Less than high school	1%
High school graduate	15%
Some college	28%
College graduate	35%
Post graduate education	21%
Prefer not to say	0%

Ethnicity	Total
White non-Hispanic	71%
Black non-Hispanic	12%
Hispanic (any race)	7%
Asian non-Hispanic	6%
Other non-Hispanic (Native American, Other, 2+ ethnicities)	3%
Prefer not to say	1%

Marital status	Total
Married	54%
Living with partner	5%
Single	20%
Separated	1%
Divorced	13%
Widowed/widower	7%
Prefer not to say	1%

Number of financially dependent children	Total
1	18%
2	16%
3	8%
4 or more	4%
No financially dependent children	28%
Do not have any children	25%
Prefer not to say	2%

Census region	Total
Northeast	18%
Midwest	22%
South	38%
West	23%

Which of the following best describes your role in your household when it comes to making decisions about financial investments?	Total
I am the primary decision-maker for my household when it comes to financial investments	75%
I share the decision-making responsibility with others in my household	25%

Not including retirement accounts, do you have any investments in stocks, bonds, mutual funds or other securities?	Total
Yes	53%
No	41%
Don't know	3%
Prefer not to say	4%

Not including retirement accounts, what is the total approximate current value of your investments in stocks, bonds, mutual funds and other securities? Would you say it is...	Total
Less than $10,000	14%
At least $10,000 but less than $50,000	22%
At least $50,000 but less than $100,000	19%
At least $100,000 but less than $250,000	21%
More than $250,000	19%
Don't know	1%
Prefer not to say	5%

APPENDIX B: SURVEY INSTRUMENT

FINRA #1371
Experience of Fraud Victimization Study
Final survey 10/3/14

Sample: N = 600 respondents who have/think they may have been victims of investor/financial fraud

A. [Introduction & Screening]

Thank you for taking the time to answer this survey. Please be assured that **all of your answers will be completely ANONYMOUS and CONFIDENTIAL**. Therefore, please try to answer these questions as openly and honestly as possible.

A1. What is your age:
1. Under 18 [TERMINATE]
2. 18-24 [TERMINATE]
---
3. 25-29
4. 30-34
5. 35-39
6. 40-44
7. 45-49
8. 50-54
9. 55-59
10. 60-64
11. 65 or older
---
12. Prefer not to say [TERMINATE]

A2. What is your gender?
1. Male
2. Female
---
2. Prefer not to say [TERMINATE]

A2b. Which of the following best describes your role in your household when it comes to making decisions about financial investments?
1. I am the primary decision-maker for my household when it comes to financial investments
2. I share the decision-making responsibility with others in my household
---
3. I do not participate in decisions regarding financial investments for my household [TERMINATE]
4. Prefer not to say [TERMINATE]

A3. Investors regularly gain and lose money in financial markets for a variety of legitimate reasons. However, the following questions are about **financial fraud**—that is, when someone intentionally gives you false information to encourage you to make a financial transaction or investment.

Do you think you might ever have been defrauded in any of the following ways?

[RANDOMIZE ITEMS]		Yes	Maybe	No
A3_1.	By a stranger who called you on the phone to offer you an investment opportunity	1	2	3
A3_2.	By an email from a stranger in another country who offered you a large amount of money, but first requested that you send him/her a deposit or fee	1	2	3
A3_3.	By investing in a product or service (e.g., a vacation timeshare, annuity product, etc.) that you learned about from a free lunch seminar	1	2	3
A3_4.	In an investment that involved oil or gas exploration	1	2	3
A3_5.	In an investment that involved a promissory note	1	2	3
A3_6.	By someone recommending a penny stock or low-cost stock that was rising quickly	1	2	3
A3_7.	By someone who offered you investments in exclusive shares of a company before that company's initial public offering (IPO)	1	2	3
A3_8.	In an investment that guaranteed a daily rate of return of over 10%	1	2	3
A3_9.	In an investment that offered a commission if you referred other people to participate in the investment	1	2	3
A3_10.	In an investment that involved digital or e-currency such as Bitcoin or e-Gold	1	2	3
A3_11.	By someone who told you that you had won a prize or lottery, but first had to pay a fee	1	2	3
A3_12.	In a Ponzi investment scheme	1	2	3
A3_13.	By someone who promised to manage or consolidate your debts	1	2	3

		Yes	Maybe	No
A3_14.	By someone who promised to assist with your home mortgage or to help you avoid foreclosure	1	2	3
A3_15.	By someone who promised to provide you with a credit card or loan	1	2	3
A3_16.	By someone who told you that you were eligible to receive a grant, but first had to pay a fee	1	2	3
A3_17.	By someone who claimed to represent a charitable organization	1	2	3
A3_18.	In an investment that involved gold coins	1	2	3
A3_19.	By someone who offered you "Prime Bank" or "bank guarantee" investments	1	2	3
A3_20.	By someone who informed you that you had an unclaimed inheritance	1	2	3

A4. [PUNCH A3 SUMMARY]

1. At least one 'YES' above
2. No 'YES' but at least one 'MAYBE'
3. 'NO' to all of the above

A5. Have you ever lost a significant amount of money in any <u>other kind of fraudulent investment</u> not mentioned previously?

1. Yes [QUALIFIER]
2. Maybe
3. No

A6. [PUNCH RESPONDENT STATUS FROM A4 & A5]

1. Yes – specific [A4 = 1]
2. Maybe – specific [A4 = 2]
3. Yes – other [A4 = 3 AND A5 = 1]
4. Maybe – other [A4 = 3 AND A5 = 2] [TERMINATE]
5. No [A4 = 3 AND A5 = 3] [TERMINATE]

[ALL RESPONDENTS MUST SAY 'YES' OR 'MAYBE' TO AT LEAST ONE ITEM IN A3, OR 'YES' TO A5]

B. [Fraud Experience]

For the following questions, please think about the fraudulent or potentially fraudulent incident you experienced that you consider to be the most serious.

B1. How much did you lose?

1. Did not lose any money [TERMINATE]

---

2. $1 to $500
3. $500 to $999
4. $1,000 to $4,999
5. $5,000 to $9,999
6. $10,000 to $49,999
7. $50,000 to $99,999
8. $100,000 or more
9. Can’t remember how much

B2. How long ago did the incident happen?

1. Within the past 12 months
2. 1 to 3 years ago
3. 4 to 5 years ago
4. More than 5 years ago
5. Don’t know/Can’t remember

B3. How were you introduced to the person or entity that defrauded you? [RANDOMIZE LIST]

1. Through a friend or family member
2. Through a social setting such as a place of worship or school
3. Through a professional contact
4. From an unsolicited telephone call
5. From an unsolicited email
6. From an Internet advertisement (including Craigslist)
7. Though a social networking website (Facebook, LinkedIn, Twitter, Google+)

10. From a newspaper or magazine advertisement

8. Other (please specify) ___________________ [OPEN END]
9. Don’t know/Can’t remember

B4. Did you report this incident to the authorities?

1. Yes
2. No
3. Don’t know

B5. [IF REPORTED (B4 = 1)] To whom did you report it? (check all that apply) [RANDOMIZE LIST]
1. The firm that sold the investment
2. The city, county or state Consumer Affairs office
3. NASD or FINRA
4. State regulatory agency
5. Securities and Exchange Commission (SEC)
6. Law enforcement
7. Federal Trade Commission (FTC)
8. Better Business Bureau (BBB)
9. An attorney
10. My bank or credit card company
11. Other (please specify) ___________________ [OPEN END]
12. Don't know/Can't remember [UNIQUE]

B6. [IF NOT REPORTED (B4 = 2)] Which of the following best describes why you did not report the incident? (check all that apply) [RANDOMIZE LIST]
1. Didn't know where to turn
2. Wouldn't have made a difference
3. Didn't have time
4. Wanted to put it behind me
5. Was embarrassed
6. Other (please specify) ___________________ [OPEN END]
7. Don't know [UNIQUE]

B7. Did you tell any friends or family members about the incident?
1. Yes
2. No
3. Don't know

B8. To what degree are you confused about the details of what happened?

Not At All Confused									Extremely Confused	Don't Know
1	2	3	4	5	6	7	8	9	10	11

B9. How certain are you that what happened was due to fraud?

Not At All Certain									Extremely Certain	Don't Know
1	2	3	4	5	6	7	8	9	10	11

B10. How much interaction did you have with the person or entity that defrauded you?
1. Very little (e.g., you just responded to the initial call or contact)
2. Moderate (e.g., you communicated back and forth a few times)
3. A great deal (e.g., you communicated many times, filled out a great deal of paperwork, etc.)
4. Don’t know

B11. How responsible do you feel for what happened?

Not At All Responsible									Completely Responsible	Don’t Know
1	2	3	4	5	6	7	8	9	10	11

B12. How well does each of the following describe how you felt about the incident?

[RANDOMIZE ITEMS]	Does Not Describe At All									Describes Extremely Well	Don’t Know
B12_1. Confused	1	2	3	4	5	6	7	8	9	10	11
B12_2. Angry	1	2	3	4	5	6	7	8	9	10	11
B12_3. Victimized	1	2	3	4	5	6	7	8	9	10	11
B12_4. Embarrassed	1	2	3	4	5	6	7	8	9	10	11
B12_5. Sad	1	2	3	4	5	6	7	8	9	10	11
B12_6. Guilty	1	2	3	4	5	6	7	8	9	10	11
B12_7. Betrayed	1	2	3	4	5	6	7	8	9	10	11
B12_8. Ashamed	1	2	3	4	5	6	7	8	9	10	11
B12_9. Regretful	1	2	3	4	5	6	7	8	9	10	11
B12_10. Helpless	1	2	3	4	5	6	7	8	9	10	11

C. [Non-traditional costs/collateral damage]

[Indirect financial costs]

C1. As a result of the fraudulent incident, did you incur any of the following additional financial costs?

[RANDOMIZE ITEMS]		Yes	No	Don't know
C1_1.	Legal fees	1	2	3
C1_2.	Fees for bounced checks	1	2	3
C1_3.	Late fees/interest	1	2	3
C1_4.	Fees for consulting a medical or mental health professional	1	2	3
C1_5.	Fees for prescription medications	1	2	3
C1_6.	Lost work time/Lost wages	1	2	3
C1_7.	Fees for consulting a private detective or investigator	1	2	3

C2. [IF 'YES' TO AT LEAST ONE OF THE ABOVE] What would you estimate the total additional financial cost to be, including: [pipe in answers from C1]? Your best guess is fine.

1. $0
2. $1 to $49
3. $50 to $99
4. $100 to $499
5. $500 to $999
6. $1,000 to $9,999
7. $10,000 to $24,999
8. $25,000 or more
9. Don't know

C3. Have you declared bankruptcy as a result of the fraudulent incident?

1. Yes
2. No
3. Don't know

[Non-financial costs]

C4. The following are some symptoms people may experience as a result of a fraudulent incident. How seriously did you experience each of the following after your incident?

If you did not have the symptom, select "did not experience."

[RANDOMIZE ITEMS]		Not At All Serious									Extremely Serious	Did not experience	Don't know
C4_1.	Stress	1	2	3	4	5	6	7	8	9	10	11	12
C4_2.	Anxiety	1	2	3	4	5	6	7	8	9	10	11	12
C4_3.	Depression	1	2	3	4	5	6	7	8	9	10	11	12
C4_4.	Difficulty sleeping	1	2	3	4	5	6	7	8	9	10	11	12
C4_5.	PTSD	1	2	3	4	5	6	7	8	9	10	11	12
C4_6.	Physical health problems	1	2	3	4	5	6	7	8	9	10	11	12
C4_7.	Negative relationship consequences (e.g., divorce, separation)	1	2	3	4	5	6	7	8	9	10	11	12
C4_8.	Loss of personal confidence	1	2	3	4	5	6	7	8	9	10	11	12
C4_9.	Loss of respect from others	1	2	3	4	5	6	7	8	9	10	11	12
C4_10.	Lost personal time	1	2	3	4	5	6	7	8	9	10	11	12

D. [Attitudes]

D1. Please indicate the extent to which you agree or disagree with each of the following statements.

[RANDOMIZE ITEMS]		Strongly Disagree									Strongly Agree	Don't Know
D1_1.	I'm not that upset by the fraudulent incident. You win some, you lose some.	1	2	3	4	5	6	7	8	9	10	11
D1_2.	I prefer <u>not</u> to tell people about the incident because I'm worried they might think it was my fault.	1	2	3	4	5	6	7	8	9	10	11
D1_3.	I know I shouldn't do it, but it's hard to resist tempting financial offers.	1	2	3	4	5	6	7	8	9	10	11
D1_4.	I blame myself for being defrauded.	1	2	3	4	5	6	7	8	9	10	11
D1_5.	I feel like I learned something from the experience.	1	2	3	4	5	6	7	8	9	10	11
D1_6.	The offer seemed too good to be true. I should have trusted my instincts.	1	2	3	4	5	6	7	8	9	10	11
D1_7.	I'm not sure how to feel about the situation.	1	2	3	4	5	6	7	8	9	10	11
D1_8.	I never understood exactly what happened.	1	2	3	4	5	6	7	8	9	10	11
D1_9.	I was defrauded because I was too trusting.	1	2	3	4	5	6	7	8	9	10	11
D1_10.	Everyone else was making a lot of money, so I was trying to do the same.	1	2	3	4	5	6	7	8	9	10	11
D1_11.	I've probably been defrauded other times in the past without knowing it.	1	2	3	4	5	6	7	8	9	10	11

E. Psychographics

E1. The following are questions that have to do with how you see yourself. Everyone answers these questions differently. Please try to be as accurate and honest as you can, and try not to let your answer to one question influence your answers to other questions.

Please indicate the extent to which you, personally, agree with each of the following statements using a 10-point scale, where 1 means "Strongly Disagree" and 10 means "Strongly Agree."

[RANDOMIZE ITEMS]		Strongly Disagree									Strongly Agree	Don't know
E1_1.	I always look on the bright side of things	1	2	3	4	5	6	7	8	9	10	11
E1_2.	I tend to worry a lot	1	2	3	4	5	6	7	8	9	10	11
E1_3.	I consider myself a risk-taker	1	2	3	4	5	6	7	8	9	10	11
E1_4.	It's always better to be safe than sorry	1	2	3	4	5	6	7	8	9	10	11
E1_5.	I often rely on, and act upon, the advice of others	1	2	3	4	5	6	7	8	9	10	11
E1_6.	I prefer to make my own way in life rather than find a group I can follow	1	2	3	4	5	6	7	8	9	10	11
E1_7.	A charismatic and eloquent person can easily influence and change my ideas	1	2	3	4	5	6	7	8	9	10	11
E1_8.	I don't give in to others easily	1	2	3	4	5	6	7	8	9	10	11
E1_9.	My life is determined by my own actions	1	2	3	4	5	6	7	8	9	10	11
E1_10.	I am usually able to protect my personal interests	1	2	3	4	5	6	7	8	9	10	11

		Strongly Disagree									Strongly Agree	Don't know
E1_11.	I can pretty much determine what will happen in my life	1	2	3	4	5	6	7	8	9	10	11
E1_12.	To a great extent my life is controlled by accidental happenings	1	2	3	4	5	6	7	8	9	10	11
E1_13.	Often there is no chance of protecting my personal interests from bad luck happening	1	2	3	4	5	6	7	8	9	10	11
E1_14.	When I get what I want, it's usually because I am lucky	1	2	3	4	5	6	7	8	9	10	11
E1_15.	People like myself have very little chance of protecting our personal interests when they conflict with those of strong pressure groups	1	2	3	4	5	6	7	8	9	10	11
E1_16.	My life is chiefly controlled by powerful others	1	2	3	4	5	6	7	8	9	10	11
E1_17.	I feel like what happens in my life is mostly determined by powerful people	1	2	3	4	5	6	7	8	9	10	11

F. [Demographics & Classification]

F1. When thinking of your financial investments, how willing are you to take risks? Please use a 10-point scale, where 1 means "Not At All Willing" and 10 means "Very Willing."

Not At All Willing									Very Willing	Don't Know	Prefer not to say
1	2	3	4	5	6	7	8	9	10	11	12

F2. The following questions are for classification purposes only. As with the rest of the survey, your answers are completely confidential and anonymous.

F3. Not including retirement accounts, do you have any investments in stocks, bonds, mutual funds, or other securities?

1. Yes
2. No
3. Don't know
4. Prefer not to say

F4. [IF YES TO F3] Not including retirement accounts, what is the total approximate current value of your investments in stocks, bonds, mutual funds and other securities? Would you say it is…

1. Less than $10,000
2. At least $10,000 but less than $50,000
3. At least $50,000 but less than $100,000
4. At least $100,000 but less than $250,000
5. More than $250,000
6. Don't know
7. Prefer not to say

F5. What is your household's approximate annual income, including wages, tips, investment income, public assistance, income from retirement plans, etc.? Would you say it is…

1. Less than $15,000
2. At least $15,000 but less than $25,000
3. At least $25,000 but less than $35,000
4. At least $35,000 but less than $50,000
5. At least $50,000 but less than $75,000
6. At least $75,000 but less than $100,000
7. At least $100,000 but less than $150,000
8. $150,000 or more
9. Don't know
10. Prefer not to say

F6. Which of the following best describes your current employment or work status?
1. Self employed
2. Work full-time for an employer
3. Work part-time for an employer
4. Homemaker
5. Full-time student
6. Permanently sick, disabled, or unable to work
7. Unemployed or temporarily laid off
8. Retired
9. Prefer not to say

F7. What was the last year of education that you completed?
1. Less than high school
2. High school graduate
3. Some college
4. College graduate
5. Post graduate education
6. Prefer not to say

F8. Which of the following best describes your race or ethnicity? (check all that apply)
1. White or Caucasian
2. Black or African-American
3. Hispanic or Latino/a
4. Asian/Pacific Islander
5. Native American or Alaska Native
6. Other
7. Prefer not to say [UNIQUE]

F9. What is your marital status?
1. Married
2. Living with partner
3. Single
4. Separated
5. Divorced
6. Widowed/widower
7. Prefer not to say

F10. How many children do you have who are financially dependent on you? Please include children not living at home, and step-children as well.
1. 1
2. 2
3. 3
4. 4 or more
5. No financially dependent children
6. Do not have any children
7. Prefer not to say

Thank you for your time!

ELDER ABUSE
Pocket Reference

A Medical/Legal Resource for California Judicial Officers

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS

CENTER OF EXCELLENCE ON ELDER ABUSE AND NEGLECT
UNIVERSITY *of* CALIFORNIA, IRVINE

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PROGRAM IN GERIATRICS
UC IRVINE SCHOOL OF MEDICINE

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Judicial Council of California
Administrative Office of the Courts
Center for Families, Children & the Courts
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www.courts.ca.gov

This reference guide is also available on the California Courts website:
www.courts.ca.gov/programs-collabjustice.htm

CONTRIBUTORS

Lisa M. Gibbs, MD
Laura Mosqueda, MD
Elaine A. Chen, MS
Mary S. Twomey, MSW
Bradley Williams, PharmD, CGP
Eve Hershcopf, AOC Associate Attorney
Donna Strobel, AOC Education Specialist

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Hon. Donna L. Hitchens (ret.), Superior Court of California, County of San Francisco
Hon. Kim R. Hubbard, Superior Court of California, County of Orange
Hon. Lon F. Hurwitz, Superior Court of California, County of Orange
Hon. Sue M. Kaplan, Superior Court of California, County of San Francisco
Hon. Ronald P. Kreber, Superior Court of California, County of Orange
Hon. Newton J. Lam, Superior Court of California, County of San Francisco
Hon. Caryl A. Lee, Superior Court of California, County of Orange
Hon. Cynthia Ming-Mei Lee, Superior Court of California, County of San Francisco
Hon. Michael J. Naughton, Superior Court of California, County of Orange
Hon. Nancy A. Pollard, Superior Court of California, County of Orange
Hon. Thomas H. Schulte, Superior Court of California, County of Orange
Hon. Mary Fingal Schulte, Superior Court of California, County of Orange
Hon. Marjorie A. Slabach (ret.), Superior Court of California, County of San Francisco
Hon. Mary E. Wiss, Superior Court of California, County of San Francisco
Hon. Garrett L. Wong, Superior Court of California, County of San Francisco

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MEDICAL INFORMATION

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INTRODUCTION

The concept for this "Pocket Reference" was born out of the idea that it would be helpful for judicial officers who see elders in their courts to have easy access to relevant medical and legal information regarding elder abuse. Judges interact with older adults who participate in court as parties, jurors, witnesses, victims, conservatees, and defendants. Abuse may be a factor affecting an elder who is appearing in any of these roles. Judicial officers will need to be aware of elder abuse whether concerns about abuse are brought before the court directly or arise indirectly.

This guide is intended to serve as a concise resource for judicial officers involved in the criminal, civil, family law, probate and mental health courts. The legal portion provides a limited discussion of protective orders available to address elder abuse and a very brief description of conservatorships. The guide also reviews judicial system issues and responses to elder abuse, and references relevant provisions of the California Code. The medical portion includes an overview of characteristic elements of physical abuse and how they are evaluated, and information on assessing elders' cognition and functional abilities. It briefly describes the most common medical conditions facing the geriatric population, and lists medications commonly prescribed for elders. This Pocket Reference is intended for informational purposes only.

Note: The focus of this Pocket Reference is elder abuse. Although the Elder Abuse and Dependent Adult Civil Protection Act also addresses protections for dependent adults, the specialized information pertaining to dependent adults is beyond the scope of this guide and therefore is not included.

Legal Information

I. ELDER ABUSE *and the* COURTS

A. Elder Population Demographics and Elder Abuse

ELDER CALIFORNIANS

- California currently has more than 4.2 million people age 65 and older, 11.4% of the state's population and the largest number of elders of any state in the country.
- The number of Californians ages 65 and older is increasing; elders who are more than 80 years old represent the fastest-growing segment of the population.
- In 2020, when the population of Californians age 65 and older increases to more than 6.1 million (15% of the total population), nearly one million of those elders will be at least 85 years old.
- By 2040, there will be nearly 9.7 million California elders 65 years old and older (20% of the population).
- Approximately 13% of people age 65 and older, and nearly half of people 85 and older, have Alzheimer's disease.

SOURCE: California Department of Finance, *Interim Population Projections for California and Its Counties 2010-2050*, May 2012. www.dof.ca.gov/research/demographic/reports/projections/interim/view.php

As our state's population ages, more elders will appear in court. Medical and psychological issues will be a factor in many cases since increased life expectancy carries an increased likelihood of living with chronic disease, Alzheimer's, and other health problems associated with old age. Some of these court cases will also involve elements of physical, mental, and financial abuse of elders.

Elder abuse is a somewhat hidden problem in society and in the justice system and may be an underlying factor in a variety of court cases involving older persons.

In California:

- The Department of Justice estimates that 1 in 20 elders is a victim of neglect or physical, psychological, or financial abuse.
- Most abuse occurs in elders' homes or other domestic settings.
- Adult Protective Services (APS) agencies received more than 110,000 reports of elder and dependent adult abuse in 2006-07.
- For every reported case of elder abuse, it is estimated that five cases are never reported.

Impact of elder abuse:

- Earlier morbidity for the elder, with the risk of death three times higher than for non-victims.
- Significant health effects, including declining functional abilities; this often leads to progressive dependency, social isolation, a sense of helplessness, and a cycle of worsening stress and psychological decline.

B. Elements of Elder Abuse

1) ABUSIVE ACTIONS

Elder abuse:

- encompasses a range of conduct by an alleged abuser;
- results in the mistreatment or exploitation of an older adult;
- causes harm or creates a serious risk of harm.

This mistreatment, exploitation or neglect is usually intentional but occasionally may be unintentional. In many cases, elder abuse is not a single act but a series of actions or failures to act that cause harm to an elderly person. Situations that come before the court often involve more than one type of abuse.

The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), (Welfare & Institutions Code §§15600-15675), California's statutory scheme protecting elder and dependent adults from abuse by caretakers and others, defines abuse of an elder or dependent adult to mean the following (Welfare & Institutions Code §15610.07):

(a)		(b)
• Physical abuse • Neglect • Financial abuse • Abandonment • Isolation • Abduction, or • Other treatment with resulting physical harm or pain or mental suffering.	*and/or*	The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

Welfare & Institutions Code §§15610-15610.65 provide definitions for each element of this description of elder abuse. (See Appendix A(1), Elder Abuse and Dependent Adult Civil Protection Act, page 72, for a listing of these definitions).

ABUSIVE ACTIONS

- May involve acts of commission or acts of omission (failure by a caregiver to meet the elder's basic needs or to protect the elder from harm).
- May or may not constitute criminal conduct.
- May include physical, mental, emotional or sexual harm, financial exploitation, neglect, abandonment, or isolation. Often, more than one form of abuse is present.
- Usually involves psychological abuse in addition to other forms of abuse.
- May be used to achieve a desired outcome such as convincing the elder to give up assets (financial abuse).
- May be perpetrated by someone close to the elder or, particularly for financial exploitation, by a stranger.
- Occurs most often within private residences, with less than 5% occurring within facility settings.
- May include self-neglect.

In reports involving abuse or neglect by others (not self-neglect), the allegations were most likely to be related to financial abuse (33 percent), psychological abuse (25 percent), and neglect (23 percent). Victims of one form of elder abuse are at the highest risk for other types of abuse.

2) SELF-NEGLECT

Self-neglect is an elder's inability to provide for his or her basic needs for food, clothing, shelter, and medical care, or to manage his or her financial affairs.

Self-neglect often occurs as a result of:

- poor cognitive functioning (due to age, illness, or failure to take medication as prescribed)
- mental limitation
- substance abuse
- chronic poor health

Self-neglect may be an outcome of earlier victimization, and frequently co-occurs with elder abuse perpetrated by others.

Elders' self-neglect has been coming to the attention of law enforcement and code enforcement officials more frequently, and thus is increasingly likely to enter the justice system. Almost half of reports to Adult Protective Services (APS) concern self-neglect. These cases may involve hoarding or cluttering behavior, or animal collecting. Self-neglect cases often arise in the context of conservatorships, and involve complex legal determinations regarding capacity and competency. See section I-E(2), Capacity and Competency, page 19, and section III, Conservatorships, page 32.

3) FINANCIAL ABUSE

Elder financial abuse can take many forms and may be committed by family members, caregivers, or other people known to the elder, or may be perpetrated by strangers. The impact of financial exploitation can be as profound as physical abuse. Elders are rarely able to rebuild their financial assets or recoup their losses. The result can be reduced independence and security for the elder, increased dependence on family, and greater reliance on public assistance and social welfare programs.

There are some obvious reasons for financial abuse of elders:

- People over age 50 own 70% of the nation's private wealth, often in the form of savings or real estate.
- California elders over age 65 currently represent only 11.4% of the population, but hold 23% of the aggregate value of owner-occupied housing units.

TYPES OF ELDER FINANCIAL ABUSE

Financial Abuse by Family Members or Caregivers

- Taking the elder's money or personal property.
- Borrowing money repeatedly and not paying it back.
- Denying services or medical care to conserve funds.
- Persuading the elder to part with an asset when to do so is likely to harm the elder.
- Using abuse or neglect to convince the elder to give up assets.
- Giving away or selling the elder's possessions without permission.
- Signing or cashing pension or social security checks without permission.
- Forcing the elder to part with resources or sign over property.

Financial Abuse by Strangers

- **Prizes or sweepstakes:** Inducing an elder to send money to cover taxes, shipping, or processing fees. The prize may never arrive or if it does, it may be of little to no value.
- **Investments:** Convincing an elder to invest in nonexistent companies or worthless property, or inappropriate investment vehicles such as annuities that are not likely to pay out during the elder's lifetime.
- **Home and automobile repairs:** Requiring an elder to put down advance deposits for repairs. The work may never be completed or may be substandard. In many cases, the repairs aren't truly needed.
- **Loans and mortgages:** Convincing an elder to enter into a predatory lending scheme or a reverse mortgage that does not benefit him/her.
- **Lottery scams.**
- **Telemarketing and mail fraud** (often used as tools for identity theft).

The misuse of legal instruments such as powers of attorney is another form of financial elder abuse, and may include:

- falsification of records;
- using funds for the personal benefit of the person holding the power of attorney rather than for the benefit of the elder.

When the power of attorney is held by a responsible person, it can be a very effective tool for managing an elder's affairs. Given the potential value of this legal instrument to elders, its misuse is a particularly unfortunate form of financial abuse because it undermines public confidence in this tool and reduces the likelihood that elders will recognize the benefits a power of attorney can provide.

The Elder and Dependent Adult Civil Protection Act (EADACPA) specifically includes financial abuse in the definition of abuse (Welfare & Institutions Code §15610.30(a),(d)). Civil protective orders may be available under some circumstances for financial abuse (Welfare & Institutions Code §15657.03); (see section II, Protective Orders, page 25).

In addition to the EADACPA, there are numerous other legal protections potentially available for victims of financial abuse. The most significant is Penal Code §368 which provides for criminal sanctions against perpetrators of financial abuse crimes. Section 368 recognizes that crimes against elders deserve special consideration and applies additional sanctions for theft or embezzlement crimes committed against elderly victims, and for those who inflict unjustifiable mental suffering on an elder or dependent adult.

Other potential legal protections for financial abuse are noted in Appendix A(8), Financial Abuse of Elders, page 80.

C. Dynamics of Elder Abuse

Complex interpersonal elements are often associated with elder abuse. In cases involving abusers who are close to the elder, there can be long-standing dynamics that have existed throughout the relationship that may increase in severity as the elder becomes more vulnerable and dependent. Although there is no single profile for a victim of elder abuse, with elders of all racial, ethnic, socioeconomic and religious backgrounds potentially at risk, research has identified certain factors as being predictors of an increased likelihood of elder abuse occurring.

RISK FACTORS FOR ABUSE

Victim

- Dependent on the abuser;
- Physical or mental frailty;
  - Nearly two-thirds of elders whose abuse was reported to Adult Protective Services were affected by major medical issues.
  - More than half of abused elders had some degree of cognitive impairment, most commonly dementia.
- Socially isolated;
- Verbally or physically aggressive;
- History of substance abuse or mental health issues;
- Hesitant to use the social services system.

Abuser

- Relationship with the victim (42% of alleged abusers were intimate partners, adult children or other family members; 16% were caregivers);
- Dependent on the victim;
- Younger (approximately two-thirds of abusers were under age 60);
- Suffering from a disturbed psychological state;
- Resentful of providing care;
- History of substance abuse or mental health issues;
- History of generational abuse (domestic violence, child abuse);
- Previous history of elder abuse in a caregiving context.

SOURCE: National Center on Elder Abuse (2006), *Abuse of Adults Aged 60+: 2004 Survey of Adult Protective Services.*

One theory of elder abuse has identified "caregiver stress" as the basis for abuse. While it is true that the responsibilities of being a caretaker can be overwhelming, especially for families with few resources, more recent research does not support "caregiver stress" as the *primary* cause of abuse in most cases. Even in those cases where stress may be a contributing factor, it is not a legal justification for abuse. In these cases, it is important to ensure that the elder receives protection, and that both the elder and caregiver receive support to alleviate the stress.

Elders who are abused are similar to victims of domestic violence or child abuse in that they are often reluctant to tell anyone about the abuse because they:

- do not want to see themselves as victims and are in denial;
- are ashamed;
- believe the abuse is their fault;
- do not want to get the abuser in trouble.

The reluctance of a victim to report abuse may be an outcome of abuser manipulation and other tactics. Abusers may portray the elder victims as unreliable, forgetful, or "poor witnesses" to minimize or justify their conduct.

FACTORS THAT MAY AFFECT AN ELDER'S WILLINGNESS OR ABILITY TO REPORT ABUSE

The victim's:

- dependence on the abuser for care and companionship;
- dementia or other mental health issues;
- frailty or lack of mobility;
- fear of reprisal, abandonment, or loss of independence (placement in a nursing home);
- fear of involvement with the legal system;
- not knowing where to turn for help;
- having responsibilities as the caregiver for the abuser.

If the abuser is the elder's own child there may be particularly complicated dynamics which lead the elder to minimize the abuse. These include:

- parents' inclination to protect their child rather than consider their own personal safety;
- feelings of guilt, shame or embarrassment because the elder attributes the abuse to poor child raising;
- desire to maintain contact with children and grandchildren;
- fear that the child will become homeless if the elder reports the abuse;
- the abuser's manipulation of the elder's emotions, including parental love.

All of these issues may be exacerbated by limited community resources to assist elders and their caregivers.

Non-English speaking elders face additional challenges such as lack of access to linguistically and culturally familiar assistance, and the fact that an act that constitutes elder abuse in American culture may not be viewed as elder abuse by someone from another culture. As California's elderly population grows in number, it will also grow in racial and ethnic diversity. Courts and agencies serving elders may need to make modifications to increase the effectiveness of their interventions in abuse cases involving elders from all of California's diverse communities.

D. California's Approach to Addressing Elder Abuse

California has developed a sophisticated approach to addressing elder abuse with three related prongs: the Elder Abuse and Dependent Adult Civil Protection Act, the Adult Protective Services program, and the Long-Term Care Ombudsman program.

1) ELDER ABUSE AND DEPENDENT ADULT CIVIL PROTECTION ACT

California's Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), Welfare & Institutions Code §§15600-15675, enacted in 1992, recognizes that the state has a responsibility to protect elders and dependent adults from abuse. The EADACPA is vital in providing protections for dependent adults; this Pocket Reference, however, focuses specifically on the EADACPA protections provided in response to allegations of elder abuse.

> ***Legislative Intent:***
> "to provide that adult protective services agencies, local long-term care ombudsman programs, and local law enforcement agencies shall receive referrals or complaints from…source(s) having reasonable cause to know that the welfare of an elder or dependent adult is endangered, and shall take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety."

The Elder Abuse and Dependent Adult Civil Protection Act

- requires every member of an elderly or dependent adult's care team to report all suspected physical, mental, emotional or financial abuse of dependent or elderly adults;

- provides specific information about how these abuse reports should be handled and investigated by local agencies carefully sharing their information with one another;
- provides protection to those who report alleged abuse for positive (nonmalicious) reasons;
- provides for the criminal prosecution of individuals suspected of abusing, neglecting or abandoning a dependent or elderly person in their care;
- provides protection for elder or dependent adults with or without a criminal prosecution;
- provides that elder or dependent adults (or their conservators) can sue for attorney fees and other damages once an abuser has been criminally convicted.

Note: In California, in addition to the EADACPA, a wide range of laws directly address various forms of elder abuse; other laws can be relevant in cases in which actual or suspected elder abuse is an issue. Appendix A, page 71, contains a list of many of these laws.

2) ADULT PROTECTIVE SERVICES (APS)

The Adult Protective Services program (Welfare & Institutions Code §§15750-15766) requires each county welfare department to establish and support a system of protective services to elderly and dependent adults who may be subjected to neglect, abuse, or exploitation, or who are unable to protect their own interests. Each county is also required to maintain a specialized entity with lead responsibility for the operation of the adult protective services program (Welfare & Institutions Code §§15751, 15752).

Counties are charged with providing case management services to elders and dependent adults who are determined to be in need of Adult Protective Services for the purpose of "bringing about changes in the lives of victims and to provide a safety net to enable victims to protect themselves in the future" (Welfare & Institutions Code 15763(d)).

Adult Protective Services Agencies:

- Are located in every California county;
- Help elder and dependent adults when they are unable to meet their own needs, or are victims of abuse, neglect or exploitation;
- Investigate reports of abuse of elders and dependent adults who live in private homes and hotels, or who are in hospitals and health clinics (when the abuser is not a staff member).

Note: The Long-Term Care Ombudsman's office, administered by the California Department of Aging, is the agency that investigates reports of abuse that occur in nursing homes, board and care homes, residential facilities for the elderly or long term care facilities. A more complete description of the Long Term Care Ombudsman's office is provided in section I-D(3), page 17.

SERVICES PROVIDED BY ADULT PROTECTIVE SERVICES AGENCIES

- In-person responses to reports of abuse, and immediate intake or intervention for reports involving life-threatening situations and crises.
- Crisis intervention and, to the extent resources are available, shelter and appropriate care for frail and disabled victims who are in need of assistance with activities of daily living.
- Investigations, needs assessments, remedial and preventive social work activities, tangible resources such as food, transportation, household goods, emergency shelter, and in-home protective care.
- Case management; money management; referrals to geriatric mental health, domestic violence, sexual assault, victim assistance and other services, counseling, monitoring, follow-up and reassessment.
- Assistance with obtaining advocacy services, out-of-home placements, or conservatorships.
- Development of interagency treatment strategies to ensure maximum coordination with existing community resources, and to avoid duplication of efforts.

Receipt of APS services is voluntary; adults who are offered APS services must consent to receive them. Mandated reporters of elder abuse, however, are authorized to provide information to APS or other agencies investigating elder abuse, and may cooperate in the investigation without prior consent of the victim (Welfare & Institutions Code §15630).

See:

- Report of Suspected Dependent Adult/Elder Abuse, California Department of Social Services Form SOC341: www.dss.cahwnet.gov/cdssweb/entres/forms/English/SOC341.pdf.
- Report of Suspected Dependent Adult/Elder Financial Abuse, California Department of Social Services Form SOC342: www.dss.cahwnet.gov/cdssweb/entres/forms/English/soc342.pdf.

3) LONG-TERM CARE OMBUDSMAN PROGRAM

A significant percentage of elders reside in various types of care facilities. Although the majority of reported abuse cases occur in elders' own residences, those who reside in facilities are also at risk, Elders have a legal right to be free from verbal, mental, physical and sexual abuse and corporal punishment in nursing homes and other institutional settings.

The primary responsibility of the California State Long-Term Care Ombudsman Program, (Welfare & Institutions Code §§9700-9741) is to investigate and endeavor to resolve complaints made by, or on behalf of, individual residents in facilities.

Facilities covered by the Ombudsman program include:

- nursing homes
- residential care facilities for the elderly
- board and care homes
- long-term care
- assisted living facilities

Institutional neglect or substandard care includes failure to:

- provide medical care for physical and mental health needs;
- attend to hygiene;
- provide adequate staffing;
- prevent malnutrition and dehydration.

This neglect or substandard care may be exacerbated or hidden through falsification of patient charts.

The Ombudsman must have the elder's permission to report the abuse unless the Ombudsman personally witnessed abuse of the elder or unless there is a violation of the Penal Code (Welfare & Institutions Code §15636). Mandated reporters, however, are authorized to provide information to the Ombudsman, Adult Protective Services or other agencies investigating elder abuse, and may cooperate in the investigation without prior consent of the victim (Welfare & Institutions Code §15630).

Detailed information regarding elder abuse in facilities and institutions is beyond the scope of this Pocket Reference; however, the Health & Safety Code addresses the following categories:

- Residential Care Facilities For Persons with Chronic Life-Threatening Illness, §§1568.01-1568.094
- Alzheimer's Day Care Resource Centers Act, §§1568.15-1568.17
- Residential Care Facilities For the Elderly §§1569-1569.889
- California Adult Day Care Health Act §§1570-1596.5
- Skilled Nursing and Intermediate Care Facility Patient's Bill Of Rights §§1599-1599.4

E. Elder Abuse Issues in the Courts

Judicial officers and staff throughout the court system may encounter elderly victims of abuse whether at the hands of a family member, a friend or neighbor, a caregiver in a home or institutional setting, or a stranger who takes advantage of the elder's trust. Elder victims of abuse may appear before the court as defendants, plaintiffs, witnesses, jurors, petitioners, respondents, conservatees and/or victims.

1) CASE TYPES

Elder abuse cases can enter the court in the form of:

- criminal cases;
- family law cases;
- cases regarding health care decisions for incapacitated persons;
- civil harassment;
- domestic violence;
- lawsuits against facilities;
- proceedings following a report to Adult Protective Services;
- probate & Lanterman-Petris-Short (LPS) conservatorships (many conservatorships are established in response to abuse);
- mental health commitment;
- civil fraud and conversion;
- personal injury;
- traffic;
- unlawful detainer (for example, an elder trying to evict an adult child who is not paying rent, is stealing from the elder, or has a drug problem);

- adult adoptions (for example, someone convincing an elder to adopt him or her in order to get access to the elder's estate);
- juvenile (abuse of elder family member or unrelated elder);
- other areas of law.

While some types of cases are initiated to address elder abuse directly, many cases are not, and these cases require judicial officers and court staff to recognize different forms of abuse or symptoms of abuse, and to be sensitive to elders' needs in navigating court processes. See section V-A, Assessing for Abuse, page 41.

2) CAPACITY AND COMPETENCY

A complex issue that may come into play in a variety of cases involving elder abuse is the "capacity" of the elder. Judicial officers often face a challenging task in addressing capacity issues that may be raised directly or indirectly.

WHAT IS CAPACITY

- the cluster of mental skills, such as memory and logic, as well as behavioral and physical functioning that people use in everyday life;
- a continuum of decision-making abilities;
- rarely lost completely or globally, except in very severe cases (in the early phases of dementia/Alzheimer's, the elder can often recall, state their desires, and testify appropriately);
- contextual, and varies by the complexity of the task or the decision;
- an element that should always be evaluated in relation to the particular act that is at issue (e.g., signing over a home, creating a will, marrying, testifying about abuse). The more significant the decision and the consequences of the decision, the higher the level of capacity required.

An individual's "capacity" is evaluated in the context of tasks and abilities. These may include an elder's capacity to manage his/her own financial affairs, capacity to make medical decisions, and capacity to provide appropriate food, clothing and shelter for himself/herself.

Elder litigants can have dementia or other capacity issues that require the court to ascertain whether they are competent to:

- care for themselves;
- take various types of actions that have legal ramifications;
- participate in litigation.

A civil case may focus on whether an elder had the capacity to understand a contract before entering into it. In a criminal case or an application for a protective order, questions about the elder's capacity may be raised by the abuser as a defense or by the prosecutor as an indicator of the elder's vulnerability to abuse. Since many abused elders have cognitive impairments, understanding the elder's capacity will be critical to understanding the context in which the alleged abuse took place. See section V-B, Assessing Cognition, page 50.

Capacity can fluctuate over time, situations and tasks:

- Capacity assessments may be misleading if conducted at a time that is not representative of the elder's true level of functioning, and may be affected by the time of day ("sundowning").
- Capacity issues are not necessarily permanent – they may wane or completely subside as injuries heal, as illnesses or medications that cause delirium are changed, as dehydration and malnutrition are addressed, and as depression is treated.
- Courts may monitor improvements to capacity or may need to impose only a short term intervention. The court may need to modify orders to address increased and then decreased capacity and abilities as the disease progresses. See definitions in section IX, Common Medical Conditions and Geriatric Syndromes, for delirium (page 57), dementia (page 58) and depression (page 59).

Note: Judicial officers should inquire into all medications the elder or dependent adult may be taking, including prescription, over-the-counter, and the medications of others (usually done to save money), all physical conditions and any recent surgeries under general anesthesia as any or all of these may temporarily affect capacity by causing "faux" dementia.

The court may also be required to decide whether there is a need for a conservatorship. Capacity is obviously a central issue in probate conservatorships. Probate Code §810 includes a rebuttable presumption that all persons have capacity to make decisions. Section 811 requires each judicial determination that a person lacks legal capacity to perform a specific act to be *based on evidence of a deficit that significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.*

The legal term "competency" is closely related to the concept of "capacity"; laypeople often use these terms interchangeably. However, a person's competency is a legal determination based on many factors, including whether a person had the capacity to understand or take an action. Being competent or having adequate capacity is a judgment of an elder's decision-making abilities; elements include choice, reasoning, understanding, and appreciation of consequences. Judicial officers face many complexities in determining competency of an elder. These include lack of consistent legal standards and difficulty in obtaining mental health assessments of elders, though such assessments are often critical for determining competency or adjudicating a case. See section V-B, Assessing Cognition, page 50.

3) UNDUE INFLUENCE

"Undue influence" is the misuse of one's role and power to exploit the trust, dependency, or fear of another to deceptively gain control over that person's decision-making. California defines undue influence by statute in Civil Code §1575:

- In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him/her, of such confidence or authority for the purpose of obtaining an unfair advantage over him/her;
- In taking an unfair advantage of another's weakness of mind; or
- In taking a grossly oppressive and unfair advantage of another's necessities or distress.

Undue influence is not in and of itself a form of abuse, but it is a pattern of manipulative behaviors that can be used as a means to abuse an elderly person, especially through financial exploitation or sexual abuse. Although a lack of capacity is not required for undue influence to occur, capacity issues may make it easier for an abuser to exert undue influence and assert his or her will over an elder.

When undue influence is present, the victim appears to agree or acquiesce to something that eventually leads to the victim's loss of property, assets, or independence. Warning signs that undue influence is at play include:

- isolation of the elder by the abuser;
- the fostering of the elder's dependency on the abuser;
- emotional manipulation or exploitation of the elder's vulnerability by the abuser.

People of any age and any cognitive status can be vulnerable to undue influence, but individuals with diminished cognitive abilities are at greater risk of succumbing to undue influence. Cognitive assessments such as those described in section V-B, Assessing Cognition, page 50, may indicate an elder's susceptibility to undue influence.

Note: In California, a wide range of laws directly address various forms of elder abuse; other laws can be relevant in cases in which actual or suspected elder abuse is an issue. Appendix A, page 71, contains a list of many of these laws.

F. Judicial System Responses to Elder Abuse Cases

Judicial officers have a range of options for responding to elder abuse cases, including several designed to make court processes more accessible for elders.

Courts may:

- Offer direct calendaring of elder abuse matters;
- Limit unnecessary continuances;
- Use flexibility in scheduling to address the elder's need for rest, medication and meals;
- Take more frequent breaks;
- Provide case setting priority for elder abuse cases; (A party over age 70 has the right to petition for case setting priority which the court must grant if the party has a substantial interest in the action and the health of the party necessitates a preference to prevent prejudicing the elder's interest in the litigation. Code of Civil Procedure §36(a).)
- Improve physical accessibility to the courtroom;
- Permit/provide support persons (see next page).

Courts also have alternative methods for obtaining and preserving testimony of an elder victim or witness. These include:

- depositions;
- telephonic hearings;
- substituting an elder's court appearance with a conditional examination using a magistrate or court reporter;
- videoconferencing;
- using videotaped testimony.
  (Penal Code §§1335-1345)

The court may also provide protection for the abused party by:

- encouraging the preparation of a safety plan;
- determining whether a restraining or protective order should be issued (See section II, Protective Orders, page 25);
- ordering counseling or treatment (pursuant to a Domestic Violence Restraining Order, or as a term of probation in a criminal case);
- requiring the surrender of firearms, when appropriate.

Support Person for Elder in a Criminal Proceeding

An elder has the right to have a support person present during important points in the criminal process. These include:

- during any formal interview by law enforcement, prosecutors or defense attorneys, when the elder is the victim of a sexual assault (Penal Code §679.04);
- at a forensic examination (Penal Code §264.02);
- when an elder who is a prosecution witness and a "dependent person" is providing grand jury testimony (Penal Code §939.21);
- when testifying as a prosecution witness at a preliminary hearing, trial or juvenile court hearing in specified violence, sexual assault and child abduction cases (Penal Code §868.5).

Judicial officers hearing criminal matters are required to provide, upon request of a party, an instruction informing the jury that although an elder with a cognitive, mental, or communication impairment may perform differently as a witness, that does not mean the elder is any more or less credible a witness, and the jury should not discount the testimony solely on that basis. Penal Code §1127g. Courts can also encourage elder abuse victims to provide impact statements at sentencing.

Courts can impose requirements designed to make the victim of elder abuse whole by ordering:

- restitution;
- return of property.

Judicial officers may use principles from domestic violence and drug court models to protect the elder and assure abuser accountability by ordering:

- escalating sanctions against the abuser;
- frequent monitoring and reviews for confirmation of compliance with restraining orders;
- counseling and treatment;
- specific payment schedules.

Judicial officers may also develop innovative practices to address elders' needs such as:

- arranging courtrooms to improve accessibility;
- recruiting volunteers to assist elderly litigants with locating courtrooms and offices, completing court forms and applications, and reading court materials;
- providing court accompaniment and support;
- providing referrals to other types of assistance programs.

Communicating with Elderly Litigants

Judicial officers are aware of the need for clear and comprehensible communication within their courtrooms. However, when a case involves an elder with one or more disabilities, additional steps may be needed to enhance the likelihood of successful communication.

COURTROOM COMMUNICATION TIPS

- Reduce distracting lighting and background noise.
- Ensure that the elder is physically and emotionally comfortable.
- Schedule matters involving elders neither early nor late in the day, as many elders' energy level is low at those times. Some elders, especially those with dementia, become more confused in the latter part of the day ("sundowning").
- Recognize that medications may cause confusion, sedation, fatigue, or have other effects that can impact the elder's level of awareness and ability to communicate.
- Assist elders with disabilities to communicate by ensuring use of assistive devices such as hearing aids and glasses, and employing techniques such as addressing the elder's "better" ear, having a document read aloud, or using writing as an alternative means of communicating.

II. PROTECTIVE ORDERS

Protective orders are often an effective tool that can be used to restrain the conduct of a person who is abusing an elder (65 years old or older) or a dependent adult (between the ages of 18 and 64 and with certain disabilities).

California's Elder Abuse and Dependent Adult Civil Protection Act (EADACP) (Welfare & Institutions Code §§15600-15675), the statutory scheme protecting elders and dependent adults from abuse by caretakers and others, defines abuse of an elder or dependent adult to mean the following (Welf & I C §15610.07):

(a)		(b)
• Physical abuse • Neglect • Financial abuse • Abandonment • Isolation • Abduction, or • Other treatment with resulting physical harm or pain or mental suffering.	*and/or*	The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

Welf & I C §§15610-15610.65 provide definitions for each element of this description of elder abuse. (See Appendix A(1), EADACP, page 72, for definitions.)

A. Emergency Protective Order

Family Code §§6240-6274

A judicial officer may issue an ex parte emergency protective order (EPO) where:

- a law enforcement officer asserts reasonable grounds to believe
- an elder or dependent adult is in immediate and present danger of abuse (as defined in Welfare & Institutions Code §15610.07)
- based on an allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought.

No emergency protective order can be issued based solely on an allegation of financial abuse (Family Code §6250(d)).

An EPO for an elder may include all of the restraining and other orders authorized under an Elder or Dependent Adult Protective Order (Welf & I

C §15657.03; Fam C §6252(e), as described below). An EPO remains in effect for up to five court days after the day of issuance or the seventh calendar day following issuance, whichever is earlier (Fam C §6256). Prior to the expiration of an EPO, the elder may apply for a longer-term protective order.

There are three different types of long-term civil protective orders that may be appropriate in elder abuse cases, depending on the facts of the situation:

- **Elder or Dependent Adult Protective Order** (Welf & I C §15657.03)
- **Domestic Violence Restraining Order** (Family Code §§6200 et seq.)
- **Civil Harassment Restraining Order** (Code of Civil Procedure §527.6)

B. Criminal Protective Order

A court *with jurisdiction over a criminal matter* may issue a protective order for a victim or witness upon a good cause belief that harm to, or intimidation of, or dissuasion of, a victim or witness has occurred or is reasonably likely to occur (Penal Code §136.2). However, in cases not involving a crime of domestic violence, there are limitations on the court's ability to use the underlying conduct of the charged offense as a basis for determining whether good cause exists.

In appropriate cases, a Criminal Protective Order may include orders to:

- prohibit the defendent or other persons from attempting to prevent or dissuade a victim or witness from attending or giving testimony at a trial or other proceeding;
- prohibit the defendent from having any communication with the victim or witness except through an attorney;
- require a law enforcement agency to provide protection for the victim or witness and his or her immediate family members;
- protect victims of violent crime from all contact by the defendant;
- restrain personal conduct pursuant to Family Code §6320, including prohibiting the defendant from coming within a specified distance of the victim or witness;
- require the defendant to relinquish firearms, and prohibit the defendant from possessing or purchasing a firearm while the protective order is in effect.

Criminal protective orders take precedence in enforcement over any civil protective order unless there is an EPO issued to protect the same person, restraining the same person, and the provisions of the EPO are more restrictive. Penal Code §136.2(e)(2)(A)-(C); Family Code §6383(h).

C. Elder or Dependent Adult Protective Order

Welfare & Institutions Code §15657.03

An elder or dependent adult who has suffered abuse as defined in Welfare & Institutions Code §15610.07 may seek a protective order for himself/herself.

Note: the Elder Abuse and Dependent Adult Civil Protection Act is vital in providing protections for dependent adults; this Pocket Reference, however, focuses specifically on the EADACPA protections provided in response to allegations of elder abuse.

A protective order petition may also be brought against "any person" on behalf of an abused elder by:

- a conservator;
- a trustee;
- an attorney-in-fact who acts within the authority of the power of attorney;
- a guardian ad litem for the elder; or
- any other authorized person.

A support person may accompany the elder in court and may sit at counsel table if the elder is not represented by an attorney, though the support person is prohibited from providing legal advice.

An order may be issued under this section, with or without notice, to restrain ***any person*** for the purpose of preventing a recurrence of abuse. The supporting affidavit must show, to the satisfaction of the court, reasonable proof of a past act or acts of abuse perpetrated against the petitioning elder or dependent adult (Welfare & Institutions Code §15657.03(c)).

An Elder or Dependant Adult Protective Order differs from a Domestic Violence Protective Order in two important respects: (1) it does not require a family or household member relationship between the parties; (2) it is available even if the elder petitioner lacks capacity.

The Elder or Dependant Adult Protective Order may enjoin a respondent from:

- abusing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, destroying personal property, or contacting the petitioner, either directly or indirectly, by mail or otherwise;

- coming within a specified distance of, or disturbing the peace of the petitioner or, in the discretion of the court, on a showing of good cause, of other named family or household members, *or the petitioner's conservator*;
- entering the petitioner's residence or dwelling unless title to or lease of the residence or dwelling is in the sole name of the party to be excluded, or is in the name of the party to be excluded and any other party besides the petitioner;
- specified behavior that the court determines is necessary to effectuate these orders (Welfare & Institutions Code §15657.03).

A temporary restraining order may include any of the protective orders described above. However, the court may issue an ex parte order excluding a party from the petitioner's residence or dwelling only on a showing of all of the following:

- Facts sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises.
- The party to be excluded has assaulted or threatens to assault the petitioner, other named family or household member of the petitioner, or conservator of the petitioner.
- Physical or emotional harm would otherwise result to the petitioner, other named family or household member of the petitioner, or conservator of the petitioner (Welfare & Institutions Code §15657.03(d)).

An Elder or Dependent Adult Protective Order prohibits the person subject to it from owning, possessing, purchasing, receiving, or attempting to purchase or receive, a firearm *except in a case consisting solely of financial abuse unaccompanied by force, threat, harassment, intimidation, or any other form of abuse* (Welfare & Institutions Code §15657.03(t)(4)). The respondent must relinquish any firearms he or she owns or possesses (Code of Civil Procedure §527.9; Welfare & Institutions Code §15657.03(t)(2)); failure to do so is punishable as a misdemeanor (Penal Code § 12021(g)).

There is no filing fee required for a protective order, nor can the petitioner be required to pay a fee for law enforcement to serve an order (Welfare & Institutions Code §15657.03(l,m)). The prevailing party may be awarded court costs and attorney's fees.

Violation of a protective order is punishable as a misdemeanor (Penal Code 273.6).

The maximum duration of a protective order is five years, and the renewal period may be either five years or permanently (Welfare & Institutions Code §15657.03(f)).

The forms to be used in Elder or Dependent Adult Protective Order actions are:

- **CLETS-001** – Confidential CLETS Information (Domestic Violence, Civil Harassment, Elder Abuse, Juvenile Law)
- **EA-100** – Request for Elder or Dependent Adult Abuse Restraining Orders (Elder or Dependent Adult Abuse Prevention)
- **EA-100-INFO** – Can a Restraining Order To Prevent Elder or Dependent Adult Abuse Help Me?
- **EA-110** – Temporary Restraining Order (CLETS-TEA or TEF) (Elder or Dependent Adult Abuse Protection)
- **EA-115** – Request Temporary Restraining Order (CLETS-TEA or TEF)
- **EA-120** – Response to Request for Elder or Dependent Adult Abuse Restraining Order
- **EA-120-INFO** – How Can I Respond to a Request for Elder or Dependent Adult Abuse Restraining Orders?
- **EA-130** – Elder or Dependent Adult Abuse Restraining Order After Hearing (CLETS-EAR or EAF) (Elder or Dependent Adult Abuse Protection)
- **EA-200** – Proof of Personal Service
- **EA-200-INFO** – What Is "Proof of Personal Service"?
- **EA-260** – Proof of Service of Order After Hearing by Mail
- **EA-800** – Proof of Firearms Turned In or Sold

The forms for an Elder and Dependent Adult Protective Order are available at: http://courts.ca.gov/forms.htm.

D. Domestic Violence Restraining Order

Family Code §§6200 et seq.

An elder may seek a Domestic Violence Restraining Order (DVRO) when:

- the elder has been abused;
- the abuse has been perpetrated by a current or former spouse; current or former domestic partner; current or former cohabitant (defined as a person who regularly resides or resided in a household), a current or former dating or engagement relationship; someone with whom the petitioner has a child; or *by a child of the petitioner*; or by any other person related by blood or marriage in the second degree (Family Code §6211).

One significant difference between a Domestic Violence Restraining Order (DVRO) and an Elder or Dependent Adult Protective Order is that a specified familial/household relationship between the restrained party and the protected party is required for a DVRO, but not for an Elder or Dependent Adult Protective Order.

When a DVRO is available, there are factors that may make obtaining this type of protective order preferable to an Elder or Dependent Adult Protective Order in some cases, including increased supports and services for DVRO applicants, and the availability of broader relief. In addition to the restraining and other orders available in an Elder or Dependent Adult Protective Order, a DVRO may mandate:

- spousal support (Family Code §6341);
- batterer's program (Family Code §6343);
- temporary use of property (Family Code §6324);
- temporary debt payment (Family Code §6324);
- restitution, and other orders.

The forms for a Domestic Violence Restraining Order (forms DV-100 – DV-810) are available at: http://courts.ca.gov/forms.htm.

E. Civil Harassment Restraining Order

Code of Civil Procedure §527.6

An elder who has suffered harassment may seek a temporary restraining order and an injunction in the form of a Civil Harassment Restraining Order. Many of the provisions of the Elder or Dependent Adult Protective Order and the Domestic Violence Restraining Order are also available in a Civil Harassment Restraining Order. A Civil Harassment action can be used to protect elders from harassment by roommates, neighbors, employees, family members, and others.

- Harassment is defined as unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose (Code of Civil Procedure §527.6(b)(3)).
- The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff (Code of Civil Procedure §527.6(b)(3)).
- The civil harassment restraining order may be issued to protect the elder and all other family and household members who reside with the elder (Code of Civil Procedure §527.6(c)).

III. CONSERVATORSHIPS

There are two common types of conservatorships in California: probate conservatorships and Lanterman-Petris-Short Act (LPS) conservatorships. Pursuant to the Probate Code, a limited conservatorship may be established for the developmentally disabled subject to several restrictions. Discussion of limited conservatorships is beyond the scope of this Pocket Reference.

A. Probate Conservatorship

Conservatorships of the person or the estate – or both – are often sought in Probate Court in response to actual or suspected elder abuse (Probate Code §§1800 et. seq.). A conservator of the person may be appointed for an adult who cannot properly care for his or her own daily personal needs (Probate Code §1801(a)). The establishment of a probate conservatorship restricts the conservatee's power over his or her own personal care decisions and/or financial decisions. A conservatorship has the potential to result in a massive curtailment of the conservatee's liberty by providing the conservator with the legal capacity to bind the conservatee's estate, choose the conservatee's residence, and consent to medical treatment for the conservatee. For this reason, strict compliance with the statutory procedures designed to protect the conservatee is required.

Conservatorships of the person are designed to:

- protect the rights of persons who are placed under conservatorship;
- ensure that the conservatee's basic needs for food, clothing, shelter, psychosocial and physical health are met (Probate Code §1800(a),(c),(f)).

No conservatorship of the person or estate may be granted without an express finding that the conservatorship is the *least restrictive alternative* needed for the protection of the conservatee (Probate Code §1800.3(b)).

Conservators are required to make use of community-based services to the greatest extent possible in order to allow the conservatee to remain as independent as possible and in the least restrictive setting (Probate Code §1800(d)).

A probate conservator may be appointed for the estate of an adult who is substantially unable to manage his/her own financial resources. A conservator may also be appointed for the estate of an adult who may be prey to fraud and/or unable to resist undue influence (Probate Code §1801(b)).

Conservatorships of the estate are designed to provide for:

- the proper management and protection of the conservatee's real and personal property;
- periodic review of the conservatorship by the court investigator (Probate Code §1800(e),(g)).

Substantial inability of an elder to manage finances, which is the basis for subjecting an elder to a conservatorship, may not be proven by isolated incidents of negligence or poor judgment by the elder (Probate Code §1801(b)).

The court may appoint a conservator of both the person and the estate for elders who have significant difficulties with the activities of daily living *and* with handling finances (Probate Code §1801(c)).

Probate courts have a unique role in supervising conservators. If a conservator is appointed for a plaintiff prior to the initiation of a civil action, the department of the superior court that has jurisdiction over probate conservatorships will have concurrent jurisdiction over any civil proceedings arising out of the abuse of the elderly or dependent adult conservatee (Welfare & Institutions Code §15657.3(a)).

For more detailed information on Probate Conservatorships, see the Administrative Office of the Courts, Center for Judicial Education and Research Benchguides: *Conservatorship: Appointment and Powers of Conservator* (Benchguide 300, www2.courtinfo.ca.gov/protem/pubs/bg300.pdf); and *Conservatorship Proceedings* (Benchguide 301, www2.courtinfo.ca.gov/protem/pubs/bg301.pdf).

B. Lanterman-Petris-Short Act Conservatorship

A Lanterman-Petris-Short Act (LPS) conservatorship (Welfare & Institutions Code §§5000-5550) is one in which:

- a conservator of the person, the estate, or both may be appointed;
- for someone who is gravely disabled (unable to provide for food, clothing and shelter) as a result of a mental disorder or impairment by chronic alcoholism;
- who is unwilling to accept or incapable of accepting voluntary treatment (Welfare & Institutions Code §5350).

Grave disability must be found beyond a reasonable doubt (see *Conservatorship of Roulet* (1979) 23 C3d 219, 235, 152 CR 424).

LPS conservatorships, whose purpose is to enable treatment of an elder's mental disorder or chronic alcoholism, result in involuntary commitment of the conservatee (Welfare & Institutions Code §5358). The conservatee's rights to vote, enter into contracts, to drive, and to own a firearm are limited.

An LPS conservator can make decisions regarding the conservatee's:

- psychiatric medications;
- medical treatment;
- money management.

The basis for an LPS conservatorship differs from a probate conservatorship. While the *procedure* for establishing, administering, and terminating an LPS conservatorship under Welfare & Institutions Code §5350 is similar to that for a probate conservatorship, [Probate Code §§1400–3925 (*In re Conservatorship of Martha P.* (2004) 117 CA4th 857, 867–868, 12 CR3d 142)], there are significant differences: (1) The proposed LPS conservatee can demand a court or jury trial on the issue of grave disability (Welfare & Institutions Code §5350(d)), and is entitled to counsel; (2) LPS conservatorship proceedings can be initiated only on recommendation of the professional person in charge of the treatment facility; (3) the officer providing conservatorship investigation is the only party who may petition to establish the LPS conservatorship (Welfare & Institutions Code §5352). An LPS conservatorship terminates automatically after one year unless re-establishment is sought (Welfare & Institutions Code §5361).

For more detailed information, see the Administrative Office of the Courts, Center for Judicial Education and Research Benchguide on LPS Conservatorship: *LPS Proceedings* (Benchguide 120, www2.courtinfo.ca.gov/protem/pubs/bg120.pdf).

The following chart outlines the most significant differences between the two types of conservatorships:

PROBATE CODE CONSERVATORSHIP	LPS CONSERVATORSHIP
No mental disorder required. Probate Code §1801(a): Conservatee must be unable to provide for personal needs or manage financial resources.	Mental disorder or impairment by chronic alcoholism required. Welfare & Institutions Code §5350.
Purposes are to protect conservatee's rights, provide for assessment, meet health and psychosocial needs, etc. Probate Code §1800.	Purpose is to treat disorder and protect the public. See generally Welfare & Institutions Code §5358.
No right to place conservatee in a locked mental health facility without conservatee's consent. Probate Code §2356. But see Probate Code §2356.5, permitting conservator to place a conservatee with dementia in a secured facility after obtaining a court order.	Conservator may place conservatee in locked mental health facility without the conservatee's consent. See Welfare & Institutions Code §5358(a),(c).
Indefinite duration. Probate Code §1860	One-year duration. Welfare & Institutions Code §5361.
Minors may not be conservatees. Probate Code §1800.3 (exception for married or formerly married minors).	Minors may be conservatees. Welfare & Institutions Code §5350(a)
Burden of proof: clear and convincing evidence. Probate Code §1801(e) .	Burden of proof of grave disability: beyond a reasonable doubt. *Conservatorship of Roulet* (1979) 23 C3d 219, 235, 152 CR 424.
Appointment of conservator is subject to the list of priorities in Probate Code §1812(b) (i.e., spouse/domestic partner, adult child, parent, brother/sister, etc.).	Appointment of conservator is subject to the list of priorities in Probate Code §1812 unless investigator recommends otherwise to the court. Welfare & Institutions Code §5350(b)(1). In appointing LPS conservator, court must consider protection of the public as well as treatment of the conservatee. Welfare & Institutions Code §5350(b)(2).
Probate conservatorship of estate is permitted even where there is LPS conservatorship of person. Welfare & Institutions Code §5350(c).	No LPS conservatorship of estate when there is Probate Code conservatorship of estate.Welfare & Institutions Code §5350(c). If Probate Code conservatorship of person already exists, LPS conservatorship runs concurrently and is superior to probate conservatorship. Welfare & Institutions Code §5350(c). Notice of LPS proceedings must be given to Probate Code guardian or conservator. Welfare & Institutions Code §5350(g).

IV. LEGAL RESOURCES RELATED *to* ELDER ABUSE

A. National Resources

1. **National Center for State Courts, Center for Elders and the Courts**
   www.eldersandcourts.org

   The National Center for Elders and the Courts serves as one of the primary resources for the judiciary and court management on issues related to aging. The Center's mission is to increase judicial awareness of issues related to aging, provide training tools and resources to improve court responses to elder abuse and adult guardianships, and develop a collaborative community of judges, court staff, and aging experts.

2. **The National Center on Elder Abuse**
   www.ncea.aoa.gov

   The National Center on Elder Abuse (NCEA) serves as a national resource center dedicated to the prevention of elder mistreatment. To carry out its mission, the NCEA disseminates elder abuse information to professionals and the public, and provides technical assistance and training to states and to community-based organizations. The NCEA makes resources available on-line and in easy-to-use formats; collaborates on research; provides training; identifies and provides information about promising practices and interventions; operates a listserv forum for professionals; and provides subject matter expertise on program and policy development.

3. **The ABA Commission on Law and Aging**
   www.americanbar.org/groups/law_aging/resources/elder_abuse.html

   The mission of the ABA Commission on Law and Aging is to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training.

B. California Resources

1. California Department of Justice

Office of the Attorney General
Bureau of Medi-Cal Fraud and Elder Abuse
http://ag.ca.gov/bmfea/index.php

Relevant laws and regulations:
http://ag.ca.gov/bmfea/laws.php

2. California Department of Social Services

Adult Protective Services
www.cdss.ca.gov/agedblinddisabled/PG1298.htm

Report of Suspected Dependent Adult/Elder Abuse, SOC 341 (pdf)
www.dss.cahwnet.gov/cdssweb/entres/forms/English/SOC341.pdf

Translation: Spanish (pdf)
www.cdss.ca.gov/cdssweb/entres/forms/Spanish/SOC341SP.pdf

Report of Suspected Dependent Adult/Elder Financial Abuse, SOC 342 (pdf)
www.dss.cahwnet.gov/cdssweb/entres/forms/English/soc342.pdf

Listing of County Adult Protective Services (APS) Offices
www.cdss.ca.gov/agedblinddisabled/PG2300.htm

3. California Department of Aging

Long-Term Care Ombudsman Program – Elder Abuse
www.aging.ca.gov/programs/elder_abuse.asp

Elder Abuse reporting form:
www.dss.cahwnet.gov/cdssweb/entres/forms/English/SOC341.pdf

4. Administrative Office of the Courts, Center for Families, Children & the Courts

Judges Guide to Domestic Violence Cases
California Protective Orders
Elder and Dependent Adult Protective Order (pp. 102-110)
http://serranus.courtinfo.ca.gov/education/domestic_violence/

5. **Administrative Office of the Courts**
Center for Judicial Education and Research

Benchguides:

- ***Conservatorship: Appointment and Powers of Conservator*** (Benchguide 300)
  www2.courtinfo.ca.gov/protem/pubs/bg300.pdf
- ***Conservatorship Proceedings*** (Benchguide 301)
  www2.courtinfo.ca.gov/protem/pubs/bg301.pdf
- ***LPS Proceedings*** (Benchguide 120)
  www2.courtinfo.ca.gov/protem/pubs/bg120.pdf

http://serranus.courtinfo.ca.gov/education/cjerpublist.htm#probate

Center for Families, Children & the Courts

Effective Court Practice for Abused Elders: A Report to the Archstone Foundation
Judicial Council of California, Administrative Office of the Courts (2008)

http://www.courts.ca.gov/documents/courtabused-eldersreport.pdf

6. **Continuing Education of the Bar**

California Elder Law Litigation: An Advocates Guide
Balisok, Russell, et. al.
http://ceb.com/

California Elder Law Resources, Benefits, and Planning: An Advocate's Guide
Camp, Priscilla, et. al.
http://ceb.com/

7. **The Rutter Group**

Elder Abuse Litigation
Balisok, Russell, et. al.
www.ruttergroup.com/ELDERABUSELITIGATION.htm

Medical Information

V. ELDER ABUSE *and* NEGLECT

A. Assessing for Abuse

Elder abuse issues arise in a wide variety of cases. Judicial officers may be presented with a range of medical evidence indicating that an elder has been or may have been abused. In a case involving an elder, there may be even greater complexity in the medical elements than in other types of abuse cases due to the complicated physical and mental health status of the victim. Understanding the ways medical and social service personnel assess for abuse and neglect can assist judicial officers in evaluating the test results, descriptions, and opinions these professionals provide to the courts.

1) ASSESSING BRUISES

A bruise or ecchymosis is formed when blood vessels rupture and leak blood into surrounding tissues. Bruising results from blunt forces: either a body part hits something harder than itself or a harder object hits a body.

- A bruise may take several days to appear if the cause of the bruise was a deep injury.
- Bruising that is present in a different location than the site of impact is called *ectopic bruising* and occurs when the tissue at the site of injury is loose, allowing blood to travel under the skin to another location due to gravity or other forces.
- Older adults bruise more easily than younger adults due to a variety of factors, including thinner, less elastic skin, fragile capillaries, and side effects of medicines.

While trained personnel may attempt to estimate the age of a bruise by its color, **this method is imprecise**.

Characteristics of suspicious bruises
(i.e., bruises more likely to be due to abuse):

- larger than typical;
- multiple;
- cause is known;
- unusual locations;
  - sexual abuse (genitals/groin, mouth/lips);
  - physical abuse (inner arm, bottom of feet, abdomen, neck);
  - multiple planes (bruises in multiple planes such as front and side of neck are unlikely to occur from a fall; bruises occurring on the inner and outer aspects of the upper arm are unlikely to be from bumping into an object);
  - skin folds, such as under breasts.

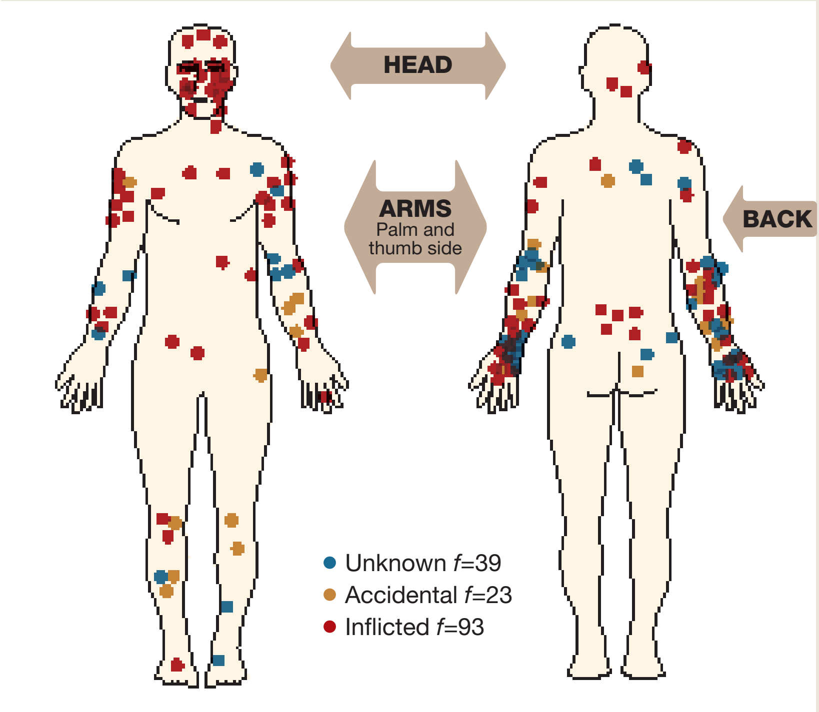
OTHER ELEMENTS OF BRUISING

- **Shape**
  - Pattern injuries; some bruises reflect the object that caused it. It may have an identifiable pattern such as a fingertip or belt buckle.
  - A circumferential (encircling a limb or thorax) bruise may be the result of restraint.
- **Size**
- **Location:** This may be misleading. A bruise that occurs in loose tissue, such as the area under the eye, may spread a great distance because the blood travels easily into the surrounding tissues.
- **Tenderness**
- **Swelling**
- **Broken skin**
- **Illnesses or medical problems:** Medical problems such as clotting disorders, leukemia or liver disease may cause a person to bruise easily.
- **Medications:** Medications do not in and of themselves cause bruising but may allow a person to bruise more easily. It is important to note both prescription and over-the-counter products taken by the elder, including herbs and supplements.
- **Senile purpura** (aka solar purpura) is a geriatric condition that mimics bruises. The purple/red bruises and brown skin discoloration result from increased vessel fragility due to connective tissue damage from chronic sun exposure.

BRUISING IN OLDER ADULTS AS REPORTED BY ABUSED ELDERS

Key finding from this study

- **Bruises were large.** More than half of older adults with bruises who had been physically abused had at least one bruise **5 cm (about 2 inches) in diameter or larger**.
- Older adults with bruises who had been abused had **more bruises in areas indicated by brown arrows** than older adults whose bruises were accidental.
- **90%** of older adults with bruises who have been physically abused **can tell you how they got their bruises, and this includes many older adults with memory problems and dementia**.



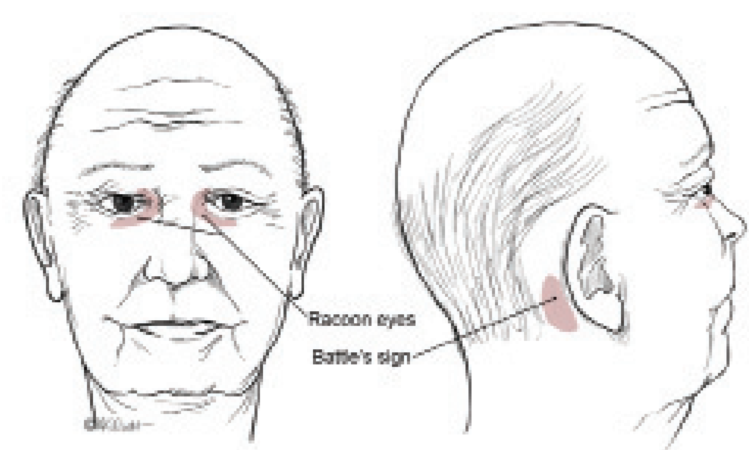
This project was funded by Grant 2005-IJ-CX-0048 from the Department of Justice (DOJ), Office of Justice Programs

Citation: Wiglesworth A, Austin R, Corona M, Schneider D, Liao S, Gibbs L, Mosqueda L. Bruising as a marker of physical elder abuse. J Am Geriatr Soc. 2009 Jul;57(7):1191-6.

Bruising Related to Skull Fractures

A basilar skull fracture (or basal skull fracture) is a fracture of the base of the skull. There are two different types that have distinctive bruising:

- Fractures of the petrous temporal bone result in leakage of spinal fluid through the ear. Bruising in this kind of skull fracture will occur behind the ear(s). This bruise is known as a **Battle's sign**.
- Fractures of the anterior cranial fossa result in leakage of spinal fluid through the nose and bruising around the eyes. This kind of bruising is known as "**raccoon eyes**."
- Signs occur 1-3 days after injury and are bilateral (occur on both sides).



2) ASSESSING STRANGULATION

Strangulation is often missed during investigations of alleged abuse. Strangulation is a form of asphyxia characterized by closure of blood vessels and air passages of the neck by external pressure (i.e., hand, rope, belt). Choking is a form of asphyxia characterized by internal blockage of the airway. Many people confuse these two terms and may indicate that they were "choked" when they actually mean that they were strangled. Strangulation occludes veins first and blood backs up into the head. With increased pressure, arteries will be obstructed, stopping blood flow and oxygen:

- At 10 seconds, the strangled person will experience loss of consciousness.
- At 1 to 4 minutes, there will be permanent brain damage.

Signs of strangulation include:

- **Neck:** Ligatures, hand prints, no marks (in many cases, bruising does NOT appear).
- **Face:** Petechiae (petechiae are caused by the breaking of small blood vessels as a result of external pressure.) Petechiae will change color as they heal, just like bruises. There may be other injuries on the face as well.
- **Head:** Bruises, swelling.
- **Voice:** Hoarse or raspy voice; frequent coughing.
- **Swallowing problems.**
- **Sniffing position:** In order to keep airway open, victim pushes head and neck forward as if "sniffing" the air.

3) ASSESSING PRESSURE SORES
(Pressure Ulcers or Bedsores or Decubitus Ulcers)

A pressure sore is an area of skin that breaks down due to unrelieved pressure.

PRESSURE SORE BASICS

May occur despite good care.

Typically occur over bony prominences.

Contributing factors include malnutrition and immobility.

Ulcers are categorized into 4 stages ranging from superficial to deep. If a scab is present, a medical professional must remove the scab before the ulcer can be staged.

Treatment consists of relieving the pressure, cleaning the wounds and keeping the area clean and dry.

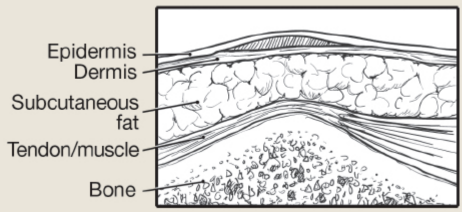
Although pressure sores may occur despite good care, **warning signs that may indicate abuse** include:

- Unusual location (e.g. head, inner part of leg, wrist);
- Malodorous wound;
- Multiple locations and on more than one plane of the body;
- No obvious attempt at care/treatment, especially for stage III or IV wounds (e.g., lots of dead tissue or debris).

PRESSURE SORE STAGES

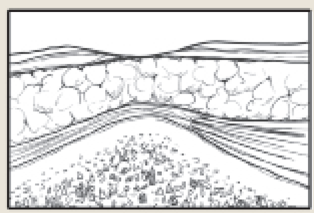
Stage I

Red area with intact skin. Redness persists even when pressure is relieved. May develop within minutes or hours.



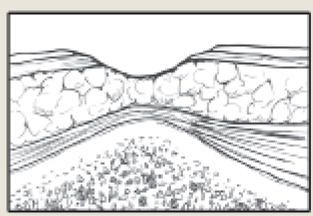
Stage II

Appears open like an abrasion or shallow crater, or there may be a blister. May develop within hours to days.



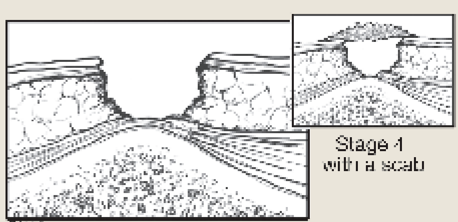
Stage III

Full thickness skin loss, deeper than a superficial wound, but not as deep as stage IV. May develop within hours to days to weeks.

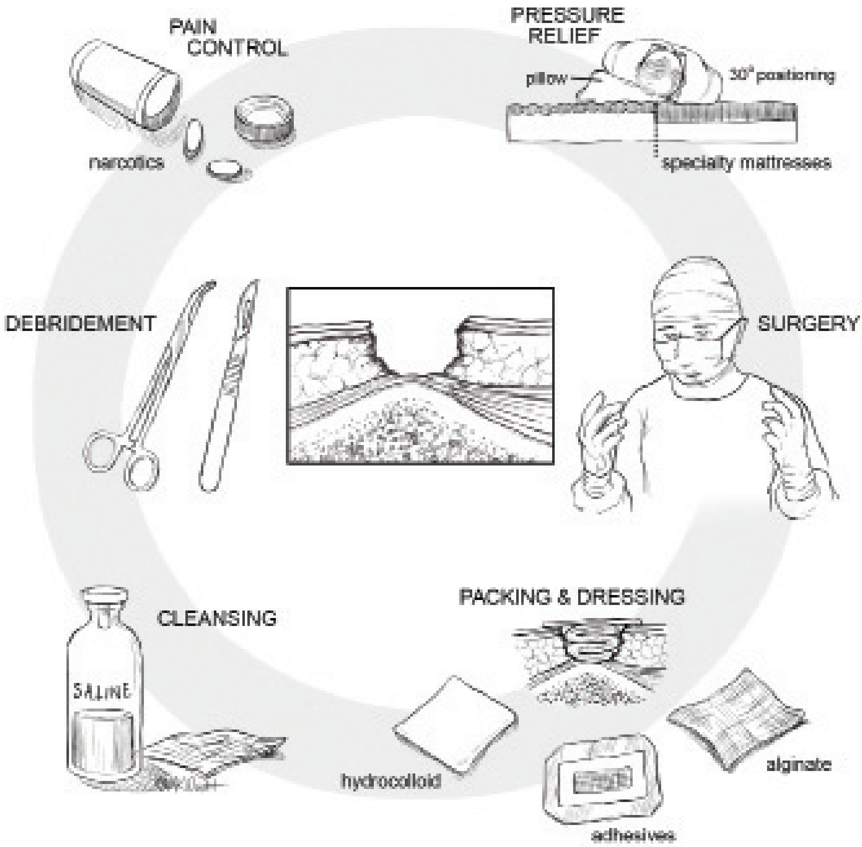


Stage IV

May see bones, muscles, or tendons. May develop within days to weeks.



Common Treatments for Pressure Sores



4) ASSESSING DEHYDRATION

Dehydration can be subtle in older adults, especially if dementia is present.

Risk factors for dehydration include:

- Decreased thirst response with advanced age
- Medications
- Chronic medical problems such as diabetes and alcoholism
- Fever
- Inaccessibility to liquids (e.g. elder can't get liquids due to mobility impairment, and no liquids are provided or made accessible by the care provider)
- Diarrhea
- Vomiting

One common technique used to assess for dehydration is "tenting of the skin" (by pinching the skin to evaluate retraction). This is not an accurate method in elders because of normal age-related changes such as thin skin, decreased elasticity and less subcutaneous fat.

Signs and symptoms of dehydration include:
- Decreased urination
- Decreased responsiveness
- Fatigue
- Weight loss
- Dizziness
- Thirst
- Dry mouth

Severe dehydration, a medical emergency, can cause:
- Extreme irritability and confusion in adults
- Extreme thirst
- Very dry mouth, skin and mucous membranes
- Lack of sweating
- Little or no urination (any urine that is produced will be dark yellow or amber)
- Sunken eyes
- Low blood pressure
- Rapid heart rate
- Unconsciousness, in the most serious cases

Laboratory tests are very helpful in determining the presence and severity of dehydration.

5) ASSESSING MALNUTRITION

Compared to younger adults, older persons have reduced muscle mass and reduced protein stores. These can be depleted in as little as three days, resulting in malnutrition.

General guidelines:
- Unintentional loss of 10 pounds or more in the previous 6 months; or
- Unintentional loss of 5% or more of usual body weight in the past month.

Risk factors for malnutrition:

- Cognitive problems
- Physical incapacity to obtain and/or prepare food
- Poor dental health
- Trouble chewing and/or swallowing
- High consumption of alcohol
- Social isolation
- Depression
- Advanced age (80+)

Common chronic diseases and conditions may cause fever, chronic infection, and disease-related changes in an elder's metabolism. Some common chronic diseases associated with malnutrition in older adults are:

- Alcoholism
- Cancer
- Chronic bronchitis and emphysema
- Dental and oral disease
- Depression
- Dementia (end stage)
- Thyroid disease

The effects of malnutrition in elderly people include:

- Loss of muscle mass
- Weakness and fatigue
- Impaired immune response
- Difficulty with wound healing
- Predisposition to pressure sores

Terminal wasting is a type of extreme weight loss. When the body gets to a more advanced stage of malnutrition, it starts to digest the muscles for energy. A malnourished person also loses the fat on his/her face and the skin becomes very taut, to the point where the face looks skeletal.

Laboratory tests are helpful in determining the presence and severity of malnutrition.

6) ASSESSING PAIN

While pain is fairly easy to assess in most people, for a person with delirium or dementia pain may be perceived differently and expressed differently.

Signs of pain include:

- Grimacing (facial contortions)
- Yelling (may need to ask witnesses about excited utterances)
- Agitation
- Squirming
- Shaking
- Decreased activity
- Holding an area of the body tightly

B. Assessing Cognition

Cognition is generally understood as the mental processes involved in judging, knowing, learning, perceiving, recognizing, remembering, thinking, and understanding.

TOOLS FOR SCREENING COGNITION

Mini Mental State Exam – MMSE: The MMSE is a general screening tool that targets some areas of cognition or thinking abilities.

*It **does** test: orientation, memory, language.*

*It does **not** test a person's capacity to make decisions, nor their judgment, reasoning, or executive skills (executive functioning).*

Mini-Cog Assessment: The Mini-Cog assessment instrument combines a 3-item recall test with the Clock Drawing Test. The Clock Drawing Test can provide insight into information processing and planning, differentiating cognitively normal adults from those with at least mild dementia.

MoCA: The Montreal Cognitive Assessment was designed as a rapid (10 minute) screening instrument for mild cognitive dysfunction. It assesses different cognitive domains: attention and concentration, executive functions, memory, language, visuoconstructional skills, conceptual thinking, calculations, and orientation.

VI. COMMON TERMS USED *in* ELDER HEALTH CARE *and* ELDER ABUSE

These terms are frequently used in discussions of aging and elder abuse:

AAA	Area Agency on Aging
ADHC	Adult Day Health Care
ADL	Activities of Daily Living
AMA	Against Medical Advice
AMS	Altered Mental Status
APS	Adult Protective Services
CCL	Community Care Licensing
CMS	Centers for Medicare and Medicaid Services
CNA	Certified Nursing Assistant
DD	Developmentally Delayed
DHS	Department of Health Services
DME	Durable Medical Equipment
DON	Director of Nursing
DPA	Durable Power of Attorney
DSD	Director of Staff Development
FAST	Financial Abuse Specialist Team
FC	Forensic Center
F/F	Face to Face
HDM	Home Delivered Meals
HHA	Home Health Aide
H/V	Home Visit
IHSS	In-Home Supportive Services
ILRC	Independent Living Resource Center
LCSW	Licensed Clinical Social Worker
LTC	Long-term Care

LTCO	Long-term Care Ombudsman
LVN	Licensed Vocational Nurse
MDT	Multi-disciplinary Team
MFT	Marriage and Family Therapist
MHA	Mental Health Association
MMSE	Mini Mental Status Exam
MR	Mental Retardation
MSE	Mental Status Exam
MSSP	Multipurpose Senior Services Program
OC	On-call
OD	Officer of the Day
PA/PG	Public Administrator /Public Guardian
PCP	Primary Care Physician
PD	Police Department
POA	Power of Attorney
RN	Registered Nurse
SNF	Skilled Nursing Facility
S/I	Self-inflicted
SSS	Supervisor of Social Services
SART	Substance Abuse Resource Team
SW	Social Worker
U/A	Unannounced
U/S	Undersigned
VAST	Vulnerable Abuse Services Team (also known as the forensic center)
W/C	Wheelchair

VII. ELDERS' HEALTH CARE PROVIDERS

Several types of professionals may have a role in providing care for an elder or may study elder issues:

- **Geriatrician:** A Medical Doctor, board certified in Family Medicine or Internal Medicine, who has finished 2 or 3 additional years of study in the diseases and syndromes of older adults.
- **Gerontologist:** A person who has received a Masters or Ph.D. degree in the study of aging (is NOT a health care provider).
- **Administrator:** The staff member responsible for the overall management of a nursing home.
- **Medical Director:** A physician who oversees the medical services provided to nursing home patients. Patients may choose the medical director to be their personal physician or they may use any other physician who is willing to make visits to the facility. The Medical Director is required by law to visit patients in the facility monthly.
- **Director of Nursing:** The DON usually is a registered nurse who oversees all of the nursing staff at a long-term care facility.
- **Director of Staff Development:** The DSD is responsible for orientation and ongoing training of all staff at a long-term care facility.
- **Psychologist:** Clinical psychologists and counseling psychologists must have a doctoral degree (Ph.D. or Psy.D.). Both types of doctoral degrees require 5 to 7 years of graduate study, and the completion of a one year internship. Psychologists who offer patient care must meet certification and licensing requirements in the state in which they practice, including training, experience, an approved internship, and examinations. Various boards (e.g., American Psychological Association, National Council for Accreditation of Teacher Education, American Board of Professional Psychology) offer accreditation to qualifying psychologists.
  - *Neuropsychologist:* A clinical neuropsychologist has expertise in how behavior and skills are related to brain structures and systems, and evaluates brain function by objectively testing memory and thinking skills.
  - *Gero-psychologist:* A clinical gero-psychologist specializes in treatment of older adults.

VIII. ASSESSING FUNCTIONAL ABILITIES

The terms "Activities of Daily Living" (ADL) and "Instrumental Activities of Daily Living" (IADL) are used in evaluating a person's functional abilities. Judicial officers may encounter these terms when reviewing medical or social service records, or when hearing testimony. Thirty-nine percent of elders have some type of functional limitation; 14% experience Instrumental Activities of Daily Living limitations, while 25% experience both IADL and at least one ADL limitations.

A. Activities of Daily Living (ADLs)

The seven functions needed to live independently at home:

- Toileting
- Feeding
- Dressing
- Grooming
- Transferring (in/out of chair, bed, etc.)
- Bathing
- Mobility (walking)

B. Instrumental Activities of Daily Living (IADLs)

The eight functions needed to live independently in the community:

- Managing finances
- Shopping
- Housekeeping
- Using the telephone
- Preparing food
- Doing laundry
- Taking transportation
- Managing medications

IX. COMMON MEDICAL CONDITIONS *and* GERIATRIC SYNDROMES

1) Alcoholism

A chronic, often progressive disease in which a person craves alcohol, and drinks despite repeated alcohol-related problems. Alcoholism involves a physical dependence on alcohol; other factors include genetic, psychological, and cultural influences.

2) Alzheimer's disease

The most common form of dementia. See "dementia", page 58. A syndrome involving loss of memory and intellectual skills (such as language, judgment and spatial relations) severe enough to cause dysfunction in daily life. More than one in eight people aged 65 and older (13%) have Alzheimer's disease. Symptoms may include: problems with short term memory; confusion; concentration deficits; inappropriate behavior; paranoia; lack of initiative.

3) Angina

A disorder of the heart marked by periods of intense pain that occurs when a portion of the heart muscle temporarily does not receive an adequate supply of oxygen.

4) Aphasia

Impairment of language (can be receptive, expressive or both).

5) Apraxia

Inability to perform a motor task despite intact motor function (e.g., the person cannot put on clothing although there is nothing wrong with his/her arms).

6) Autism

A group of developmental disabilities that can cause significant social, communication and behavioral challenges. Autism Spectrum Disorders can range from very mild to severe, and affect each person in different ways.

7) Bedbound or sedentary

Confined to bed; bedridden. Physical disabilities and/or mental health issues may lead to severe limitations in mobility or to a person becoming bedbound. ***Secondary problems that can be caused by being sedentary or bedbound include:*** pressure sores (bedsores); weakness/deconditioning; contractures (frozen joints); malnutrition; dehydration; poor personal hygiene.

8) Cellulitis
A skin infection that can occur anywhere on the body, spreads rapidly, and generally requires a medical evaluation and treatment with antibiotics.

9) Cerebral Palsy (CP)
A group of disorders of movement and posture due to problems with the developing brain from an injury that occurs before or just after birth. A person with CP may also have difficulty with communication, cognition (i.e. mental retardation), and/or seizures.

10) Cerebrovascular accident (stroke)
Occurs when part of the brain does not receive an adequate oxygen supply and dies. Symptoms may include: weakness or paralysis on one side of the body; numbness on one side of the body; loss of balance or dizziness; inability to speak or slurred speech; cognitive changes. Functional effects may include: inability to walk safely; swallowing difficulties; memory problems; incontinence; inability to communicate clearly.

11) Chronic Fatigue Syndrome (CFS)
A condition with unknown causes that results in fatigue severe enough to interfere with normal work, recreation or social activities. Fatigue caused by CFS will NOT improve substantially with rest. Symptoms may include: sleep problems; memory problems; fever; headaches; muscle and joint pain; tender glands in the throat and neck; decreased ability to think clearly.

12) Chronic Obstructive Pulmonary Disease (COPD)
A group of lung diseases that involve limited airflow and lung tissue destruction. The most common forms of COPD are emphysema and chronic bronchitis. Symptoms may include: shortness of breath; wheezing and coughing persisting for months to years; decreased tolerance for exercise and activity; and in severe cases, dependence on mechanical ventilation and oxygen therapy. Complications may include heart failure and pneumonia.

13) Congestive Heart Failure (CHF)
Occurs when a heart is weak and cannot pump blood effectively. Fluid can "back up" into the lungs and legs and may cause difficulty in breathing and swollen legs (edema).

14) **Coronary Artery Disease**
Sometimes known as "hardening" or narrowing of the arteries that provide oxygen to the heart muscle. Symptoms may include: chest pain with exertion, often described as "pressure" or "crushing"; left sided pain, often radiating to the left arm; sweating; feeling of intense distress; shortness of breath. The quality of the pain/discomfort may differ, especially in women, and may be associated with sharp, stabbing pains, nausea or neck pain. If the chest pain episodes are occurring at rest or more frequently, medical care may be needed. Functional effects of coronary artery disease may include inability to walk safely, swallowing difficulties, memory problems, incontinence, and inability to communicate clearly.
- ***Angina***: pain that occurs when a portion of the heart muscle temporarily does not receive an adequate supply of oxygen.
- ***MI (Myocardial Infarction/ heart attack)***: irreversible damage to the heart from artery blockage resulting in death of part of the heart muscle.

15) **Cystic Fibrosis**
Most common lung disease affecting children and young adults; similar to emphysema (COPD) in older adults. Recurrent lung infections are common.

16) **Dehydration**
More likely to occur with medical conditions such as infection, diabetes, or any situation where a person stops drinking fluids. This may happen in cases of serious illness and/or neglect when a person is dependent on others for access to adequate fluids. Symptoms may include drowsiness or altered mental status; skin, lips and mouth appear dry; urination is decreased. Dehydration should always be considered when neglect or self-neglect is alleged. If a person is very weak, drowsy or confused due to dehydration this constitutes a medical emergency.

17) **Delirium**
Affects cognitive or thinking abilities, but is distinct from dementia. The causes of delirium are often reversible; many cases are due to medications or infections. Delirious individuals may have fluctuating awareness and experience hallucinations. Memory is affected; concentration is impaired; individuals are often not oriented to place and time. Any acute or sudden change from a baseline mental status should prompt suspicion for delirium. Elders with dementia are particularly susceptible to delirium. Symptoms may include: quick onset of decreased cognition; fluctuating cognition; disorientation; inattentiveness.

18) Dementia

A syndrome involving loss of memory and intellectual skills (such as language, judgment and spatial relations) severe enough to cause dysfunction in daily life. The most common form of dementia is Alzheimer's disease. More than one in eight people aged 65 and older (13%) have Alzheimer's disease. Symptoms may include: problems with short term memory; confusion; concentration deficits; inappropriate behavior; paranoia; lack of initiative. There are different patterns of cognitive loss with different types of dementia (see table, below). Some dementias are accompanied by physical changes (motor symptoms) early in their course. Instrumental Activities of Daily Living may be affected as the person loses the ability to handle complex tasks such as money management and medication management. As the syndrome progresses, elders lose the ability to care for their basic needs.

Many people with dementia maintain excellent social skills, and may appear to respond appropriately to questions even though their responses are inaccurate. Checking with a caregiver or relative may yield more accurate and helpful information. Reversible illnesses that cause cognitive decline or dementia may be acute or chronic and include: depression; thyroid illnesses; vitamin deficiencies; advanced syphilis; subdural hematomas; delirium; normal pressure hydrocephalus.

TYPE OF DEMENTIA	CHARACTERISTICS
Alzheimer's disease (AD)	*Short term memory loss in early stages, long term memory loss in later stages.*
Frontal-Temporal dementia (FTD/ Pick's Disease)	*Personality and behavioral changes, loss of inhibitions may be apparent before memory problems develop.*
Normal pressure hydrocephalus (NPH)	*Includes a triad of (1) memory problems, (2) urinary incontinence, and (3) abnormal gait.*
Lewy body dementia	*Memory problems, fluctuating alertness and attention, and hallucinations; similar to Parkinsons disease symptoms (see page 63); psychosis is common.*
Vascular dementia	*Short and long term memory loss, sudden declines may be apparent (unlike Alzheimer's disease which is slowly progressive), may have deficits from strokes.*
Late Parkinson's disease	*Memory loss occurs in later stages, unsteady, shuffling gait, stiffness, resting tremor.*

19) Dementia-related Psychosis

Often associated with symptoms such as delusions, hallucinations, and paranoia. These symptoms are also part of many psychiatric diagnoses. Elders with dementia may have psychotic symptoms; individuals with psychiatric and medical illnesses may also suffer from psychosis.

- **Delusions:** fixed, false beliefs despite evidence that the belief is not true; various types of delusions include those of grandeur, persecution and paranoia.
- **Hallucinations:** perceptions, usually visual or auditory, that are not real. Hallucinations are common symptoms of psychosis related to mental disorders, dementia and delirium.
- **Illusions:** a false perception; an object or stimulus is mistaken for something that it is not.
- **Paranoia:** excessive and unreasonable fear that one is threatened or persecuted; the fear may be pervasive, affecting function.

20) Depression

More prevalent in the elderly than in younger people. Elders are often coping with multiple losses – spouses, friends, financial, status, driver's license, independence – that may lead to depression. In 2006, 10% of men and 18% of women aged 65 and over exhibited clinically relevant depressive symptoms. Elderly men have the highest suicide rate. It is very common to find depression in people with dementia, especially early stage dementia. Depression in elders often affects thinking and memory even in the absence of dementia. Effective treatment may lead to improved thinking and memory, and improved quality of life. Some elders suffering from depression may not admit to feeling depressed. Symptoms may include: a decreased interest in activities; change in personality; complaints of memory decline; irritability. Depression is more common as the number of co-existing medical conditions increases.

21) Developmental disability

A diverse group of severe chronic conditions due to mental and/or physical impairments that result in problems with major life activities such as language, mobility, learning, self-help, and independent living. Developmental disabilities may begin at any point during development, up to 22 years of age, and usually last throughout a person's lifetime.

22) Diabetes Mellitus (DM)

An illness that causes blood sugar (glucose) levels to be dangerously high (hyperglycemia) or dangerously low (hypoglycemia), and can lead to a diabetic coma which is a life threatening condition. Diabetics control their blood sugar levels with diet, oral medicines and/or insulin. There are many different types of insulin that have varying effects. Symptoms of hyperglycemia may include: altered mental status, weakness, increased thirst, increased urination. Symptoms of hypoglycemia may include: tremors; headache, sweating; dizziness; confusion. Any diabetic with symptoms of hypoglycemia or hyperglycemia requires a medical evaluation. Both hyper- and hypoglycemia may lead to inappropriate or inaccurate responses.

23) Falls

A leading cause of death among the elderly. Indicators include: a slow or unsteady gait; walking with a shuffle; difficulty moving or standing. If an elder has fallen more than once in the past 6 months and abuse is suspected, an investigation should determine the frequency of falls, whether the elder has been injured or taken for medical care as a result, and whether anyone pushed the elder.

24) Fibromyalgia

A chronic pain disorder that causes widespread pain and tenderness in the muscles and soft tissues, as well as sleep problems and fatigue.

25) Hearing impairment

Approximately 45% of people over 65 have significant hearing impairment; in many cases, hearing can be improved with hearing aids.

26) Hepatitis

Inflammation of the liver. Hepatitis can be chronic or acute, often due to infection with viruses. Alcoholic hepatitis is also common and may lead to cirrhosis. Symptoms may include: abdominal pain; nausea; decreased appetite; jaundice; fatigue; fever.

27) **Hodgkin's disease**
A type of white blood cell cancer that manifests as painless lymphadenopathy (enlarged lymph nodes). Symptoms may include: fever; weight loss; night sweats.

28) **Huntington's disease**
A progressive disease of the brain, characterized by chorea (abnormal, involuntary movements) and dementia. Onset usually occurs between ages 30 and 50, and a parent usually has had the same illness.

29) **Hypertension**
High blood pressure that causes damage to the blood vessels in the eyes, kidneys and heart over time. Called the "silent killer" as it usually causes no symptoms for many years. A blood pressure reading consists of an upper (systolic) and lower (diastolic) number written as (Systolic/Diastolic). A reading of 140/90 represents the upper limits of normal blood pressure, however many older adults have a systolic blood pressure (SBP) of 160-180. While this is not usually an emergency, it may be a cause for concern. If blood pressure rises to dangerous levels quickly, it may cause headaches or chest pain and lead to heart attacks or strokes. Blood pressure that is too high may also cause delirium or confusion in some older adults.

30) **Incontinence**
Loss of bladder or bowel control; may be addressed with medication and/or diapers.

31) **Kidney (renal) insufficiency or failure**
Medical problems such as hypertension and diabetes mellitus may cause kidney damage and lead to kidney failure. Because the kidneys play a key role in excreting many medications, older adults with relatively minor renal disease may have toxic levels of medication in their bloodstream despite being on a "normal" dose of medication. At end-stage renal failure, patients must have dialysis which works as an "artificial" kidney by filtering toxins from the blood and maintaining appropriate levels of electrolytes such as sodium and potassium.

32) **Malnutrition**

A condition that develops when the body does not get the right amount of the vitamins, minerals, and other nutrients it needs to maintain healthy tissues and organ function. An elder with unexplained weight loss should consult a doctor. Losing 5% of one's body weight can indicate a serious problem that may be due to underlying medical problems such as cancer, but can also be a sign of neglect. An elder may be malnourished due to cognitive problems (doesn't know how to get food), physical problems (unable to prepare a meal or food is withheld), psychiatric problems (believes the food is poisoned) or a combination of several issues. Depression is a common cause of decreased appetite and weight loss. A person with malnutrition may not necessarily appear underweight, though if a person loses enough weight, he or she will appear emaciated. Malnutrition predisposes one to infections and pressure sores (see section V-A(5), Assessing Malnutrition, page 48).

33) **Mental Retardation**

A diagnosis applied to persons with an IQ of less than 70; an IQ from 71 to 84 indicates below- average functioning and adaptive behavior. Delayed development is usually evident in early childhood, and is generally classified as mild, moderate, severe or profound.

34) **Multiple Sclerosis**

A neurological disorder with episodic symptoms that may resolve and recur intermittently. Over time, neurological deficits may become more severe, leading to disability. Symptoms may include: weakness; numbness; vision problems.

35) **Pancreatitis**

A serious inflammation of the pancreas. There are many causes; one of the more common is heavy alcohol intake, especially in recurrent cases. Symptoms may include: abdominal pain; fever; nausea/vomiting.

36) **Parkinson's Disease (PD)**
A disorder of the brain that leads to shaking (tremors) and difficulty with walking, movement, and coordination. Parkinson's disease most often develops after age 50, and is one of the most common nervous system disorders of the elderly. Persons with PD lose the ability to control their movements and need medicine to decrease tremors and allow smoother motion. There is an increased risk for disability, falls, and inability to care for oneself. Most people are helped by medication and live well with PD for many years, though 25 to 40% develop dementia. Symptoms may include: resting tremors (especially in the hands); rigidity; masked facies (poker face); weakness; shuffling gait; poor balance.

37) **Physical disability**
A significant percentage of elderly living in the community (i.e., not institutionalized) have a disability that may include difficulty getting out of a chair, difficulty walking, favoring one side of the body over the other, and other limitations in their daily activities. Assistive devices can provide help with some physical disabilities.

38) **Pneumonia**
A serious lung infection. Symptoms may include: lethargy; shaking chills; shortness of breath/difficulty breathing; decreased appetite; fever and/or cough; altered mental status.

39) **Seizures**
Occur when electrical impulses in the brain are interrupted. The resulting symptoms will depend on the part(s) of the brain involved in the seizure and may affect the whole body or just a small part of the body.

40) **Self-neglect**
Behavior of an elder that threatens his/her health, welfare or safety. This may include refusing or failing to provide themselves with food, water, clothing, shelter, safety, hygiene and/or medication. The elder may or may not understand the consequences of his/her decisions. Symptoms of self-neglect may include: dehydration; malnutrition; unkempt personal appearance; dirty environment; utilities turned off; medicines mismanaged; signs of dementia, depression or drug/alcohol abuse.

41) Sepsis

Occurs when an infection, usually bacterial, spreads throughout the body via the bloodstream. The infection can start anywhere in the body, but commonly begins in the lung or urinary tract. The source may be chronic pressure sores. Sepsis has a very high mortality rate, especially in the elderly. Reduced level of consciousness and any change in mental status may be the only symptoms of a serious infection.

42) Shingles (Herpes zoster)

A very painful rash (looks like blisters) occurring along a dermatome or single nerve distribution; usually in an area on one side of the body, typically the back or chest wall. It may also occur on the face. Shingles can be contagious for people who are exposed to the fluid from the shingles' blisters and have never had chickenpox.

43) Traumatic Brain Injury

An injury to the brain caused by trauma to the head such as occurs from falls, accidents involving motor vehicles, and/or abuse. Symptoms vary greatly and may range from mild memory loss to personality change to coma.

44) Tuberculosis (TB)

A bacterial infection, usually pulmonary (lung), that is highly contagious. Tuberculosis is treated with multiple drugs that need to be taken daily for at least 9 months. Symptoms may include: coughing, including coughing blood; night sweats; weight loss.

X. MEDICATIONS *and* PRESCRIPTIONS

Judicial officers handling cases involving an elder may encounter lists of medications taken by an elderly litigant and other medical information. The following descriptions are designed to assist judicial officers in interpreting medication information provided to the court.

Note

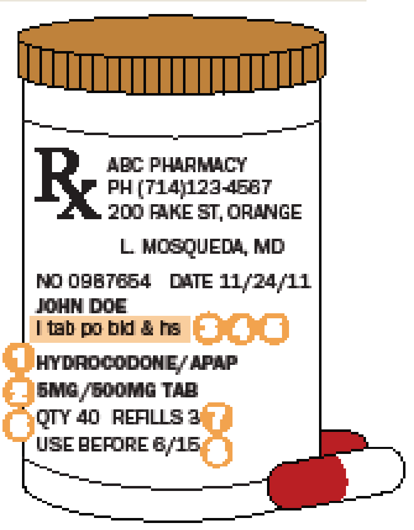
- The same medication may be used to treat different conditions.
- Dosages vary based on the patient and the condition.

A. Understanding Prescription Terminology

Factors that may have significance in understanding the context and effect of medication in a legal case include:

- The medication being taken;
- The purpose for taking the medication;
- The dosage;
- The person responsible for procuring the medications if not the elder him/herself;
- The person responsible for dispensing the medications if not the elder him/herself.

UNDERSTANDING THE LABEL



1. **Name**
   The complete name of the medicine

2. **Dose**
   mg *(milligrams)*
   mcg *(micrograms)*
   mEq *(milliequivalent)*
   IU *(International Units)*
   % *(percent strength)*

3. **How to take medicine**
   PO *(orally)*
   PR *(rectally)*
   IM *(inject intramuscularly)*
   IV *(intravenously)*
   SL *(sublingual or under the tongue)*

4. **Frequency of taking medicine**
   QD *(once per day)*
   BID *(twice per day)*
   TID *(three times per day)*
   QID *(four times per day)*

"I tab po bid & hs"
Translation: *"Take 1 tablet by mouth, twice a day and at bedtime"*

   PRN medications are taken on an "as needed" basis. There are typically instructions that limit the frequency with which a person may take the medication. For example "one to two pills q 4 hours prn pain" means the person should take one or two pills every 4 hours if they have pain.

5. **When to take medicine**
   AC *(before meal)*
   PC *(after meals)*
   HS *(afternoon or at bedtime)*
   AM *(in the morning)*
   PM *(in the evening)*

6. **Quantity**

7. **Number of Refills**

8. **Expiration Date**

B. Medications That Require Particular Caution

❖ = indicates a controlled substance

1) **Benzodiazepines ❖:** (those ending in -"pam") clonazepam, diazepam, temazepam, lorazepam. (Klonopin®, Valium®, Restoril ®, Ativan®), used to treat insomnia or anxiety.

   ➤ *Often associated with falls and memory problems.*

2) **Tricyclic antidepressants (TCAs):** (ending in -tryptyline) amitriptyline or imipramine, Elaril®, Tofranil®.

   ➤ *May cause confusion, dizziness, dry mouth, falls, memory problems.*

3) **Reglan® (Metoclopramide):** Used to treat slow movement of the stomach, gastric reflux or heartburn.

   ➤ *Side effects include dizziness, confusion, drowsiness, rigidity.*

4) **Theo-Dor® (Theophylline):** Used to treat asthma.

   ➤ *May have cardiac or heart effects. Can easily become toxic. Signs to watch out for are severe diarrhea, nausea, fast heart rate, agitation, seizures. There is also the potential for significant problems with drug interactions.*

5) **Benadryl® (Diphenhydramine) and Bentyl® (Dicyclomine):** Benadryl is a component of Tylenol PM, Advil PM and many other non-prescription sleep medicines. Dicyclomine is a similar medicine found in many sleep preparations.

   ➤ *May cause confusion and can be associated with falls.*

6) **Chronic anti-inflammatory medicines:** Motrin®, Ibuprofen, Naprosyn®, used for arthritis pain relief.

   ➤ *May increase the risk of stomach bleeding and kidney problems in the elderly.*

7) **Sudafed®**: Over-the-counter allergy medication.

   ➤ *May cause increase in blood pressure, agitation, anxiety, insomnia.*

C. Herbal Medicines

Elders commonly use herbal treatments that are advertised as helpful for memory enhancement, joint pains and various other maladies. Some of these herbal medicines have been studied in the medical literature, although not very thoroughly, and some have serious side effects or may lead to dangerous complications when combined with other medications.

Common examples of herbal medicines and their uses include:

- **Cranberry**: (Urinary tract infection) Generally considered safe, but in large quantities can cause kidney stones.
- **Echinacea**: (Used to treat colds) Questionable efficacy. Not recommended for long term use. May over-stimulate the immune system.
- **Garlic:** (Cholesterol and blood pressure lowering) Not as effective as traditional medicines. May cause bleeding, bruising when used with other blood thinners.
- **Ginger:** (Motion sickness, nausea and vomiting) Not as effective as traditional medicines. May cause bleeding, bruising when used with other blood thinners.
- **Ginkgo biloba:** (Memory, circulation, ringing in the ears and impotence) Questionable efficacy. Studies do not demonstrate any benefit. May cause bleeding when used with other blood thinners.
- **Glucosamine, chondroitin, and MSM:** (Osteoarthritis) Glucosamine has had several clinical trials supporting its effectiveness. In many elders, it is better tolerated than anti-inflammatory medicines for arthritis.
- **St. John's Wort:** (Depression) Similar to traditional anti-depressants. It is important not to combine this medicine with other anti-depressants as it can cause "Serotonin Syndrome" (too much serotonin in the brain), and may also produce unwanted drug interactions.
- **Saw Palmetto:** (Prostate symptoms) Works similarly to traditional medications for prostate symptoms.

Appendices

APPENDIX A:
Elder Abuse Provisions in the California Code

The most significant provisions in the California Code to specifically address elder abuse are in the Welfare & Institutions Code and the Penal Code. Four chapters in the Welfare & Institutions Code address elder abuse: the "Elder Abuse and Dependent Adult Civil Protection Act," §§15600-15675, "Protective Placements and Custody of Endangered Adults," §§15700-15705.40, "Adult Protective Services," §§15750-15766, and "Long-Term Care Ombudsman," §§9700-9741.

In the Penal Code, the most pertinent provisions are located in "Crimes Against Elders, Dependent Adults and Persons with Disabilities," Penal Code §368 et.seq. but there are many other relevant penal statutes including those that enhance punishment when a crime is committed against an elder. These chapters are briefly outlined below, together with a limited list of other code sections related to elder abuse.

The Probate Code provisions addressing conservatorships, capacity and other issues can also be relevant to elder abuse cases; several sections are listed below.

APPENDIX A: TABLE OF CONTENTS

1. Elder Abuse and Dependent Adult Civil Protection Act

Welfare & Institutions Code §§15600-15675

§15600: Legislature recognizes needs and problems of elders and dependent adults.

§15601: Encourages reporting of suspected cases of elder abuse and provides protection to non-malicious reporters.

§15610-15610.65: Definitions of types of abuse and other terms.

The Elder Abuse and Dependent Adult Civil Protection Act (Welfare & Institutions Code §§15600-15675) provides legal definitions for elements of elder abuse (Welfare & Institutions Code §§15610-15610.65).

- **"Abuse of an elder or a dependent adult"** means either of the following:
  - (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  - (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering (Welfare & Institutions Code §15610.07).

- **Physical abuse** includes assault, battery, assault with a deadly weapon or force likely to produce great bodily injury, sexual assault, and rape as defined by their respective Penal Code definitions. In the context of elder abuse, physical abuse also encompasses physical constraint, prolonged or continual deprivation of food or water, use of physical or chemical restraint or psychotropic medication for punishment or for any purpose not authorized by a physician who is providing medical care to the elder. (Although physical abuse as defined here encompasses sexual assault, it is sometimes treated as a distinct category that encompasses other acts such as inappropriate touching and forced viewing of pornographic materials.) (Welfare & Institutions Code §15610.63.)
- **Psychological/mental abuse (mental suffering)** is defined as "fear, agitation, confusion, severe depression, or other forms of serious emotional distress that is brought about by forms of intimidating behavior." This conduct includes threats, harassment, intimidation, deceptive acts or false or misleading statements made with malicious intent to agitate, confuse, frighten, or cause severe depression or serious emotional distress of the elder or dependent adult (Welfare & Institutions Code §15610.53).
- **Abandonment** is defined as "the desertion or willful forsaking of an elder or a dependent adult by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody" (Welfare & Institutions Code §15610.05).
- **Abduction** means the removal from California and/or the restraint from returning to California of any elder or dependent adult who does not have the capacity to consent to the removal or the restraint from returning, or of any conservatee without the consent of the conservator or the court (Welfare & Institutions Code §15610.06).
- **Isolation** means acts intentionally committed for the purpose of preventing and that do prevent the elder or dependent adult from receiving phone calls or mail; telling a caller or prospective visitor that an elder or dependent adult is not present, or does not wish to talk with the caller, or does not wish to meet with the visitor where the statement is false, is contrary to the express wishes of the elder or the dependent adult, whether he or she is competent or not, and

is made for the purpose of preventing the elder or dependent adult from having contact with family, friends, or concerned persons; false imprisonment as defined in the Penal Code, or physical restraint of an elder or dependent adult to prevent the elder or dependent adult from meeting with visitors, unless these actions are taken pursuant to the instructions of the physician who is caring for the elder or dependent adult, or if they are in response to a reasonably perceived threat of danger to property or physical safety (Welfare & Institutions Code §15610.43).

- **Deprivation of goods or services necessary to avoid physical harm or mental suffering** includes deprivation of medical care for physical and mental health needs, assistance in personal hygiene, adequate clothing, adequately heated and ventilated shelter, protection from health and safety hazards, and protection from malnutrition under those circumstances where the results include, but are not limited to, malnutrition and deprivation of necessities or physical punishment; and deprivation of transportation and assistance necessary to secure any of these needs (Welfare & Institutions Code §15610.07; §15610.35).
- **Neglect** means the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise the degree of care, or the elder himself or herself to exercise that degree of self-care, that a reasonable person in a like position would exercise. This includes, but is not limited to, failure to assist in personal hygiene, or in the provision of food, clothing or shelter; failure to provide medical care for physical or mental health needs; failure to protect from health and safety hazards; and failure to prevent malnutrition or dehydration. (No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.) Neglect also includes the failure of an elder to satisfy these needs for himself/herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health (Welfare & Institutions Code §15610.57).

- **Financial abuse** of an elder or dependent adult occurs when a person or entity does any of the following:
  1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
  2) 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.
  3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code.

  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 engages in this conduct, and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult, and the elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult. "Representative" means a person or entity that is either: a conservator, trustee, or other representative of the estate of an elder or dependent adult, or an attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney (Welfare & Institutions Code §15610.30).

§15630: Mandated reporters include any person who has paid or unpaid responsibility for care or custody of an elder or dependent adult or any administrator, supervisor or licensed staff of a facility which provides care or services of the elderly, or any employee of adult protective services or local law enforcement. Mandated reporters must report knowledge of or suspicion of abuse by phone and by a written report. Failure to report is a misdemeanor.

§15631: Any person who is not a mandated reporter may make a report of elder abuse.

§15633: Reports are confidential, with limited exceptions.

§15636: Adult Protective Services agency or the Long-Term Care Ombudsman may act only with the consent of the victim unless a violation of the Penal Code is alleged. If the abuse victim is incapacitated, conservatorship proceedings may be initiated.

§15640(a)(1): An Adult Protective Services agency shall cross-report to the law enforcement agency that has jurisdiction if there is knowledge or reasonable suspicion of criminal activity.

§15640(c),(d): Local law enforcement shall report to the Long-Term Care Ombudsman program or the Adult Protective Services agency every instance of known or suspected elder abuse.

§15653: Minimum guidelines for determining when investigation of abuse is warranted and guidelines for law enforcement assistance.

§15656: Elder abuse penalties for up to 4 years in state prison.

§15657.03: Victims of elder abuse may seek protective orders.

§15657.3(a): The department of the superior court having jurisdiction over probate conservatorships shall also have concurrent jurisdiction over civil actions and proceedings involving a claim for relief arising out of the abuse of an elderly or dependent adult, if a conservator has been appointed for the plaintiff prior to the initiation of the action for abuse.

CODE OF CIVIL PROCEDURE §527.9

§527.9(b): Upon the issuance of an Elder Abuse and Dependent Adult Civil Protection Act protective order against a person, the court shall order that person to relinquish any firearm in that person's immediate possession or control.

2. Protective Placements and Custody of Endangered Adults

Welfare & Institutions Code §§15700-15705.40

§15700(b): The purpose of this act is to enhance the protection of elderly persons and dependent adults by providing a mechanism for temporary emergency protective custody of elderly or dependent adults who are suspected victims of abuse or neglect, and who are found to be in a situation that poses an immediate risk of serious injury or death, and when no other means are available to mitigate the risk to the elderly or dependent adult.

§15705: The designated county agency shall initiate an investigation and file a petition for issuance of an emergency protective services order within 24 hours after the endangered adult has been taken into temporary emergency protective custody, and the court shall render its decision within a 72 hour period.

§15705.15: In its emergency order, the court shall appoint a temporary conservator of the endangered adult. Protective services may be provided through an emergency order for no more than 14 days, and may not include hospitalization or a change of residence unless the court specifically finds that action is necessary.

3. Adult Protective Services

Welfare & Institutions Code §§15750-15766

§15636: Adult Protective Services agency or the Long-Term Care Ombudsman may act only with the consent of the victim unless a violation of the Penal Code is alleged. If the abuse victim is incapacitated, conservatorship proceedings may be initiated.

§15755: Where Adult Protective Services caseworker has been denied access and there is probable cause to believe an elder is subject to abuse, law enforcement may seek a search warrant.

§15763(a): Each county shall establish an emergency response Adult Protective Services program to provide an in-person response, 24 hours per day, seven days per week, to reports of abuse of an elder or a dependent adult, for the purpose of providing immediate intake or intervention, or both, to new reports and to crises in existing cases.

4. Long-Term Care Ombudsman

Welfare & Institutions Code §§9700-9741

§§1568.01-1568.094: Residential Care Facilities For Persons with Chronic Life-Threatening Illness

§§1568.15-1568.17: Alzheimer's Day Care Resource Centers Act

§§1569-1569.889: Residential Care Facilities For the Elderly

§§1570-1596.5: California Adult Day Care Health Act

§§1599-1599.4: Skilled Nursing and Intermediate Care Facility Patient's Bill Of Rights.

§9722: Long-Term Care Ombudsmen have the right to enter long-term care facilities for the purpose of hearing, investigating, and resolving complaints by, or on behalf of, and rendering advice to, elderly individuals who are patients or residents of the facilities, including complaints of elder abuse.

§15636: Adult Protective Services agency or the Long-Term Care Ombudsman may act only with the consent of the victim unless a violation of the Penal Code is alleged. If the abuse victim is incapacitated, conservatorship proceedings may be initiated.

5. Crimes Against Elders, Dependent Adults and Persons With Disabilities

Penal Code §368 and other Penal Code Sections

§273.6(a): Any intentional and knowing violation of an Elder Abuse and Dependent Adult Civil Protection Act protective order is a misdemeanor.

§368: Felony physical or emotional abuse or criminal neglect by any person likely to cause serious bodily injury or death to an elder (age 65 or over) or dependent adult.

§368(b)(2): Sentence enhancement if physical injury is inflicted on an elder victim under 70 years of age and is increased if victim is over age 70.

§368(b)(3): Sentence enhancement if crime results in death of an elder victim under 70 years of age and is increased if victim is over age 70.

§368(c): Misdemeanor physical or emotional abuse or criminal neglect by any person.

§368(d): Felony theft or embezzlement of property over $950 value of an elder or dependent adult *by any person* (not a caretaker) is fiduciary abuse.

§368(e): Felony theft or embezzlement of property over $950 value of an elder or dependent adult *by a caretaker* is fiduciary abuse.

§368(f): False imprisonment of an elder or dependent adult by use of violence, menace, fraud or deceit.

§368.5: Local and state law enforcement have concurrent jurisdiction to investigate elder and dependent adult abuse. Adult Protective Services and Long Term Care Ombudsman programs have jurisdiction to investigate elder and dependent adult abuse and criminal neglect, and may assist local law enforcement in criminal investigations.

§11174.5: Counties may establish Interagency Elder and Dependent Adult Death Review Teams to assist in identifying and reviewing suspicious elder and dependent adult deaths, and facilitate communication among persons who perform autopsies and the agencies involved in elder and dependent adult abuse or neglect cases.

§13515: Every city police officer or deputy sheriff at a supervisory level and below who is assigned field or investigative duties must complete an elder and dependent adult abuse training course certified by the Commission on Peace Officer Standards and Training within 18 months of assignment to field duties.

6. Civil Harassment Restraining Order

Code of Civil Procedure § 527.6

§527.6: A person who has suffered harassment may seek a temporary restraining order and an injunction prohibiting harassment.

7. Family Code Protective Orders

Family Code §§6200-6409

§§6200-6229: Domestic Violence Prevention Act.

§§6240-6275: Emergency Protective Orders.

§6250: A judicial officer may issue an ex parte emergency protective order where a law enforcement officer asserts reasonable grounds to believe that an elder or dependent adult is in immediate and present danger of abuse, based on an allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought, except that no emergency protective order shall be issued based solely on an allegation of financial abuse.

§6252: An Emergency Protective Order for an elder may include all of the restraining and other orders authorized under an Elder or Dependent Adult Protective Order.

§§6300-6409: Protective orders and other domestic violence prevention orders.

§6324: The court may issue an ex parte order determining the temporary use, possession, and control of real or personal property of the parties and the payment of any liens or encumbrances coming due during the period the order is in effect.

§6341: (a) The court may, if requested by the petitioner, order a party to pay an amount necessary for the support and maintenance of the child if the order would otherwise be authorized in an action brought pursuant to the Uniform Parentage Act. (c) If the parties are married to each other and no spousal support order exists, after notice and a hearing, the court may order the respondent to pay spousal support.

§6343: (a) After notice and a hearing, the court may issue an order requiring the restrained party to participate in a batterer's program approved by the probation department as provided in Section 1203.097 of the Penal Code.

8. Financial Abuse of Elders

BUSINESS & PROFESSIONS CODE

§6126: Prohibits the unauthorized practice of law and makes a person holding himself/herself out as an attorney, such as sellers of living trusts, guilty of a misdemeanor. (***Note:*** this provision is not enforceable by private parties.)

§§6450-6456: Prohibits paralegals from providing legal advice. Some unethical living trust salespeople provide legal advice, and thus violate the statute.

§17200: Prohibits unlawful, unfair, or deceptive acts, and is a commonly used enforcement tool by private attorneys in civil actions acting for the interests of the general public. Acts of unfair competition perpetrated against elders are subject to additional penalties.

§17206.1: Provides for additional civil penalties to be imposed for unfair or fraudulent business practice violations against persons age 65 and over, and restitution to be given priority over recovery of civil penalties.

§17500: Provides a penalty for false or misleading statements made by any person, firm, corporation, or association with respect to the disposal of real or personal property or the performance of services.

CIVIL CODE

§2224: One who gains a thing by fraud, accident, mistake, undue influence or other wrongful acts is an involuntary trustee for the benefit of the person who would otherwise have had the thing.

§3344: Provides for protection against salespeople who falsely use trusted names to legitimize their product.

§3345: Permits the trier of fact to impose treble damages when seniors are the victims of misrepresentations by salespeople who falsely use trusted names to legitimize their misrepresentations.

§1575: Undue influence occurs when someone in a position of trust or authority takes unfair advantage of another, or when unfair advantage is taken of another person's weakness of mind or distress.

§1750: The California Consumer Legal Remedies Act includes specific enhanced penalties and protections for seniors.

§1770: Lists proscribed practices in the sale or lease of goods or services on the ground they are "unfair methods of competition" or "unfair or deceptive acts"; **§1770(a)(23)** applies to home solicitations of a consumer who is a senior citizen where a loan is made encumbering the primary residence of that consumer for the purposes of paying for home improvements.

§1780(b): Applies an extra $5,000 in damages for misrepresentation against a senior or disabled person.

FAMILY CODE

§2210: Voidable marriage due to fraud, undue influence, consent obtained by force.

§6250: A judicial officer may issue an ex parte emergency protective order where a law enforcement officer asserts reasonable grounds to believe that an elder or dependent adult is in immediate and present danger of abuse, based on an allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought, except that no emergency protective order shall be issued based solely on an allegation of financial abuse.

§6252: An Emergency Protective Order for an elder may include all of the restraining and other orders authorized under an Elder or Dependent Adult Protective Order.

GOVERNMENT CODE

§27388: Recording fees shall be used to fund the Real Estate Fraud Prosecution Trust Fund for use by law enforcement agencies.

INSURANCE CODE

§785: Provides for a duty of honesty, good faith, and fair dealing (often covers annuity salespeople).

§789: Provides the commissioner with administrative authority to assess penalties against insurers, brokers, agents, and other entities engaged in the transaction of insurance.

PENAL CODE

§368: Felony physical or emotional abuse or criminal neglect by any person likely to cause serious bodily injury or death to an elder (age 65 or over) or dependent adult.

> §368(d): Felony theft or embezzlement of property over $950 value of an elder or dependent adult *by any person* (not a caretaker) is fiduciary abuse.
>
> §368(e): Felony theft or embezzlement of property over $950 value of an elder or dependent adult *by a caretaker* is fiduciary abuse.

PROBATE CODE

§259: Any person found liable for physical abuse, neglect, false imprisonment or fiduciary abuse (fraud and undue influence) of an elder or dependent adult decedent shall be deemed to have predeceased the decedent, and shall not receive any award from the decedent's estate or be allowed to serve as a fiduciary.

§2950: In order to reduce the incidence of financial abuse of mentally impaired elders and minimize their monetary losses, any peace officer trained in assessment of competence or a county public guardian is authorized to assess competence of elders to facilitate timely intervention to protect elder victims and recover their assets.

§6104: The execution or revocation of a will or a part of a will is ineffective to the extent it was procured by duress, menace, fraud, or undue influence.

§8252: In a will contest, the burden of proof of due execution is on proponents; contestants have the burden of proof of lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation.

WELFARE & INSTITUIONS CODE

§15610.30: For purposes of the Elder Abuse and Dependent Adult Civil Protection Act, financial abuse of an elder or dependent adult occurs when a person or entity does any of the following:

1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
2) 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.
3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code. 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 engages in this conduct, and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult, and the elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult. "Representative" means a person or entity that is either: a conservator, trustee, or other representative of the estate of an elder or dependent adult, or an attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

9. Judicial System Supports for Elderly Victims/Witnesses

PENAL CODE

§264.02: An elder has the right to have a support person present at a forensic examination.

§679.04: An elder has the right to have a support person present during a formal interview by law enforcement, prosecutors and defense attorneys, when the elder is the victim of a sexual assault.

§868.5: An elder has the right to have a support person present at a preliminary hearing, at trial, and in a juvenile court hearing.

§939.21: An elder has the right to have a support person present when an elder who is a prosecution witness (and a "dependent person") is providing grand jury testimony.

§§1335-1345: Examination of Witnesses Conditionally. Courts have alternative methods for obtaining and preserving testimony of an elder victim or witness, including depositions; telephonic hearings; substituting an elder's court appearance with a conditional examination using a magistrate or court reporter; videoconferencing; using videotaped testimony.

10. Conservatorships and Related Probate Code Sections

PROBATE CODE

§259: Any person found liable for physical abuse, neglect, false imprisonment or fiduciary abuse (fraud and undue influence) of an elder or dependent adult decedent shall be deemed to have predeceased the decedent, and shall not receive any award from the decedent's estate or be allowed to serve as a fiduciary.

§810: Rebuttable presumption that all persons have capacity to make decisions. A judicial determination that a person lacks legal capacity to perform a specific act should be based on evidence of a deficit in the person's mental function rather than a diagnosis of a person's mental or physical disorder.

§811: A deficit in mental functions may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

§§1800-1970: Probate Conservatorships

§1800: Legislative intent to: protect the rights of persons who are placed under Conservatorship; provide that an assessment of the needs of the person is performed in order to determine the appropriateness and extent of a conservatorship and to set goals for increasing the conservatee's functional abilities to whatever extent possible; provide that the health and psychosocial needs of the proposed conservatee are met; provide that community-based services are used to the greatest extent in order to allow the conservatee to remain as independent and in the least restrictive setting as possible; provide that the periodic review of the conservatorship by the court investigator shall consider the best interests of the conservatee; ensure that the conservatee's basic needs for physical health, food, clothing, and shelter are met; provide for the proper management and protection of the conservatee's real and personal property.

§1800.3: The court may appoint a conservator of the person or estate of an adult, or both. No conservatorship of the person or of the estate shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.

§1801: A conservator of the person and estate may be appointed for a person who is unable to provide for his/her personal needs or who is substantially unable to handle his/her own financial resources or resist fraud or undue influence. The standard of proof for the appointment of a conservator shall be clear and convincing evidence.

§1820: A petition for the appointment of a conservator may be filed by the proposed conservatee, spouse, domestic partner, relative, interested state or local entity, or interested person or friend of the proposed conservatee.

§1821: Contents of the petition and supplemental information which addresses the proposed conservatee's inability to properly provide for his/her needs for physical health, food, clothing, and shelter; use of confidential supplemental information form.

§1826: Court investigator's duties; distribution and confidentiality of investigator's report.

§1835: Conservator's rights, duties, limitations and responsibilities; dissemination of information by county; failure to provide information does not relieve conservator of any duties.

§1850: Review of conservatorship.

§1852: Right to termination of conservatorship or removal of existing conservator or other modification, if it is in the best interests of the conservatee.

§2340: Professional fiduciaries.

§2351: Powers and duties of conservators.

§2401.3: Breach of fiduciary duty; liability.

§§2580-2586: Court review and determination whether to authorize conservator's proposed action, or to require conservator to take action to benefit conservatee or estate.

§§2650-2662: Removal or resignation of guardian or conservator.

§2900-2944: Public Guardian.

§2950: In order to reduce the incidence of financial abuse of mentally impaired elders and minimize their monetary losses, any peace officer trained in assessment of competence or a county public guardian is authorized to assess competence of elders to facilitate timely intervention to protect elder victims and recover their assets.

§2952: The public guardian is authorized to rely on a peace officer's declaration to take possession or control of the elder's property.

§2953: Court determination whether there is sufficient evidence to justify the certificate of authority by the public guardian and the imposition on civil liberties caused by the certification; reasonable fees for a public guardian who is appointed as temporary or general conservator and has taken possession or control of an elder's property.

§4000-4465: Powers of Attorney.

§§4500-4545: Judicial proceedings concerning Powers of Attorney.

§§4600-4806: Health Care Decisions.

§6100.5: Persons not mentally competent to make a will.

§§21340-21356: Construction of wills, trusts, and other instruments; limitations on transfers to drafters and others.

11. Lanterman-Petris-Short Act Conservatorship

Welfare & Institutions Code §§5000-5550

§§5000-5550: The Lanterman-Petris-Short Act

§5350: A Lanterman-Petris-Short Act conservatorship is one in which a conservator of the person, the estate, or both may be appointed for someone who is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism who is unwilling to accept or incapable of accepting voluntary treatment.

§5358: Authorizes involuntary commitment of the conservatee to enable treatment of an elder's mental disorder or chronic alcoholism and to protect the public.

Appendix B:
Common Abbreviations for Medical Terms

The following terms are often abbreviated in medical records or other reports that may be submitted to the court and considered as part of the judicial officer's deliberations.

AAA	abdominal aortic aneurysm
ADL	Activities of Daily Living
AH	auditory hallucination
AI	aortic insufficiency (heart valve abnormality)
AKA	above the knee amputation
AMA	against medical advice
AMS	altered mental status
ARF	acute renal failure (sudden kidney failure)
AS	aortic stenosis
BKA	below the knee amputation
BP	blood pressure
CA	cancer
CAD	coronary artery disease(hardening of the arteries)
CHF	congestive heart failure
C/O	complains of
COPD	chronic obstructive pulmonary disease (emphysema)
CP	chest pain or cerebral palsy
CPPD	calcium pyrophosphate disease (type of arthritis)
CRF	chronic renal failure
CVA	cerebrovascular accident (stroke)
DI	diabetes insipidus (typically begins in childhood/youth)
DJD	degenerative joint disease (osteoarthritis)
DM	diabetes mellitus
EMS	emergency medical services

ESLD	end stage liver disease/failure
ESRD	end stage renal (kidney) disease/failure
ETOH	ethanol (alcohol)
FX	fracture
GERD	gastroesophageal reflux disease (heartburn)
HCM	hypertrophic cardiomyopathy (heart abnormality)
HI	homicidal ideation
HOH	hard of hearing
HR	heart rate
HTN	hypertension (high blood pressure)
IADL	Instrumental Activities of Daily Living
IBS	irritable bowel syndrome
LOC	loss of consciousness
LVH	left ventricular hypertrophy (enlarged muscle of a heart's chamber)
MI	myocardial infarction (heart attack)
MR	mitral regurgitation (heart valve abnormality)
MS	multiple sclerosis or mitral stenosis (heart valve abnormality)
NIDDM	non-insulin dependent diabetes mellitus
NWB	non-weight bearing
OA	osteoarthritis
OBS	organic brain syndrome (used to describe decreased mental function due to a medical disease, other than a psychiatric illness; often used synonymously, but incorrectly, with dementia)
OR/F	open reduction/internal fixation (surgical procedure to repair some types of fractures)
PCKD	polycystic kidney disease
PD	Parkinson's disease
PNA	pneumonia
PND	paroxysmal nocturnal dyspnea (difficulty breathing while lying down at night; may be a symptom of heart failure)

PVD	peripheral vascular disease
RA	rheumatoid arthritis
SBE	subacute bacterial endocarditis (infection of heart valve)
SBO	small bowel obstruction
SI	suicidal ideation
SOB	shortness of breath
SOBOE	shortness of breath on exertion
S/P	status post (clinical shorthand referring to a state that follows an intervention)
SZ	seizure
THR	total hip replacement
TIA	transient ischemic attack (brief interruption of blood supply to a part of the brain causing stroke-like symptoms that completely resolve within 72 hours)
UI	urinary incontinence
UTI	urinary tract infection
VH	visual hallucination
Y/O	year old

Appendix C:
Medications Commonly Prescribed for Elders (By Brand Name)

✱ = Available without a prescription
❖ = Controlled substance

Brand Name	Generic Name	Usage
ACCUPRIL	Quinapril	Blood pressure; heart failure
ACEON	Perindopril	Blood pressure; heart failure
ACHROMYCIN	Tetracycline	Bacterial infection
ACIPHEX	Rabeprazole	Ulcer; Heartburn
ACTOS	Pioglitazone	Diabetes
ADALAT	Nifedipine	Chest pain
ADVIL ✱	Ibuprofen	Pain; Arthritis; Inflammation
AEROBID	Flunisolide	Asthma
AFRIN ✱	Oxymetazoline	Nasal stuffiness
AFTATE ✱	Tolnaftate	Fungal infection
AGGRENOX	Dipyridamole+ aspirin	Stroke prevention
AKINETON	Biperidin	Parkinson's disease
ALDACTONE	Spironolactone	Diuretic; Heart failure
ALDOMET	Methyldopa	Blood pressure
ALLEGRA	Fexofenadine	Allergy
ALPHAGAN	Brimonidine	Glaucoma
ALTACE	Ramipril	Blood pressure; heart failure
ALTERNAGEL ✱ ALU-CAP	Aluminum	Antacid
ALU-TAB ✱	Aluminum	Antacid
ALUPENT	Metaproterenol	Asthma
AMBIEN ❖	Zolpidem	Sleep
AMOXIL	Amoxicillin	Bacterial infection
AMPHOGEL ✱	Aluminum	Antacid
ANAFRANIL	Clomipramine	Depression
ANAPROX	Naproxen	Pain; Arthritis; Inflammation

✱ = Available without a prescription ❖ = Controlled substance

Brand Name	Generic Name	Usage
ANUSOL-HC ✱	Hydrocortisone	Inflammation
ANSAID	Flurbiprofen	Pain; Arthritis; Inflammation
ANTABUSE	Disulfiram	Alcohol
ANTIVERT	Meclizine	Dizziness
ANUSOL ✱	Phenylephrine	Hemorrhoids
APRESOLINE	Hydralazine	Blood pressure
ARICEPT	Donepezil	Alzheimer's disease
ARMOUR THYROID	Thyroid Dessicated	Thyroid hormone replacement
ARTANE	Trihexyphenidyl	Parkinson's disease
ASCRIPTIN ✱	Aspirin	Pain; Fever; Inflammation
ASMACORT	Triamcinolone	Asthma
ATACAND	Candesartan	Blood pressure
ATARAX	Hydroxyzine	Itching
ATIVAN©	Lorazepam	Anxiety
ATROMID	Clofibrate	High cholesterol
ATROVENT	Ipratropium	Asthma
AUGMENTIN	Amoxacillin/ Clavulanic Acid	Bacterial infection
AVANDIA	Rosiglitazone	Diabetes
AVAPRO	Irbesartan	Blood pressure
AVELOX	Moxifloxacin	Bacterial infection
AXID (AR✱)	Nizatidine	Ulcer; GERD
AZOPT	Brinzolamide	Glaucoma
BACLOFEN	Lioresal	Muscle relaxant
BACTRIM	Sulfamethoxazole/ Trimethoprim	Bacterial infection
BECLOVENT; BECONASE	Beclomethasone	Asthma; Allergy
BENADRYL ✱	Diphenhydramine	Parkinson's disease
BENEMID	Probenecid	Gout
BENTYL	Dicyclomine	Stomach problem
BENYLIN ✱	Dextromethorphan	Cough

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Brand Name	Generic Name	Usage
BETAGAN	Levobunolol	Glaucoma
BETIMOL	Timolol	Glaucoma
BETOPTIC	Betaxolol	Glaucoma
BIAXIN	Clarithromycin	Bacterial infection
BLOCADREN	Timolol	Blood pressure; chest pain
BRICANYL; BRETHAIR BRETHINE	Terbutaline	Asthma
BUFFERIN ✱	Aspirin	Pain; Fever; Inflammation
BUMEX	Bumetanide	Diuretic
BUSPAR	Buspirone	Anxiety
CAFERGOT	Ergotamine/Caffeine	Headache
CALAN	Verapamil	Chest pain; Blood pressure; Heart rate control
CALCIPARINE	Heparin	Prevent blood clots
CALTRATE 600 ✱	Calcium Carbonate	Antacid; Calcium supplement
CAPOZIDE	Captopril/ Hydrochlorothiazide	Blood pressure; heart failure
CARAFATE	Sucralfate	Ulcer
CARDENE	Nicardipine	Chest pain; Blood pressure
CARDIZEM	Diltiazem	Chest pain; Blood pressure
CARDURA	Doxazosin	Blood pressure
CATAPRES	Clonidine	Blood pressure
CECLOR	Cefaclor	Bacterial infection
CEFADYL	Cefapirin	Bacterial infection
CEFTIN	Cefuroxime axetil	Bacterial infection
CEFZIL	Cefprozil	Bacterial infection
CELEBREX	Celexoxib	Osteoarthritis; Pain
CELEXA	Citalopram	Depression
CENTRAX	Prazepam	Anxiety
CHERACOL ✱	Guaifenesin	Cough; Nasal stuffiness
CHLOR-TRIMETON ✱	Chlorpheniramine	Allergy

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Brand Name	Generic Name	Usage
CHOLYBAR	Cholestyramine	High cholesterol
CHRONULAC	Lactulose	Laxative
CIBALITH	Lithium	Mania
CIPRO	Ciprofloxacin	Bacterial infection
CLEOCIN	Clindamycin	Bacterial infection
CLINORIL	Sulindac	Arthritis
CLOZARIL	Clozapine	Tranquilizer
COGENTIN	Benztropine	Parkinson's disease
COGNEX	Tacrine	Alzheimer's disease
COLACE ✱	Docusate Sodium	Stool softener
COLESTID	Colestipol	High cholesterol
COMPAZINE	Prochlorperazine	Vomiting; Tranquilizer
COMTAN	Entacapone	Parkinson's disease
COREG	Carvedilol	Blood pressure; heart failure
CORGARD	Nadolol	Blood pressure; chest pain
CORTAID; CORTEF; CORTIFOAM	Hydrocortisone	Inflammation
COSOPT	Dorzolamide + Timolo	Glaucoma
COUMADIN	Warfarin	Prevent blood clots
COZAAR	Losartan	Blood pressure
CROLOM	Cromolyn sodium	Eye allergy
CYLERT	Pemoline	CNS stimulant
CYTOMEL	Liothyronine	Thyroid hormone replacement
CYTOTEC	Misoprostol	Ulcer
DALMANE ❖	Flurazepam	Hypnotic
DANTRIUM	Dantrolene	Muscle Relaxant
DARVOCET ❖	Propoxyphene/ Acetaminophen	Pain
DARVON ❖	Propoxyphene	Pain
DATRIL ✱	Acetaminophen	Pain; Arthritis
DELSYM ✱	Dextromethorphan	Cough
DELTASONE	Prednisone	Inflammation

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Brand Name	Generic Name	Usage
DEMADEX	Torsemide	Diuretic
DEMEROL ❖	Meperidine	Pain
DEPAKENE	Valproic Acid	Seizure
DEPAKOTE	Divalproex Sodium	Seizure
DESYREL	Trazodone	Depression
DIABETA	Glyburide	Diabetes
DIABINESE	Chlorpropamide	Diabetes
DIALOSE ✱	Docusate Sodium	Stool softener
DIAMOX	Acetazolamide	Glaucoma
DIASORB ✱	Attapulgite	Diarrhea
DICARBOSIL ✱	Calcium Carbonate	Antacid; Calcium supplement
DIFLUCAN	Fluconazole	Fungal infection
DILANTIN	Phenytoin	Seizure
DILAUDID ❖	Hydromorphone	Pain
DIMETANE ✱	Bromopheniramine	Allergy
DIMETAPP	Phenylephrine, Bropheniramine	Allergy; Nasal stuffiness
DIOVAN	Valsartan	Blood pressure
DIPROLENE; DIPROSONE	Betamethasone	Inflammation
DISALCID	Salsalate	Inflammation
DITROPAN	Oxybutynin	Urinary incontinence
DIULO	Metolazone	Diuretic
DIURIL	Chlorothiazide	Diuretic
DOLOBID	Diflunisal	Pain; Arthritis
DOLOPHINE ❖	Methadone	Pain
DORAL ❖	Quazepam	Hypnotic
DRAMAMINE ✱	Dimenhydrinate	Motion sickness; Dizziness
DRISTAN ✱	Phenylephrine Chlorpheniramine	Nasal stuffiness
DRISTAN LONG ACTING ✱	Oxymetazoline	Nasal stuffiness

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Brand Name	Generic Name	Usage
DRIXORAL ✱	Phenylephrine Dexbropheniramine	Nasal stuffiness
DULCOLAX ✱	Bisacodyl	Laxative
DURICEF	Cefadroxil	Bacterial infection
DYNACIRC	Isradipine	Blood pressure
DYNAPEN	Dicloxacillin	Bacterial infection
DYRENIUM	Triamterene	Diuretic
E.E.S.	Erythromycin ethylsuccinate	Bacterial infection
ECOTRIN ✱	Aspirin	Pain, Fever, Inflammation
ELAVIL	Amitriptyline	Depression
ELDEPRYL	Selegiline	Parkinson's disease
EMPIRIN ✱	Aspirin	Pain, Fever, Inflammation
E-MYCIN	Erythromycin	Bacterial infection
EQUANIL ❖	Meprobamate	Anxiety
ERGOSTAT	Ergotamine	Migraine headache
ERYC	Erythromycin	Bacterial infection
ERYPED	Erythromycin ethylsuccinate	Bacterial infection
ERY-TAB	Erythromycin	Bacterial infection
ERYTHROCIN STEARATE	Erythromycin stearate	Bacterial infection
ERYTHROMYCIN BASE	Erythromycin	Bacterial infection
ESIDRIX	Hydrochlorothiazide	Diuretic
ESTACE; ESTRADERM	Estradiol	Estrogen replacement
EXELON	Rivastigmine	Alzheimer's disease
EX-LAX ✱	Bisacodyl	Laxative
FELDENE	Piroxicam	Pain; Arthritis; Inflammation
FEOSOL; FERGON ✱	Ferrous sulfate	Iron supplement
FIBERALL ✱	Psyllium	Laxative
FIBERCON ✱	Calcium Polycarbophil	Laxative

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Brand Name	Generic Name	Usage
FIORICET ❖	Acetaminophen/ Butalbital/Caffeine	Pain
FIORINAL ❖	Aspirin/Butalbital/ Caffeine	Pain
FLAGYL	Metronidazole	Bacterial infection
FLEXERIL	Cyclobenzaprine	Muscle relaxant
FLOMAX	Tamsulosin	Prostate enlargement
FLORINEF	Fludrocortisone	Inflammation
FLOXIN	Ofloxacin	Bacterial infection
FURADANTIN	Nitrofurantoin	Urinary bacterial infection
GABITRIL	Tiagabine	Seizure
GANTRISIN	Sulfisoxazole	Bacterial infection
GLUCOPHAGE	Metformin	Diabetes
GLUCOTROL	Glipizide	Diabetes
GLUCOVANCE	Metformin + Glyburide	Diabetes
GLYSET	Miglitol	Diabetes
GYNE- LOTRIMIN ✱	Clotrimazole	Vaginal yeast infection
HABITROL ✱	Nicotine	Stop smoking
HALCION ❖	Triazolam	Hypnotic
HALDOL	Haloperidol	Tranquilizer
HISMANAL	Astemizole	Allergy
HYDROCORTONE	Hydrocortisone	Inflammation
HYDRODIURIL	Hydrochlorothiazide	Diuretic
HYDROTON	Chlorthalidone	Diuretic
HYTRIN	Terazosin	Blood pressure
HYZAAR	Losartan + Hydrochlorothiazide	Blood pressure
ILOSONE	Erythromycin estolate	Bacterial infection
IMDUR	Isosorbide mononitrate	Chest pain
IMITREX	Sumitriptan	Migraine headache
IMODIUM ✱	Loperamide	Diarrhea
INDERAL	Propranolol	Blood pressure, Chest pain, Heart rate control, Migraine

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Brand Name	Generic Name	Usage
INDOCIN	Indomethacin	Pain; Arthritis; Inflammation
INH	Isoniazid	Tuberculosis
INTAL	Cromolyn	Asthma, Allergy
IOPIDINE	Apraclonidine	Glaucoma
ISOPTIN	Verapamil	Chest pain; Blood pressure; Heart rate control
ISOPTO CARPINE	Pilocarpine	Glaucoma
ISORDIL	Isosorbide dinitrate	Chest pain
KAON	Potassium chloride	Potassium supplement
KAOPECTATE ✱	Attapulgite	Diarrhea
K-DUR	Potassium chloride	Potassium supplement
KEFLEX; KEFTAB	Cephalexin	Bacterial infection
KENALOG	Triamcinolone	Inflammation
KEPPRA	Levetiracetam	Seizure
KERLONE	Betaxolol	Blood pressure
KLONOPIN	Clonazepam	Seizure
KLOR-CON; KLOTRIX	Potassium chloride	Potassium supplement
KWELL	Lindane	Lice; Scabies
LAMICTAL	Lamotrigine	Seizure
LANOXIN	Digoxin	Heart rate control
LASIX	Furosemide	Diuretic
LEVOTHROID	Levothyroxine	Thyroid hormone replacement
LEVSIN	Hyoscyamine	Urinary incontinence
LIBRITABS ❖	Chlordiazepoxide	Anxiety
LIBRIUM ❖	Chloridiazepoxide	Anxiety
LIDEX	Fluocinonide	Inflammation
LIPITOR	Atorvastatin	High cholesterol
LIQUAEMIN	Heparin	Prevent blood clots
LITHOBID	Lithium	Mania
LODINE	Etodolac	Pain; Arthritis; Inflammation
LONITEN	Minoxidil	Blood pressure

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Brand Name	Generic Name	Usage
LOPID	Gemfibrozil	High cholesterol
LOPRESSOR	Metoprolol	Blood pressure; chest pain
LORELCO	Probucol	High cholesterol
LORTAB	Hydrocodone/ Acetaminophen	Pain
LOTENSIN	Benazepril	Blood pressure
LOTRIMIN ✱	Clotrimazole	Yeast infection
LOXITANE	Loxapine	Tranquilizer
LOZOL	Indapamide	Diuretic
MAALOX ✱	Magnesium/ Aluminum	Antacid; Laxative
MACRODANTIN	Nitrofurantoin	Urinary bacterial infection
MARPLAN	Isocarboxazid	Depression
MAVIK	Trandolopril	Blood pressure
MAXAIR	Pirbuterol	Asthma
MAXIVATE	Betamethasone	Inflammation
MAXZIDE	Triamterenel/ Hydrochlorothiazide	Blood pressure
MELLARIL	Thioridazine	Tranquilizer
METAMUCIL ✱	Psyllium	Laxative
METAPREL	Metaproterenol	Asthma
MEVACOR	Lovastatin	High cholesterol
MICARDIS	Telmisartan	Blood pressure
MICRONASE	Glyburide	Diabetes
MIDAMOR	Amiloride	Diuretic
MILK OF MAGNESIA ✱	Magnesium hydroxide	Antacid
MILTOWN ❖	Meprobamate	Anxiety
MINIPRESS	Prazosin	Blood pressure
MINOCIN	Minocycline	Bacterial infection
MIRAPEX	Pramipexole	Parkinson's disease
MITROLAN	Calcium polycarbophil	Laxative
MOBIC	Meloxicam	Arthritis; Pain

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Brand Name	Generic Name	Usage
MONOPRIL	Fosinopril	Blood pressure
MOTRIN ✱	Ibuprofen	Pain; Arthritis; Inflammation
MYAMBUTOL	Ethambutol	Tuberculosis
MYCELEX	Clotrimazole	Yeast Infection
MYCOSTATIN	Nystatin	Fungal Infection
MYLANTA ✱	Magnesium/Aluminum/ Simethicone	Indigestion; Antacid
MYLICON ✱	Simethicone	Stomach gas
MYSOLINE ❖	Primidone	Seizure
NALDECON ✱	Guaifenesin	Cough
NALFON	Fenoprofen	Pain; Arthritis; Inflammation
NAPROSYN	Naproxen	Pain; Arthritis; Inflammation
NARDIL	Phenelzine	Depression
NASALCORT	Triamcinolone	Asthma; Allergy
NASALCROM ✱	Cromolyn	Allergy; Asthma
NAVANE	Thiothixene	Tranquilizer
NEOLOID ✱	Castor Oil	Laxative
NEOSYNEPHRINE ✱	Oxymetazoline; Phenylephrine	Nasal stuffiness
NEPTAZANE	Methizolamide	Glaucoma
NEURONTIN	Gabapentin	Seizure; Pain
NICODERM; NICORETTE ✱	Nicotine	Smoking cessation
NITRO-BID; NITRODISC; NITRO-DUR; NITROGARD; NITROLINGUAL SPRAY; NITROSTAT	Nitroglycerin	Chest pain
NIZORAL	Ketoconazole	Fungal infection
NORFLEX	Orphenadrine	Muscle relaxant
NOROXIN	Norfloxacin	Urinary bacterial infection
NORPACE	Disopyramide	Heart rate control

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Brand Name	Generic Name	Usage
NORPRAMIN	Desipramine	Depression
NORVASC	Amlodipine	Blood pressure
NUMORPHAN	Oxymorphone	Pain
OCUPRESS	Carteolol	Glaucoma
OCUSERT	Pilocarpine	Glaucoma
OMNIPEN	Ampicillin	Bacterial infection
OPTICROM	Cromolyn	Allergy; Asthma
OPTIMINE	Azatadine	Allergy
OPTIPRANOLOL	Metipranolol	Glaucoma
ORGANIDIN	Iodinated glycerol	Cough
ORINASE	Tolbutamide	Diabetes
OS-CAL 500 ✱	Calcium carbonate	Antacid; Calcium supplement
P.C.E.	Erythromycin	Bacterial infection
PAMELOR	Nortriptyline	Depression
PARAFLEX; PARAFON FORTE	Chloroxazone	Muscle relaxant
PARLODEL	Bromocriptine	Parkinson's disease
PAXIL	Paroxetine	Depression
PENTIDS	Penicillin G	Bacterial infection
PEN-VEE K	Penicillin V	Bacterial infection
PEPCID (AC ✱)	Famotidine	Ulcer; Heartburn
PEPTO-BISMOL	Bismuth subsalicylate	Diarrhea
PERCOCET ❖	Oxycodone/ Acetaminophen	Pain
PERCODAN ❖	Oxycodone/ Aspirin	Pain
PERDIEM FIBER ✱	Psyllium	Laxative
PERMAX	Pergolide	Parkinson's disease
PERSANTINE	Dipyridamole	Stroke prevention
PERTUSSIN ES ✱	Dextromethorphan	Cough
PHENERGAN	Promethazine	Allergy; Vomiting; Sedative
PILOCAR	Pilocarpine	Glaucoma
PLAVIX	Clopidogrel	Stroke prevention

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Brand Name	Generic Name	Usage
PLENDIL	Felodipine	Blood pressure
PRAVACHOL	Pravastatin	High cholesterol
PRECOSE	Acarbose	Diabetes
PREMARIN	Estrogens, conjugated	Estrogen replacement
PREVACID	Lansoprazole	Ulcer; Heartburn
PRILOSEC (OTC ✱)	Omeprazole	Ulcer; Heartburn
PRINIVIL	Lisinopril	Blood pressure
PRO-BANTHINE	Propantheline	Bowel irritation
PROCAN	Procainamide	Heart rate control
PROCARDIA	Nifedipine	Blood pressure; Chest pain
PROLIXIN	Fluphenazine	Tranquilizer
PRONESTYL	Procainamide	Heart rate control
PROPINE	Dipivefrin	Glaucoma
PROSCAR	Finaasteride	Prostate enlargement
PROSOM ❖	Estazolam	Hypnotic
PROTONIX	Pantoprazole	Heartburn
PROVENTIL	Albuterol	Asthma
PROZAC	Fluoxetine	Depression
PYRIDIUM	Phenazopyridine	Urinary tract pain
PZA	Pyrazinamide	Tuberculosis
QUESTRAN	Cholestyramine	High cholesterol
QUINAGLUTE; QUINIDEX	Quinidine	Heart rate control
REGLAN	Metoclopramide	Vomiting; stomach motility
RELA	Carisoprodol	Muscle relaxant
RELAFEN	Nabumetone	Pain; Arthritis; Inflammation
RELENZA	Zanamivir	Influenza treatment
REMERON	Mintazapine	Depression
REQUIP	Ropinorole	Parkinson's disease
RESTORIL ❖	Temazepam	Hypnotic
RETIN-A	Tretinoin	Acne
RETROVIR	Zidovudine	Viral Infection

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Brand Name	Generic Name	Usage
RIFADIN	Rifampin	Tuberculosis
RISPERDAL	Risperidone	Tranquilizer
RITALIN	Methylphenidate	CNS Stimulant
ROBAXIN	Methocarbamol	Muscle relaxant
ROBITUSSIN ✱	Guaifenesin/ Dextromethorphan	Cough
ROGAINE	Minoxidil	Male pattern baldness
SECONAL ❖	Secobarbital	Hypnotic
SECTRAL	Acebutolol	Blood pressure
SENOKOT ✱	Senna concentrate	Laxative
SEPTRA	Sulfamethoxazole/ Trimethoprim	Bacterial infection
SERAX ❖	Oxazepam	Anxiety
SEROQUEL	Quetiapine	Tranquilizer
SERPASIL	Reserpine	Blood pressure
SERZONE	Nefazodone	Depression
SINEMET	Carbidopa/ Levodopa	Parkinson's disease
SINEQUAN	Doxepin	Depression
SLO-BID	Theophylline	Asthma
SLOW-K	Potassium chloride	Potassium supplement
SLOW- PHYLLIN	Theophylline	Asthma
SOMA	Carisoprodol/ Aspirin	Muscle relaxant
SONATA ❖	Zaleplon	Hypnotic
STELAZINE	Trifluoperazine	Tranquilizer
SUDAFED	Pseudoephedrine	Nasal stuffiness
SUPRAX	Cefixime	Bacterial infection
SYLLACT ✱	Psyllium	Laxative
SYMMETREL	Amantidine	Parkinson's disease
SYNTHROID	Levothyroxine	Thyroid hormone replacement
TAGAMET (HB ✱)	Cimetidine	Ulcer; Heartburn
TAMIFLU	Oseltamivir	Influenza treatment
TASMAR	Tolcapone	Parkinson's disease

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Brand Name	Generic Name	Usage
TAVIST ✱	Clemastine	Allergy
TEGOPEN	Cloxacillin	Bacterial infection
TEGRETOL	Carbamazepine	Seizure
TELDRIN ✱	Chlorpheniramine	Allergy
TENORMIN	Atenolol	Blood pressure; chest pain
TEQUIN	Gatifloxacin	Bacterial infection
TERAZOL	Terconazole	Vaginal fungal infection
TEVETEN	Eprosartan	Blood pressure
THEO-24; THEO-DUR; THEOLAIR	Theophylline	Asthma
THORAZINE	Chlorpromazine	Tranquilizer
TICLID	Ticlopidine	Prevent blood clots
TIGAN	Trimethobenzamide	Vomiting
TILADE	Nedocromil	Allergy; Asthma
TIMOPTIC	Timolol	Glaucoma
TINACTIN ✱	Tolnaftate	Fungal infection
TOFRANIL	Imipramine	Depression
TOLECTIN	Tolmetin	Inflammation
TOLINASE	Tolazamide	Diabetes
TOPAMAX	Topiramate	Seizure
TORADOL	Ketorolac	Pain; Arthritis; Inflammation
TRANSDERM SCOP	Scopolamine	Motion sickness
TRANSDERM-NITRO	Nitroglycerin	Chest pain
TRANXENE ❖	Clonazepate	Anxiety
TRENTAL	Pentoxifylline	Poor circulation in legs
TRILAFON	Perphenazine	Tranquilizer
TRILEPTAL	Oxcarbazepine	Seizure
TRUSOPT	Dorzolamide	Glaucoma
TUMS ✱	Calcium carbonate	Antacid; Calcium supplement
TUSSIONEX ❖	Chlorpheniramine/ Hydrocodone	Nasal stuffiness; cough

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Brand Name	Generic Name	Usage
TUSSI-ORGANIDIN ❖	Codeine/ Iodinated Glycerol	Cough; Nasal stuffiness
TYLENOL ✱	Acetaminophen	Pain; Osteoarthritis
TYZINE ✱	Tetrahydrozoline	Nasal stuffiness
ULTRAM	Tramadol	Pain
UNIPEN	Nafcillin	Bacterial infection
UNISOM ✱	Doxylamine	Sedative
UNIVASC	Moexepril	Blood pressure
URECHOLINE	Bethanechol	Urinary retention
VALISONE	Betamethasone	Inflammation
VALIUM ❖	Diazepam	Anxiety; Muscle relaxant
VANCENASE; VANCERIL	Beclomethasome	Asthma; Allergy
VANTIN	Cefpodoxime	Bacterial infection
VASCOR	Bepridil	Blood pressure; chest pain
VASOTEC	Enalapril	Blood pressure; heart failure
V-CILLIN K; VEETIDS	Penicillin V	Bacterial infection
VELOSEF	Cephradine	Bacterial infection
VENTOLIN HFA	Albuterol	Asthma
VIAGRA	Sildenafil	Erectile dysfunction
VIBRAMYCIN	Doxycycline	Bacterial infection
VICODIN ❖	Hydrocodone/ Acetaminophen	Pain
VISINE ✱	Tetrahydrozoline	Eye redness
VISKEN	Pindolol	Blood pressure
VISTARIL	Hydroxyzine	Itching
VIVACTIL	Protriptyline	Depression
VOLTAREN	Diclofenac	Pain; Inflammation; Arthritis
WELLBUTRIN	Bupropion	Depression
WESTCORT	Hydrocortisone	Inflammation
WYGESIC	Propoxyphene/ Acetaminophen	Pain

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Brand Name	Generic Name	Usage
XALATAN	Latanoprost	Glaucoma
XANAX ❖	Alprazolam	Anxiety
ZANTAC ✱	Ranitidine	Ulcer; Heartburn
ZAROXOLYN	Metolazone	Diuretic
ZESTRIL	Lisinopril	Blood pressure; heart failure
ZITHROMAX	Azithromycin	Bacterial infection
ZOCOR	Simvastatin	High cholesterol
ZOLOFT	Sertraline	Depression
ZYBAN	Bupropion	Smoking cessation
ZYLOPRIM	Allopurinol	Gout
ZYPREXA	Olanzapine	Tranquilizer
ZYRTEC	Cetirizine	Allergy

Adapted from *Reducing Medication Problems in the Elderly*, 2nd edition, Bradley Williams, editor

IMPORTANT LOCAL NUMBERS

We encourage judicial officers to add local contact names, phone numbers, and email addresses here.

Adult Protective Services: ______________________________________

____

Long Term Care Ombudsman: ___________________________________

____

Medical Services: ____

____

Mental Health Services: ______________________________________

____

Domestic Violence Shelter: ____________________________________

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Domestic Violence Hotline: ____________________________________

____

Area Agency on Aging: _______________________________________

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Victim Services: ____

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Public Administrator/Public Guardian: ___________________________

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Regional Center/Developmental Disabilities Resources: _______________

____

Center for Independent Living for people with disabilities: ____________

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National Eldercare Locator (senior services): **1-800-677-1116**

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For more information, visit our websites:

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UNIVERSITY of CALIFORNIA, IRVINE

Center of Excellence on Elder Abuse and Neglect, University of California, Irvine

www.centeronelderabuse.org

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Geriatric Medicine Program

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We welcome your comments.
Please visit **www.centeronelderabuse.org** and use the "Contact Us" feature to send us an email.

MY CLIENT JUST DIED - NOW WHAT?

Debra G. Speyer

Representing Estates, Trusts and Beneficiaries after the death of the Account Holder. What are the ethical and practical ramifications of the death of an Account Holder? This presentation will provide some of those answers.

Introduction:

The death of a client can be a complicated matter. After their family contacts you to tell you the bad news, then what? What if your hearing is about to start next week? What if your mediation is about to start the next day? What if you have a settlement on the table and were waiting for the client to return the settlement agreement. Your state's law, the Rules of Professional Responsibility, the rules of agency, and how the account is titled will dictate how you may proceed.

When a client dies, based on the law of agency (Restatement (Third) of Agency (see also Restatement (Third) of the Law Governing Lawyers), the actual authority permitting the attorney to proceed terminates with the clients death. The attorney may be able to continue the representation with a substituted client such as a personal representative, a successor trustee, etc. The attorney must take action to protect the interests of the deceased client while this transition is taking place. On a practical level, immediate notification to FINRA to advise of the situation would be prudent so that all actions and deadlines can cease while the substitution process is taking place, and to advise that a substituted client will be put in place.

But what if a settlement has taken place and the client dies just before the signatures are inked. The doctrine of apparent authority exists in order to allow third parties to depend on agents without investigating their agency before every transaction. Would that suggest that the substituted party can unravel the settlement agreement? Can the Respondent do so as they may believe they now have a stronger case without a live Claimant.

The answers may depend on the circumstances and your state's laws. The ABA and state bars have guidelines as to how to proceed in different professional responsibility situation. As well, the state's bar associations have legal ethics hotlines as part of membership to provide guidance to their members.

The Rules of Professional Responsibility:

Rule. 1.0 (e) Terminology:

Practical Ramification: Since the client relationship involves informed consent of the client, upon the death of the client, that informed consent terminates.

The Rule: "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer:

Practical Ramification: The client determines whether to proceed with a case or even settle a matter. The death of a client terminates the ability for the attorney to proceed with entering into any further matters. The attorney may not take any further steps even if the parties were in settlement negotiations. Once a qualified person is put in place, then the attorney may proceed.

The Rule:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.4 Communications:

Practical Ramification: Because the client determines whether to proceed with a case or even settle a matter, the death of a client terminates the ability to communicate with the client, and therefore terminates the ability to enter into any further matters with the client. The attorney may not take any further steps even if the parties were in settlement negotiations. Once a qualified person is put in place, then the attorney may proceed.

The Rule:

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation. Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications. Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Rule 1.6 Confidentiality of Information:

Practical Ramification: Because a lawyer shall not reveal information unless the client gives consent, the death of the client terminates the ability for that client to give consent regarding the release of confidential information.

The Rule:

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the clientlawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved. Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer’s services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client’s misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer’s obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client’s crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third

party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law. Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c). Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a

means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules. Former Client
[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Rule 1.9 Duties to Former Clients:

Practical Ramification: Due to the death of the clietn, this is now your former client. The issue to determine is what information can you now reveal, to whom and what is the timing to reveal it. This will depend on the information and when a successor will step in on behalf of the deceased client.

The Rule:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 3.3: Candor Toward the Tribunal Share:

Practical Ramifications: Any appearance by the lawyer before the court without disclosing the client's death would be tantamount to making a "false statement of material fact...to a tribunal" within the meaning of Rule 3.3.

The Rule:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 4.1 Truthfulness in Statement to Others:

Practical Ramification: The Rule's commentary is below. When should the Respondent be advised, immediately or after a person has been substituted for the deceased client. There are differing interpretations of this rule by various bar associations. The ABA Formal Opinion 95-397 dated September 18, 1995 - Duty to Disclose Death of Client addressed this in the context of a personal injury action. This opinion has been made a part of your materials.

Misrepresentation [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

The Rule:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Estate Process:

For those unfamiliar with the estate probate process or probate and non probate assets, the below will explain some of the concepts and how they will be addressed regarding the death of your client. Some of these issues may be easier to deal with depending upon how the account in dispute was titled.

Joint Account with Rights of Survivorship

If the account that is in dispute was set up as a Joint Account with Rights of Survivorship, the remaining account holder can continue as the client. A joint account is a non-probate asset. No estate needs to be raised. You can proceed with your arbitration with the remaining account holder. You can attend the mediation with the remaining account holder. The remaining account holder can sign the settlement agreement. The issue you may run into for example is, if the deceased client was your more sympathetic client and the Respondent recognizes that as well, the Respondent may not wish to settle or settle for less.

Payable on Death Accounts

If the account was set up as a Payable on Death Account, the designated beneficiary on the Account is now the new owner of the Account upon the death of the account owner. A Payable on Death Account is a non-probate asset. The transfer is immediate. No estate needs to be raised. The deceased person no longer owns the account.

IRA with Beneficiary

Like the Payable on Death Account, upon the death of the IRA account holder, the new beneficiary is the owner of the account. An IRA Account is a non-probate asset. The transfer is immediate. No estate needs to be raised. The deceased person no longer owns the account.

Trusts

When a Trustee dies, there is generally a Successor Trustee named in the Trust document who has authority over the Trust. If there is no named Successor Trustee, the Trust itself may have language that determines how to proceed. For example the Settlor (person who initially set up the Trust) based on language in the Trust may have the right to appoint a new Trustee if that Settlor is still alive. The Trust language may provide for the beneficiary to serve as Trustee if the Trustee is deceased.

If the Settlor is deceased or there is no named Successor Trustee, the involved parties can turn to the Courts to appoint a Successor Trustee by filing a Petition To Appoint a Successor Trustee.

If the deceased Trustee had Co-Trustees, the Joint Trustees take over the Trust without involving the Courts.

Deceased Individual account

If the account was set up in the client's individual name, an estate will need to be raised. Generally to raise an estate, a Petition for Probate is filed with the Court.

If the deceased client had a Will, that Will shall be submitted to the Court with a Petition for Probate and an original death certificate. The Executor of the Estate will be sworn in by the Court. Shortly after that, the Court shall issue Letters of Testamentary. Some problems may arise such as the family only has a photocopy or the Will. Then a Petition to Probate a Photo Copy of a Will needs to be filed. Your client will now be the Executor of the Estate.

If the deceased client had no Will, then the next of kin determined by state specific law will be sworn in as the Administrator. If there are more than one next of kin i.e. multiple children. Each one has the right to be the Administrator. The next of kin may sign a Renunciation to allow someone else to serve as Administrator. If there a disagreement as to who will serve, a Petition can be filed with the Court to determine who will serve as Administrator.

It is possible that your client will have a Pour-Over Will which is a testamentary device where the Testator (writer of the Will) bequested the assets to a Trust. Those assets will be distributed by a Trustee of the Trust.

Conclusion:

In conclusion, the death of a client can be complicated on many levels. This one hour presentation will likely raise more questions regarding your ethical obligations regarding the death of a client.

PROFESSIONAL ETHICS RULES RELATING TO DIMINISHED CAPACITY

Debra G. Speyer, Esq., Dr. Robert E. Roush, Benjamin P. Edwards, Esq.

I. Introduction

Each day, approximately 10,000 Americans reach the age of sixty-five. As the population ages, an increasing percentage of the populace will have diminished cognitive capacity. This creates significant challenges for professional attorney/client relationships premised on norms devoted to client service and fostering client autonomy. In many instances, clients may no longer be able to protect their own interests. To address these issues, the American Bar Association has issued special model rules designed to assist lawyers working with clients experiencing diminished capacity. These materials present these rules as well as the comments associated with these rules and some of the other, related ethical considerations.

II. Diminished Capacity

ABA Model Rule 1.14 provides guidance for attorneys working with clients with diminished capacity. That rule provides:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

III. Comments to the Diminished Capacity Rule

The comments to ABA Rule 1.14 provide additional guidance about its meaning and interpretation. There are ten comments to ABA Rule 1.14. Those comments are:

> [1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example,

children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. 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.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking 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. 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 decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: 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. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.
[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other

counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

IV. Confidentiality Rules

The ABA's diminished capacity rule must also be read in relation to the general ABA rule on confidentiality. That rule is Rule 1.6. It provides:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
>> (1) to prevent reasonably certain death or substantial bodily harm;
>>
>> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>>
>> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>>
>> (4) to secure legal advice about the lawyer's compliance with these Rules;
>>
>> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>>
>> (6) to comply with other law or a court order; or
>>
>> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

V. Confidentiality Comments

There are twenty comments to the ABA confidentiality rule. Those comments are below. Notably, the ABA's diminished capacity rule provides an additional exception to the confidentiality exceptions expressly authorized by the confidentiality rule.

> [1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.
>
> [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.
>
> [3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.
>
> [4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer’s services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client’s misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer’s obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client’s crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has

committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited

information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the

lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.