Use care when referring clients to professionals

by David A. Weintraub

Hypothetical 1

You have just referred one of your elderly clients to a local accountant. The accountant is in his 40s. You have seen him around town for years. He regularly eats breakfast at an expensive local restaurant. He appears to be popular at the restaurant. His office is located in a good part of town. He is a nice guy. You have heard that in addition to being an accountant, he also advises his clients about investments. So, what can possibly go wrong with referring one of your elderly clients, for accounting purposes, to this gentleman? Well, lots can go wrong.

As it turns out, for years this accountant, while being registered as a stockbroker/financial advisor, was alleged to have been soliciting his clients to co-invest in various internet businesses operated by the accountant's son. The accountant was further alleged to have signed promissory notes in favor of his customers, for an aggregate amount in excess of $1 million. When his former broker-dealer employer learned of his conduct, he was fired. His former employer, the broker-dealer, has paid settlements in excess of $500,000 to several investors. As the result of an investigation initiated by FINRA, the Financial Industry Regulatory Authority, the accountant was suspended for two years from acting in any capacity with a FINRA member firm. That suspension ends in December 2013. The accountant's Florida accounting license remains in good standing.

Hypothetical 2

Sadie and Thelma, 78 and 80 years old, respectively, have been domestic partners for 50 years. They recently returned from a California vacation and are now married. Their combined assets are $750,000. Because of their very conservative nature, 100 percent of their assets are in a savings account with a local bank. They need income. They also need new estate planning documents, which is why they have come to you. Because they barely receive any interest from the local bank, they also want you to recommend a new financial advisor.

For the past three or four years you have been receiving invitations to attend a dinner at a local restaurant. The dinner's sponsor is a local financial advisor who regularly pitches annuities. The advisor appears to be about 50 years old. While you have been attending the dinners, it has been mostly for networking purposes. The food is O.K., but you love the bottomless red wine. The advisor's talk about annuities has been too complex for you to follow (especially after the wine), and it has gone in one ear and out the other (the talk, not the wine). However, you have assumed 1) the advisor must be both *well educated* and *experienced* in order to understand annuities, and 2) the advisor must be *very successful* to be able to pay for dinner for his 20 to 30 guests. These assumptions, it turns out, are wrong. First, the advisor never graduated from high school, having left school in the 11th grade. Second, until five years ago, the advisor was working as a salesman at the local used car dealership. He had been there for 15 years. Third, the advisor initiated Chapter 7 bankruptcy proceedings three years ago, unable to juggle his own finances.

Lessons learned(?)

If after reading the preceding paragraphs you would remain comfortable referring your elderly clients to either the accountant or the advisor, please stop reading and move on to the next article. If you would not be comfortable, please continue reading.

The key fact in the preceding hypotheticals is that both the accountant and the advisor either have in the past, or may still, advise clients about investments. This fact alone should alert you to the availability of voluminous public information about the individual's background. The single most important document to review is the advisor's Central Registration Depository report or CRD. The CRD details the financial advisor's employment history, including all reportable events. A financial advisor's reportable events include customers' complaints, arbitrations, settlements, arbitration awards, regulatory investigations, bankruptcies, uncollected judgments and certain criminal matters. For the accountant in Hypothetical 1, his CRD reflects settlements exceeding $500,000, a summary of each complaint, the amount of each individual settlement and the two-year suspension of the accountant's securities license. As for the free dinner financial advisor, his CRD reflects that he has been licensed for only five years, that he failed the Series 7 examination two times before passing, that he worked for 15 years as a used car salesman and that he recently filed for bankruptcy court protection. Notably, the fact that he never completed high school would not appear anywhere on his CRD.

Obtaining a CRD

Obtaining a CRD is easy and free. After obtaining the broker's CRD number from FINRA's website, *www.finra.org/Investors/ToolsCalculators/BrokerCheck/index.htm*, one can download a redacted version of the CRD. The redacted version of the CRD differs in several respects from an unredacted version. First, the redacted version does not provide the name of the investors who have

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complained about the broker. Second, the redacted version will not include bankruptcies that occurred more than 10 years ago. Third, the redacted version will not report whether the broker ever failed a licensing exam. The easiest way to obtain an unredacted CRD is through the Florida Office of Financial Regulation. Send an email to *electronic_licensing@fldfs.com* or *samantha.chambers@flofr.com*. In the email, request the broker's entire CRD, including a full legacy report.

Stockbrokers' education

My corporations professor in law school once said, "Financial advisors are nothing more than used car salesmen with more expensive suits." Although her words may have been somewhat harsh, her comment was prescient in one particular regard—the subject of education. Whether one sells used cars or investments, the educational prerequisites for those who sell them are identical—there are none. Perhaps there is good reason in the case of the car salesperson, but is the same true with respect to one's financial advisor? Unfortunately, neither the SEC nor FINRA mandate educational prerequisites for taking the primary stockbroker licensing examination. Both the securities industry and regulators allow individuals without any formal higher education not only to advise our elderly clients how to invest, but also to recommend and sell products that have "rocket science" complexity. In the past 10 years, the types and varieties of complex variable and equity indexed annuities, as well as structured products, have exploded. Many of these products' strategies are so intricate that the salespeople selling them readily acknowledge they do not understand them and are forced to rely upon the marketing literature presented by their firms.

Conclusion

Rather than focusing on whether Florida courts would recognize the tort of "negligent referral" in the accountant, attorney or stockbroker context, the safer path is to spend a few minutes investigating the background of the person to whom you are referring your vulnerable clients. The Florida Bar posts information regarding a lawyer's disciplinary history. The Florida Office of Financial Regulation provides information regarding a stockbroker's regulatory history. The Florida Department of Business and Professional Regulation provides information about complaints against accountants. Given the degree to which our clients, especially our vulnerable elderly ones, trust our professional referrals, it is not asking too much to engage in a few minutes of due diligence before making a referral.

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DPOA still a less restrictive alternative to guardianship

by Sam W. Boone, Jr.
on behalf of the Estate Planning and Advance Directives Committee

A recent case out of the 3rd District Court of Appeal, *Albelo v. Southern Oak Ins. Co., --- So.3d ----, 2013 WL 440199 (Fla. 3d DCA February 06, 2013)*, is one of the first to apply Florida's new Power of Attorney Act. The case demonstrates the importance of a well drafted durable power of attorney (DPOA) and reaffirms that a DPOA will be considered by the court to be a less restrictive alternative than a guardianship. It also reminds us that the rewrite of Chapter 709, enacted in 2011, applies to DPOAs executed before the new law came into effect, even though the court notes that it believed "the result would be the same even if the former version of Chapter 709 were applied fully to the facts of this case."

In this case, a woman in her eighties executed a DPOA appointing her son as her agent. That DPOA was duly executed in April 2007. The mother suffered damages to her home caused by a burglary just a month after she executed the DPOA. After the insurance company paid a de minimis amount on the claim, the woman's son, as agent for his mother, filed an additional claim in a sworn proof of loss on behalf of his mother, supported by a public adjuster's estimate.

The trial court's order dismissed the mother's premises liability complaint, with prejudice, for failure to file a petition in probate to determine her own incapacity. The appellate court reversed the trial court and held both the insurance company and its attorneys liable for appellate attorney's fees under Section 57.105(1).

The insurance company contended that the claim was fraudulent and instigated not by the mother but rather by her son. The insurance