

FINRA Interference with Estate Planning

by David A. Weintraub

Financial exploitation of the elderly is rampant in the United States. The elderly are routinely exploited by those close to them, such as family, friends, caregivers, financial advisors, as well as by scammers trying to sell them products they do not need. These products include elaborate home security systems and other home improvements.

An example of a new potential for elder abuse stems from the Financial Industry Regulatory Authority's ("FINRA") well intentioned rules designed to curb financial exploitation. Effective February 2018, FINRA Rule 4512 requires registered representatives to make reasonable efforts to obtain the name of and contact information for a "trusted contact person" (hereafter "TCP") upon the opening of a retail account or when updating account information for a retail account.

Pursuant to the rule, "the member is authorized to contact the trusted contact person and disclose information about the customer's account to address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney..."

The TCP is intended to be a resource for the FINRA member in administering the customer's account, protecting assets and responding to possible financial exploitation. Unfortunately, this rule will serve to alert nefarious third parties that Aunt Betty or Uncle Bernie had significantly more assets than relatives may have believed. But for Rule 4512, certain people (the putative "villains") will be alerted to assets they did not know existed. Opportunity and motive to steal have been created by this new Rule. The Rule may also interfere with pre-existing estate plans.

Because FINRA Rule 4512 does not require the customer to identify the TCP, how should we as lawyers advise our clients? Do we tell them to refuse to identify TCP's? Do we encourage clients to identify TCP's, and if so, do we do it in writing? Should we explain to our clients the pros and cons of designating TCP's? Do we incorporate the TCP concept in estate planning documents? Do we revise Durable Powers of Attorney to address issues that will arise from a potentially conflicting TCP? Do we provide copies of Durable Powers of Attorney to financial advisors? Do we routinely write to financial advisors to find out if our clients have already designated a TCP? If our clients have designated a TCP, is the TCP consistent with the client's choice of personal representative or trustee? Do we want to put into place mechanisms that prevent financial advisors from changing TCP's without attorney involvement?

One simple precaution that all estate planning lawyers should take is to revise their intake form. Intake forms should ask clients to identify their brokerage firms as well as any trusted contacted persons.

Regardless of whether the client knows if they designated a TCP, or who they think they designated, clients should ask that their financial advisor identify the TCP.

Once the TCP's identity is known, the lawyer should confirm the client's understanding of this person's role. In addition, is possible that, between the date the client originally designated the TCP and the date you as the lawyer confirm the TCP with the client, that the client's relationship with the TCP may have changed. You may also learn that the client identified a TCP who is different from a previously designated personal

representative or power of attorney. If there is a conflict between the TCP and others, it needs to be resolved.

Assuming you and your client are satisfied with the client's choice of TCP, the next step would be to get the client's permission to ask the financial advisor to notify you, in writing, if the client changes their TCP. You want this information for several reasons. First, if there is a change in TCP, notification will give you the opportunity to consult with the client about changing the personal representative or other key designees. Second, a change of TCP may be an indication of potential exploitation, particularly if a caregiver, the next-door neighbor, or the financial advisor's brother-in-law becomes the new TCP, you have cause for concern. If the financial advisor fails to provide you with this requested information, and exploitation occurs, there will be a stronger argument supporting the financial advisor's liability for a third party's exploitation.

It is clear that FINRA Rule 4512 creates a plethora of issues for the elder law or estate planning attorney to consider. At a minimum, best effort should be directed toward incorporating the TCP concept into your intake documents. It is in your client's best interest that you have this information. **B**



David Weintraub's securities litigation practice primarily consists of representing investors who have been victims of stockbroker misconduct. David is the Co-Chair of the Elder Law Section's Abuse, Neglect and Exploitation Committee. David's website is www.stockbrokerlitigation.com.