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**A 360 DEGREE VIEW OF ROLES AND RESPONSIBILITIES
CONCERNING DIMINISHED CAPACITY:
FINANCIAL ADVISERS' OBLIGATIONS TO CLIENTS,
LAWYERS REPRESENTING CLIENTS, AND
LAWYERS PREPARING THEIR PRACTICES**

Elissa Germaine, Nicole G. Iannarone, and Teresa Verges¹

Aging is inevitable and impacts everyone. The risk of a person developing cognitive impairment or some other incapacity affecting daily life increases with each passing year. While some will live long lives without suffering from cognitive decline, others will not be so fortunate. One thing is clear: seniors have the greatest risk of developing some form of impairment that will impact their ability to make their own decisions and that will put them at risk of fraud by predators or of harm by well-intentioned but ill-informed persons seeking to help them. As lawyers representing clients in FINRA proceedings, PIABA members see this problem daily and are uniquely positioned to see it from nearly every angle.

Cognitive decline and aging are significant concerns in this country. Persons aged 65 and older represent the fastest growing segment of the U.S. population.² Approximately 10,000 people will turn age 65 every day for the next 15 years.³ By 2030, 1 in 5 Americans (approximately 72 million people)

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2. CARRIE A. WERNER, THE OLDER POPULATION: 2010 (Nov. 2011), *available at* <https://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf>. Between 2000 and 2010, the population of persons aged 65 grew 15%, compared to the 9.7% growth of the overall U.S. population. *Id.*

3. SEC OFFICE OF COMPLIANCE INSPECTIONS AND EXAMINATIONS AND FINRA REPORT ON NATIONAL SENIOR INVESTOR INITIATIVE, at 3 (Apr. 15, 2015) (hereinafter, "SEC/FINRA National Senior Investor Report") (citing ADMINISTRATION ON AGING ADMINISTRATION FOR COMMUNITY LIVING, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, A PROFILE OF OLDER AMERICANS:

will be over 65.⁴ Those over 65 hold 70% of the nation's wealth.⁵

The magnitude of the aging population in the United States, coupled with its collective wealth, makes fraud concerning senior investors a significant issue. In addition to being a prime target for fraud, this exploding demographic is particularly vulnerable to investment fraud because seniors are at a time in their lives when they cannot meaningfully add to their retirement savings, yet have significant needs.⁶ Unfortunately, seniors are most at risk of abuse or fraud at home, with over 40% of abusers identified as family, spouses, or caregivers.⁷ Sadly, "trusted professionals," specifically including attorneys, financial professionals, and "fiduciary agents" are among the largest categories of perpetrators.⁸ The risk of fraud or abuse at the hands of family members or trusted professionals is even more acute given the reality of how seniors interact with the financial system post-retirement.

As retirees begin to tap into their retirement savings, many will lack the ability to manage their investments, or even their financial affairs generally.

2012, at 1 (2012), *available at*: http://www.aoa.gov/Aging_Statistics/Profile/2012/docs/2012profile.pdf.

4. WAN HE ET AL., 65+ IN THE UNITED STATES: 2005 (Dec. 2005), *available at* <https://www.census.gov/prod/2006pubs/p23-209.pdf>.

5. Note, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population*, 82 ST. JOHN'S L. REV. 289, 290 (2008) (citing Jane Gross, *New Techniques Used to Fight Elder Abuse*, PITTSBURGH POST-GAZETTE, Oct. 1, 2006, at A7).

6. In a 2009 study, it was estimated that the financial loss by victims of elder financial abuse was \$2.6 billion per year. METLIFE MATURE MARKET INSTITUTE, *BROKEN TRUST: ELDERS, FAMILY & FINANCES* (Mar. 2009), *available at* <https://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf> (joint study with National Committee for the Prevention of Elder Abuse and the Center for Gerontology at Virginia Polytechnic Institute and State University (hereinafter, "2009 MetLife Study")). In 2010, the MetLife Mature Market Institute ("Metlife") conducted a follow-up joint survey that found a 12% increase in the amount of financial losses reported, to \$2.9 billion per year. METLIFE MATURE MARKET INSTITUTE, *THE METLIFE STUDY OF ELDER FINANCIAL ABUSE: CRIMES OF OCCASION, DESPERATION AND PREDATION AGAINST AMERICA'S ELDERS 2* (June 2011), *available at* <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf>.

7. 2009 MetLife Study, *supra* note 6, at 12.

8. *Id.*

As an initial matter, many individuals (regardless of age) lack the training or specialized knowledge to make sound decisions about investments and appropriate withdrawal rates, among other issues.⁹ As a result, many seek out professional advice, choosing to work with some form of financial adviser. As the SEC and FINRA recently observed in a joint report, however, seniors with such limited knowledge, when combined with historically low yields on savings accounts and more conservative investments, are particularly vulnerable because “some broker-dealers may be recommending riskier and possibly unsuitable securities to senior investors looking for higher returns and may be failing to adequately disclose the terms and risks of the securities they recommend.”¹⁰

Even seniors with sufficient knowledge to manage their investments during retirement will likely face other challenges that may limit their ability to direct and protect their retirements. Specifically, there is no question that increasing mental and physical ailments associated with aging can impede many seniors’ ability to handle their financial affairs.¹¹ The Alzheimer’s Association reports that 13% of persons over 65, and 45% of persons over 85, suffer from dementia.¹² It further estimates that by 2050, the number of individuals with the disease is expected to nearly triple to a projected 13.8 million people.¹³

Declining cognitive abilities may not affect all seniors, but other realities of aging may make seniors more likely to be victims of financial abuse or fraud. For instance, many seniors will face significant declines in their physical well-being, such as their mobility or vision. These changes may not impact their ability to make a decision, but may make it difficult for them to participate in,

9. Lawrence A. Frolik, *Protecting Our Aging Retirees: Converting 401(k) Accounts into Federally Guaranteed Lifetime Annuities*, 47 SAN DIEGO L. REV. 277, 278 (Spring 2010). Moreover, the shift from “defined benefit plans” to “defined contributions plans” places retirees at risk of outliving their savings because, among other things, significant mental and physical decline exposes seniors to financial exploitation and abuse. *Id.* at 296-97.

10. SEC/FINRA National Senior Investor Report, *supra* note 3, at 3.

11. Frolik, *supra* note 9, at 292-94.

12. ALZHEIMER’S ASSOCIATION, 2012 ALZHEIMER’S DISEASE FACTS AND FIGURES, at 14 (2012), available at: https://www.alz.org/downloads/facts_figures_2012.pdf.

13. 2016 Alzheimer’s Disease Facts and Figures, ALZ.ORG, <http://www.alz.org/facts> (last visited Sep. 12, 2016).

let alone direct, their financial well-being.¹⁴ Additionally, social isolation and excessive dependence on one person or adviser also increases the likelihood of financial exploitation.¹⁵

Aging-related challenges, whether cognitive or physical, will affect millions, creating enormous challenges for the individual seniors, their families, financial advisers, and lawyers. These challenges raise significant questions concerning how to best interact with impaired individuals and ensure that they are not exploited or otherwise abused. Yet when considering the challenges that aging presents, lawyers often neglect to consider their own challenges and limitations. The average age of lawyers in America appears to be steadily increasing. From 1980 to 2005, the median age of lawyers increased from 39 to 49.¹⁶ In 2005, over fifty percent of lawyers were 45 or older.¹⁷ In several jurisdictions, significant portions of the attorney population are over the age of 55.¹⁸ In Vermont, for example, lawyers over the age of 80 outnumber lawyers in their twenties.¹⁹ A recent study and report from a coalition of the National Organization of Bar Counsel, the Association of Professional Responsibility Lawyers, and the American Bar Association Commission on Lawyer Assistance Programs who studied lawyers and aging described the advancing age of attorneys as a “senior tsunami.”²⁰ Given the

14. Frolik, *supra* note 9, at 292-94.

15. See Julia A. Lemke & Seymour Moskowitz, *Protecting the Gold in the Golden Years: Practical Guidance for Professionals on Financial Exploitation*, 7 MARQ. ELDER’S ADVISOR 1, 9 (Fall 2005).

16. See AMERICAN BAR ASSOCIATION, LAWYER DEMOGRAPHICS YEAR 2016, available at: http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf (hereinafter “ABA Lawyer Demographics”).

17. *Id.*

18. See, e.g., CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM, CONVOCATION ON PROFESSIONALISM, AGING IN THE LAW: IT’S MORE THAN A SENIOR MOMENT PROGRAM MATERIALS, Generational Chart, Active Members of the State Bar of Georgia (on file with author) (23% of active Georgia lawyers over 60). See also Kristi Vetri & H. Amos Goodall, Jr., NAELA, *Twilight Lawyers*, NAELA NEWS 12 (Oct./Nov. 2014) (percentage of lawyers over 55 in Florida – 33%, Washington – 71%, California – 42%, Pennsylvania – 38%).

19. Vetri, *supra* note 18.

20. NOBC-APRL-COLAP SECOND JOINT COMMITTEE ON AGING LAWYERS, FINAL REPORT 1 (Apr. 2014).

realities presented with the passage of time, it is imperative that we understand the obligations, responsibilities, and roles of all individuals working with senior investors.

To adequately represent clients in FINRA proceedings, members must understand financial service providers' obligations to investors who suffer from cognitive impairment, decline, or another disability impacting their decision-making abilities. Lawyers who work with clients suffering from impairment, either in FINRA proceedings or in other practice areas, must be aware of the challenges and responsibilities such representation brings to adequately represent and best protect their clients. In addition, because lawyers also face the risk of cognitive decline or other impairment as they age, they must understand their own ethical obligations to prepare for any impairment that may influence their ability to competently represent their clients and to protect the integrity of the profession.

The three articles that follow address cognitive impairment from each of these angles: (1) financial advisers' obligations when working with clients suffering from impairment; (2) lawyers' responsibilities to impaired clients; and, (3) lawyers' responsibilities to prepare for the possibility of their own potential impairment. As all three frame the substantial concerns associated with aging and cognitive decline, the authors intentionally wrote them at the same time, and they are presented here in a staged series, published in one volume. The authors intend that the articles initially be read together and then consulted separately for discrete issues as they may arise in practice.

The first article, *The Broker-Dealers' Role in the Detection and Prevention of Elderly Financial Exploitation*, begins the progression and provides an overview of the problem from the financial services sector's point of view, outlining the recent regulatory efforts to address cognitively impaired investors, the current state of rules, and best practices that financial services professionals should employ when working with investors. The second article, *Lawyers' Obligations When Representing Clients with Diminished Capacity*, focuses on lawyers' ethical and professional responsibilities to clients who may suffer some form of diminished capacity. The final article, *Keeping our Houses in Order: Lawyers' Obligations Concerning our own or our Colleagues' Inability to Competently Represent Clients*, brings the discussion full circle and addresses lawyers' ethical obligations in light of their own potential diminished capacity or other impairment. The article reviews the ethical and professional rules concerning lawyers with diminished capacity, including individual obligations as well as the obligation to act if a lawyer becomes aware of another lawyer's diminished capacity impacting his or her ability to competently advise and represent clients.

Cognitive decline or impairment is a problem that will undoubtedly arise

in some aspect of a securities arbitration lawyer's practice. It may become an issue when reviewing how a financial adviser interacted with a client, when personally dealing with a client who has a potential claim, or in a lawyer's own practice. Understanding the obligations of all parties involved in this area better prepares lawyers to deal with the various issues associated with aging that will affect them and their clients.