TRUSTED CONTACT PERSONS

What you need to know about this new tool for protecting the investment accounts of seniors

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Speaker material and more information available online at: https://www.americanbar.org/groups/senior_lawyers/events_cle/webinar‐‐new‐‐tool‐‐investments.html

Today's Panel

Kerry Peck, Panelist
Kerry is managing partner of the Chicago law firm Peck Ritchey, LLC. He concentrates his practice in trust and estate litigation, estate planning, administration, guardianship, fiduciary litigation, and special needs and Alzheimer's disease planning. He is the Chair of State's Attorney Anita Alvarez's Elder Abuse Task Force. He was retained by the City of Chicago Department of Aging to rewrite the Illinois Elder Abuse and Neglect Act. He co-wrote the book “Alzheimer’s and the Law,” published by the ABA.

Martin B. Cowan, Panelist
Marty is Chair of the ABA Senior Lawyers Division’s Committee on Financial Services and Retirement Planning. He is past chair of the Real Estate Committee of the ABA Tax Section. He has practiced in areas of taxation and bankruptcy as a member of Milbank Tweed Hadley and McCloy in New York City. He has taught tax law at NYU, Miami, Florida State and Quinnipiac Law Schools. He is the author of more than 40 published articles on taxation.

Prevalence of Dementia

• By age 85, over half the population will have some form of dementia.
• The most common cause of dementia among seniors is Alzheimer’s Disease (“AD”)
  • Cognitive impairment can start up to 20 years before the onset of dementia
  • Four percent (4%) of AD cases strike before age 60
• Other causes of dementia in seniors include Parkinson’s Disease, strokes and physical traumas
Other Vulnerabilities of the Elderly

- Seniors often experience emotional instability that renders them more susceptible, especially after a life style change [e.g., death of a spouse, relocation to a nursing home or other unfamiliar living quarters].
- Studies indicate that, as we age, a part of the brain that enables us to detect fraud and make other value judgments deteriorates, rendering us less able to determine the honesty of others and, therefore, more vulnerable and easier to victimize.

Who are the likely financial predators?

- Most common: caregivers, relatives and other persons known to the victim
  - Some estimates are that these categories account for close to 90% of the thefts.
  - Caregivers may include staff in a nursing home.
  - Relatives can include adult children, siblings, and even a spouse [esp. if a second or later marriage]
- Fiduciaries, including trustees and attorneys, are the predators in approximately one-sixth of the cases.
- Sometimes there is no third party—the loss is self-inflicted [e.g., churning an account].

Theft, Theft, Theft!

- 6 million seniors fall victim to fraud every year.
- Cognitive conditions such as dementia and Alzheimer’s disease increase vulnerability.

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<tr>
<th>Category</th>
<th>Annual Cost to Seniors</th>
<th>Defining Feature</th>
<th>Examples</th>
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| Exploitation | $16.99 billion | Operating openly claiming consent of the victim | *Hidden shipping and handling or subscriptions
*Work-from-home schemes
*Quack weight loss or dietary products
*Excessive Gifts
*Misleading financial advice |
| Criminal fraud | $12.76 billion | Anonymous illegal activity | *Grandparent scam
*Nigerian prince emails
*Fake lottery winnings or government grants
*Sweetheart scam [Online dating sites] |
| Con artists | $9.85 billion | Attempt to get you to give them the money |
Theft, Theft, Theft!

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<tbody>
<tr>
<td>Identity theft</td>
<td>$2.91 billion</td>
<td>Opening or using accounts without authorization</td>
<td>*Opening new credit cards, bank accounts, or payday loans</td>
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<td></td>
<td></td>
<td></td>
<td>*Car title or home equity loans on your property</td>
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<td>*Using card data by phishing, in data breach, or from the mail</td>
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<td>Caregiver abuse</td>
<td>$6.67 billion</td>
<td>Abuse of trusting relationship</td>
<td>*Thief by family members or caregivers</td>
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<td></td>
<td></td>
<td></td>
<td>*Rewritten wills or powers of attorney</td>
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<td></td>
<td></td>
<td></td>
<td>*Borrowing money hoping senior will forget</td>
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<td>*Sometimes combined with physical abuse or neglect</td>
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Total losses $36.48 billion

Seniors lose $36.48 billion each year to Elder financial abuse, this is more than twelve times what has been previously reported in years past.


Mickey Rooney

- He and his wife had food and water withheld from them by his stepson in order to control him.
- Over $400,000 was allegedly taken.
- His mail, ID cards and passport were withheld and when he asked his stepson for information he was told “it was none of his business”.
- His son took control of all his finances and forced him to do performances he did not wish to do.

Ernie Banks

- New set of estate planning documents were signed 3 months prior to his death.
- Caregiver, Regina Rice, in control of everything. His family was completely excluded from new will and trust.
- Rice prevented his children from speaking to their father in his last few months.
- Issue when did dementia start and how significant was the disease when he signed new documents.
A New Tool: Designating a "Trusted Contact Person" for a Senior’s Investment Accounts

• New FINRA rule requires every broker-dealer to invite investors over the age of 65 to designate a "Trusted Contact Person" for every investment account.
  • No penalty if investor declines to make any designation.
  • Rule applies immediately for all new accounts, and will eventually apply to all existing accounts.
  • Most financial institutions will let you do this now for existing accounts, but you must initiate the designation.

Who can be a TCP?

• Must be an adult (over age 21)
  • Must be an individual

Expected Function of a TCP

• This is a person the financial institution may contact to discuss confidential matters about your account
  • Rule insulates financial institution from liability for disclosure of or discussing confidential information (e.g., medical matters).
  • Permits financial institution to warn TCP of possible irregularities in the account suggesting fraud or other financial abuse or of other signs of dementia and financial irresponsibility (e.g., churning or buying into apparently bogus promotions).
  • In extreme cases, financial institution may suspend distributions temporarily while it investigates.
    • If it does, it must notify the TCP of the suspension and the reasons for it.
    • Rule specifies the type of investigation required and the time limits for any suspension.
How to Appoint a TCP

• For new accounts, the financial institution must actively solicit a designation. It will provide the forms and the instructions, along with an explanation of what it will and will not do.
• For existing accounts, the financial institution must solicit that designation from you at some time in the near future (possibly up to a year or so from now).
• To appoint a TCP for an existing account without waiting for the financial institution to solicit the information from you, the web sites of many financial institutions already have the necessary forms on line, but they may be hard to find and do not have full explanations of what a TCP does.

What Are the Benefits of Designating a TCP?

• If the TCP receives an alert from the financial institution and determines that there may be cause for concern, the TCP can take the following steps (with or without first discussing the matter with you, another close relative or friend, or your regular financial advisor):
  • Contact law enforcement agencies
  • Contact adult protection services
  • Arrange for a medical consultation
  • Arrange to remove the predator (e.g., caretaker) from your house, or to remove you to a safer location
  • Commence a guardianship proceeding

Whom Should You Designate?

• It should be someone—
  • That you trust explicitly and foresee a little risk of that trust deteriorating over time
  • May not be easy at some future time, e.g., 10 years from now, to cancel the designation without causing damage to a friendship or other relationship.
  • With whom you would feel comfortable disclosing confidential information about yourself, now or in the future. Examples of information that you might not want disclosed:
    • Medical issues, like the onset of dementia.
    • Gifts being made to a new romantic interest.
  • Who, preferably, is someone younger than yourself.
  • Who has and will continue to have a substantial interest in helping you protect your financial assets and a willingness and ability to be helpful
• It does not necessarily have to be someone with on-line access to your account or the ability to actively manage that account (e.g., trade securities in the account).
Other Factors and Complications

- Strangely, the new rule does not require that the person designated to be your TCP consent to that designation or be compensated, but it would be pointless not to discuss those issues with that person in advance.
- If the TCP is a professional advisor (e.g., attorney or accountant), you may need to discuss compensation and agree whom that TCP may contact or not contact with confidential information about yourself.

Why Isn’t a Power of Attorney an Adequate Alternative?

1. Even a durable power can be cancelled at any time by the predator, without notice to the holder.
2. The holder may not have the time, interest or ability to scan your accounts with the necessary frequency, skill and intensity to discover problems.
3. Even a dedicated and highly competent attorney in fact will not be able to discover the warning signs (e.g., changes of beneficial interests)—they don’t necessarily show up on the financial statements or on line.
4. One in six thefts are committed by fiduciaries, including holders of powers of attorney.

What the Designation of a TCP Will Not Do.

- The TCP will not, merely because of the designation, have the ability, the interest or the time, to monitor your accounts and detect red flags.
- Unless the financial institution warns the TCP of red flags, or the TCP has other means to monitor your financial activities, an independent ability to detect financial irregularities, and does so on a constant and continuing basis, the TCP will not be able to protect you.
  - A financial institution is not required to provide warnings to the TCP unless it is suspending distributions
  - Even monitoring the monthly financial statements will not disclose many red flags, like a change of beneficial interests or the creation of a new link to an unknown bank account.
Typical Red Flags

- A change in the password or other sign-in information, including changes in security questions or the answers to such questions.
- A change in beneficial interests, including changes in percentages or in the contingencies associated with such interests.
  - Especially suspicious if a person not related to the investor is suddenly given a major share of the beneficial interests.
- A change in the identity or contact information of the person or bank, brokerage or other account to which distributions or transfer of funds or securities may be made.
- A change in the identity of a Trusted Contact person or any change in who has a power of attorney or in the powers that can be exercised by the holder of that power.

What are the Possible Downside Risks of Appointing a TCP?

- If the TCP turns out to be a financial predator, disclosure of confidential information increases the risk of loss.
- If you begin to lose confidence in the person you designated, it may be difficult to change that designation without further damaging the relationship with that person.
- If the TCP is a beneficiary of the account and you later decide to reduce or eliminate his or her gift without letting the TCP know that, it may be impossible to do it without the TCP learning of it.
- The financial institution may disclose confidential information to the TCP that you may not want disclosed, including medical issues.
  - E.g., if you start making gifts to a new romantic interest, you may not want that information shared but a TCP.
- Appointing a TCP may create a false sense of security.
  - It may create an expectation that that designation will provide protections. That expectation may convince the financial institution provide alerts of all red flags, something that most of them may not do.

Suggested Guidelines

- Investor should allowed to designate at least three TCPs.
  - This will reduce the risk that a single TCP turns out to be the financial predator.
- If one does turn out to be the bad guy, the other two will spot that and be able to take appropriate actions
- All of the TCPs should alerted to all important red flags
  - E.g., change of beneficial interests or bank linkages
Balancing the Pros and Cons

• Unless and until financial institutions agree to provide notices of red flags to the TCPs on a regular and ongoing basis, the “cons” may outweigh the “pros” for most investors.
• The balance would tip more toward the “pros” if financial institutions permitted the designation of three TCPs, not just one. But even this would not be sufficient to alter the balance unless all of those TCPs are notified of red flags on an ongoing basis.

Questions to Panelists

Following the end of the webinar additional questions may be sent to:
abusrlawyers@americanbar.org

Please provide the name of the speaker to whom the question is addressed. We will try to respond as quickly as possible.

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You will receive an email with a link to a recording of the presentation and the materials for download.