



Aging Clients, Legal Capacity, and Elder Financial Protections:

A Securities Attorney's Guide for RIAs and IARs

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Introduction and Regulatory Context

Aging Clients, Legal Capacity, and Elder Financial Protection

As a financial advisor, if you haven't had issues or concerns around an aging client yet, it is only a matter of time. There are many examples of various types of issues and concerns, as well as many areas of the law that must be considered for each instance.

Discussion Question

In your career as an investment advisor, have you had questions or concerns around an aging client's capacity or behavior?

A. Yes

B. No

Introduction and Regulatory Context

Current enforcement trends involving senior investors show a coordinated focus by federal and state regulators on protecting older and vulnerable individuals from fraud, exploitation, and unsuitable investment practices while also increasing scrutiny on registered advisors' compliance failures and disclosures.

At the state level, securities regulators report rising investigations tied to suspected financial exploitation of vulnerable adults, aided by expanded reporting laws and protective tools like temporary disbursement holds, reflecting a broader trend toward earlier intervention, inter-agency coordination, and aggressive action against marketing practices, high-fee products, and scams disproportionately affecting seniors.

Introduction and Regulatory Context

Registered Investment Advisor (RIA) firms owe clients a fiduciary duty - an ongoing legal and ethical obligation to act in the client's best interests at all times - under regulation by the U.S. Securities and Exchange Commission pursuant to the Investment Advisers Act of 1940.

This duty includes a duty of care (providing advice based on a thorough understanding of the client's financial situation, goals, and risk tolerance and supported by diligent research and monitoring), a duty of loyalty (placing client interests above the firm's, avoiding or fully disclosing conflicts of interest, and maintaining transparency about fees and affiliations), seeking best execution when placing trades, and providing full and fair disclosure of all material facts, with these obligations applying throughout the entire advisory relationship rather than only at the time of a recommendation.

Capacity vs. Cognitive Decline

The legal standards of competency generally refer to an older client's ability to understand, appreciate, and communicate informed decisions about their finances, which determines whether transactions and advisory instructions are valid.

While competency is ultimately a legal determination often made by a court, under guidance from regulators such as the U.S. Securities and Exchange Commission, RIAs are expected to watch for diminished capacity indicators such as confusion about basic financial concepts, memory loss affecting decisions, or susceptibility to undue influence.

Capacity vs. Cognitive Decline

Advisor limitations:

SEC “Reasonable Belief” Framework

According to the SEC’s “reasonable belief” framework, an RIA may be able to protect the client by reporting concerns or contacting a trusted contact if there is a good-faith, fact-based belief that the client may be suffering from confusion, memory lapses, signs of exploitation, or unusual transactions.

Account Titling and Property Ownership

When opening an account for a client, we are familiar with the title options available to investment advisors. Each option comes with its own beneficiary choices.

IRA – Individual Retirement Accounts require a listed beneficiary. Some states require the authorization of a married person's spouse if the beneficiary is someone other than the spouse.

Individual Accounts – May be set up as Transfer On Death (TOD) accounts.

On these types of accounts, only the individual has authorization to give instructions on the account. Therefore, when there are red flags, these can be the most difficult accounts to manage as you cannot take instruction from the spouse or adult child without legal documentation (POA) or a court order of incompetence.

Account Titling and Property Ownership

Trust Accounts – Trust documents typically have provisions to replace the trustee if there are concerns or red flags.

Joint (JTWROS) – Each spouse owns 100%. When one spouse exhibits concerning behavior, the other spouse has 100% authority to provide instruction.

Corporate Accounts – Corporate documents typically have provisions to replace control persons if there are concerns or red flags.

Jurisdictional Analysis

SEC vs. State Registered Advisors

While the controlling securities laws may either be state or federal (SEC), often, the state of the client's residence will have additional laws that apply to senior protection.

Discussion Question

If the custodian approves a transaction, am I protected?

No. Custodian approval does not transfer fiduciary responsibility or eliminate advisor liability. Advisors remain responsible for their own actions, observations, and documentation.

Custodian Role and Limits

Custodian vs. Advisor Responsibilities

The custodian relies on the advisor to know the customer and to provide information when a red flag occurs.

Each party has a duty to the customer, and while these overlap, the advisor may not rely solely on custodian policies and procedures.

Custodian Role and Limits

Case Study - Exploitation

Fidelity sent a service message to a firm requesting more information regarding the recipient of a \$50,000 wire that was sent to Mexico. An assistant at the firm reached out to the client for details of the wire as the request was not submitted by the firm. The wire was entered by the client through Fidelity's online platform.

The assistant receives information that the client is paying a registration fee to a federal agency in Mexico and attempts to submit the response to Fidelity. The service request required an officer of the firm to submit the response.

The CCO of the firm was provided the information and asked to respond to Fidelity. After review of the information provided by the client to the assistant, the CCO recognized the red flags and determined that this was a scam. The CCO then responded to the custodian with the details and the concerns that this was fraud.

The custodian immediately placed a block on the client's accounts and began a review of the activity. The custodian reviewed for the possibility of elder abuse including reaching out to the local authorities for a wellness check. Concerns of elder abuse were alleviated and the custodian classified it as "exploitation of elderly."

The custodian refused to remove the account blocks until the client acknowledged that the entire situation was a scam and would cut all ties with the fraudsters. If the client refused to acknowledge that this was a scam, they would require that the client move their assets to another custodian.

The custodian provided a link to the FTC website regarding Refund and Recovery Scams for the client to review to aid the firm in helping the client understand that they were indeed being scammed.

Custodian Role and Limits

Case Study - Exploitation

The Scam:

The client, who was in his 80s, was the subject of a time share scam in Mexico.

The client was contacted by an individual claiming to be a federal agent for Mexico. The “agent” informed the client that they were able to identify the fraudster involved in the time share scam and that they were contacting victims to help with the collection of the recovered funds.

The agent stated that a registration fee was required of \$100,000 and the registration fee would be reimbursed once the case was closed. The client was able to talk the “agent” down to \$50,000 and proceeded to submit a request through Fidelity online to wire \$50,000 to a bank account in Mexico.

Discussion Question

Do I owe any duty to the client's children or beneficiaries?

No. Your fiduciary duty is owed exclusively to the client during their lifetime. Beneficiaries generally have no rights until death, regardless of family pressure.

Beneficiary and Post-Death Litigation

Advisors owe a fiduciary duty to their customers to act in their best interest and to understand activity within their accounts. Oftentimes, once the client has passed away, beneficiaries question the activity in the account and the actions of the advisor.

Defending this litigation can be costly.

Discussion Question

How do I know when a client is no longer competent?

You don't - and you're not supposed to. Advisors do not determine competency.

Your role is to observe behaviors, apply the "reasonable belief" standard, document objective facts, and escalate concerns using firm procedures and custodial tools.

Definitions and Red Flags

At a federal and state level, “red flags” of elder abuse refer to observable warning signs that suggest that an older or at-risk adult may be experiencing abuse, neglect, self-neglect, or financial exploitation, prompting heightened scrutiny and possible reporting by professionals such as RIA advisors. Federal guidance from agencies including the U.S. Securities and Exchange Commission highlights indicators such as sudden, unexplained withdrawals, abrupt changes in investment patterns, the appearance of a new person exerting unusual control over finances, or signs of confusion and diminished capacity.

Colorado law and guidance, as an example, similarly emphasize behavioral, physical, environmental, and financial warning signs such as unpaid bills despite adequate resources, isolation, poor living conditions, or evidence of coercion, all of which may trigger duties to investigate further, place protective holds where permitted, or report concerns to Adult Protective Services.

Definitions and Red Flags

Exploitation vs. Imprudent Decisions

Exploitation references harm from the outside influences. Imprudent decisions refer to harm being caused to the client's self. In both instances, an advisor should be monitoring and asking questions in order to best meet their duty to protect the client.

Federal Regulatory Framework

Regulation S-P is a privacy rule issued by the U.S. Securities and Exchange Commission that requires RIAs and other financial institutions to protect clients' nonpublic personal information and to provide clear notices about their privacy practices. The rule mandates that firms adopt written policies and procedures to safeguard sensitive data (such as Social Security numbers, financial records, and account details), deliver initial and annual privacy notices explaining how information is collected, shared, and protected, offer clients the right to opt out of certain third-party information sharing, and implement administrative, technical, and physical safeguards against unauthorized access or data breaches, with additional obligations to properly dispose of consumer information and respond to incidents involving compromised data.

Discussion Question

Can I refuse a transaction if I think the client is being exploited?

Under SEC Rule 2165, you potentially can if you have a reasonable belief of financial exploitation. Temporary holds are permitted, not mandatory, and must follow firm policy and custodial procedures. Documentation is critical.

Federal Regulatory Framework

Safe harbor provisions are legal protections that firms and their personnel may utilize to reduce liability when they take specified actions in good faith to protect clients, so long as they follow prescribed rules and procedures.

Advisors may place temporary holds on suspicious disbursements, delay transactions, or report suspected financial exploitation of vulnerable or elderly clients without fear of violating privacy obligations or facing legal claims, so long as the action is reasonable, documented, and consistent with regulatory requirements and applicable state laws.

Discussion Question

Can I share client information with Adult Protective Services?

Yes, limited information may be shared for protective purposes under Regulation S-P and potentially state law as well. Disclosures should be narrowly tailored and documented.

State Elder Abuse Laws

As an example, Colorado Adult Protective Services (APS) is a state-mandated program administered through county departments of human or social services that investigates reports of abuse, neglect, self-neglect, and financial exploitation involving at-risk adults (generally those aged 70 years and older, or vulnerable due to disability), provides protective interventions, and coordinates services to safeguard the individual's welfare while respecting their rights. In some circumstances under Colorado's elder abuse laws, financial professionals may have reporting obligations and APS workers may be able to assist in assessing competency, risk, and living conditions, as well as arrange emergency services for such individuals when necessary.

Discussion Question

Am I required to report suspected elder abuse in Colorado?

Generally, reporting by financial professionals is permissive rather than mandatory, but good-faith reporting is protected by immunity provisions. Advisors should follow firm policy and consult compliance when in doubt.

State Elder Abuse Laws

Advisor Immunity Provisions

As an example, according to the “Colorado Protection of Vulnerable Adults From Financial Exploitation Act,” an investment advisor *may* delay a disbursement from an account if they reasonably believe that the requested disbursement may result in financial exploitation. They must immediately provide written notification of the delay and reason for it to all authorized parties able to transact business on the account, unless any party is believed to have engaged in suspected or attempted financial exploitation of the eligible adult. The advisor must also notify the reporting agencies of the incident and continue their review of the suspected or attempted exploitation, as necessary. A report of the results must be provided to the commissioner within seven businesses days after the requested disbursement.

Client Relationship Risks

Family dynamics can vary wildly. One client may want their adult child intimately involved in each step of their financial and estate planning. Another client may find it to be nobody else's business.

As an investment advisor, it is important to try to have these discussions with all clients at any age so you are prepared when the time comes.

Discussion Question

What if the client gets angry when I use the authorized account?

That risk exists, but SEC rules expressly permit use of an authorized contact for protection purposes. Proper disclosure and documentation reduce both regulatory and relationship risk.

Risk Mitigation Strategies

Authorized Contacts

Authorized contacts are individuals who the client has authorized the advisor to speak with and provide information.

These individuals do not have trading or withdrawal authority on the accounts.

This is the person you may call when you have identified red flags but still need more information.

POA Verification

If the client has provided you with a copy of their power of attorney, you want to identify if it is currently in effect or if it has further requirements to be enforced.

In these circumstances, you may want to contact a local attorney or contact the attorney who drafted the POA (usually the attorney's name is listed).

Risk Mitigation Strategies

Firms should maintain clear internal escalation procedures for situations involving suspected financial exploitation of elderly or at-risk clients. Employees should promptly report concerns to designated supervisory, compliance, or legal personnel when red flags arise, such as unusual withdrawals, sudden account changes, third-party influence, diminished capacity, or inconsistent transaction patterns. Escalation protocols should identify who reviews concerns, when temporary transaction holds may be appropriate, and when disclosure to regulators, Adult Protective Services, law enforcement, or trusted contacts is permitted.

Firms should document all observations, communications, actions taken, and the rationale behind the decisions in a timely and objective manner. Documentation should include dates, transaction details, client interactions, supervisory review, and any external reports made. Maintaining thorough records helps demonstrate good-faith compliance with regulatory obligations, supports consistent decision-making, and protects both vulnerable clients and the firm.

Privacy and Information

Regulation S-P Requirements

Be careful not to disclose private client information to someone who is not authorized to receive it.

Privacy and Information

Under Colorado law, client financial records, account activity, health-related information, and personal identifying data should remain confidential and only be shared with authorized individuals or entities. If exploitation is suspected, Colorado permits limited disclosure of relevant information to Adult Protective Services, law enforcement, regulators, or a trusted contact person when done in good faith. Firms should avoid unnecessary disclosure, share only information reasonably needed to address the concern, and document the basis for any release of information.

Case Studies and Application

Diminished capacity Scenario

The firm is located in Denver, Colorado. The client, in her mid 70s, is also located in Denver, Colorado. However, her three adult children are spread out in New York, San Francisco, and Los Angeles.

The client began making requests over the telephone for purchases and sales of specific securities in her account. Later that same day, or the next day, she would call and ask why those sales and purchases were made and denied having made the first call.

There were no trusted contacts on the account and there were no POAs in place.

The advisor was placed in a difficult position where he didn't have the authority to call an adult child but also did not want to risk a written customer complaint. Clearly this client needed help.

Ultimately the advisor did reach out to the adult children and ask about the mother's health without disclosing any private financial information.

Case Studies and Application

Exploitation Scenario

A female client called into the firm stating that money was missing from her account when she logged in online. However, her statement showed that she still had \$200,000. She was very angry and threatened to sue the firm.

The firm investigated and confirmed that there was no advisor access to withdraw money from her account. However, regular distributions had been made through the custodian's online portal.

This brought up concerns of either capacity or fraud.

Ultimately, it was determined that her husband had used her login and had been making withdrawals from her account without her knowledge or consent, and he had created false statements to cover his actions.

The firm might have been able to catch this if they had noticed the frequent withdrawals through their regular account monitoring process and asked the client about the unusual withdrawals.

Discussion Question

What creates the biggest liability risk for advisors?

Delay, silence, and poor documentation - not taking reasonable, well-documented protective steps.

How to be Proactive

Firms need to recognize the need to protect vulnerable clients from financial exploitation. Although senior or elderly clients are the most common types of clients who might suffer from diminished mental capacity or be at risk of financial exploitation or abuse, vulnerable clients can include individuals of any age. Consequently, firm policies are not limited to senior or elderly clients.

As the client's trusted financial advisor, a firm may find itself in a primary position to detect and prevent issues that may arise due to a client's diminished capacity or other vulnerability to financial exploitation. Accordingly, RIAs should adopt certain procedures to address vulnerable clients.

How to be Proactive

Example Vulnerable Client Policies and Procedures:

Identifying Red Flags

IARs should be alerted to detect the warning signs of diminished capacity when handling client accounts. While there is no definitive list of signs of diminished capacity or cognitive decline, below are some examples of red flag behaviors we expect our IARs to be aware of:

- Client appears unable to understand simple concepts
- Client has trouble with easy math problems
- Client exhibits confusion and inability to understand basic financial terms and concepts.
- Client exhibits difficulty understanding account related details
- Client exhibits memory loss
- Client's behavior changes or becomes erratic
- Client exhibits confusion and/or disorientation
- Client exhibits speech problems and/or difficulty communicating as would be expected
- Client appears uncharacteristically dressed or disheveled
- Typically jovial, light-hearted client becomes increasingly paranoid or untrusting
- Client exhibits impaired judgment or handling of personal finances (for example, failure to manage checkbook or pay recurring bills timely)
- Client exhibits inability to comprehend consequences of financial decisions
- Client's decision making becomes inconsistent with long-term goals and commitments

Potential Warning Signs of Abuse Related to Diminished Capacity

For clients that are already being assisted by a caregiver, legal guardian or power of attorney, IARs should be alerted to detect possible warning signs that financial abuse might be occurring or that the client is at increased risk for abuse. While there is no definitive list of signs of abuse related to diminished capacity, below are some examples of red flags we expect our IARs to be aware of:

- Caregiver or client explanation for an injury is inconsistent with its possible cause or otherwise appears suspect
- Client's caregiver is angry, indifferent, or aggressive toward the elder/dependent adult
- Client's personal belongings, papers, or credit cards are missing
- The client appears hesitant to talk openly, particularly when the caregiver is present, declines or is prevented from talking privately with the IAR
- Client exhibits a lack of necessities, such as food, water, utilities, medications, and/or medical care
- Another person's name is added to the client's bank/brokerage account(s) or important documents
- Unusual (or changes in) account activity involving:

- Increased withdrawals (especially to new and/or unfamiliar third parties)
- Frequent checks made out to cash.
- Odd or unusual payees

Procedures for Reporting Diminished Capacity and Abuse of Vulnerable Clients

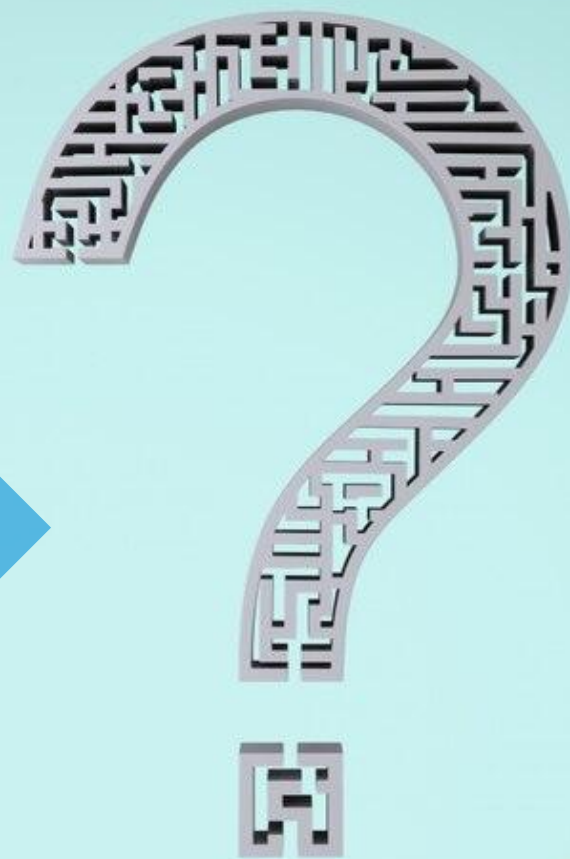
During account opening procedures or throughout the advisory relationship, Firm employees shall make efforts to gather and maintain a Trusted Contact for each client. While a Trusted Contact holds no advisory discretion in the account, a Trusted Contact may be asked to confirm the client's current contact information, health status or the identity of any legal guardian, executor, trustee or holder of a power of attorney and is a great resource in responding to claims of possible financial exploitation.

All Firm employees are responsible to immediately report to the CCO if they encounter a situation where they believe a client may be showing signs of diminished capacity or may be the victim of financial abuse or exploitation. The reporting individual must provide notice to the CCO in writing, providing sufficient detail describing the questioned behaviors exhibited by the client or the suspect transactions in the client's account(s). The CCO shall be responsible to determine whether the matter warrants further action on a case-by-case basis, including consideration of whether a durable power of attorney, trading authorization, or guardianship form is on file and whether the agent, attorney or guardian should be contacted to discuss the concerns raised (assuming such person is not the perpetrator of the suspected abuse). If no such form is on file, the CCO should consult legal counsel to determine appropriate steps to be taken, including, without limitation, the disclosure of the questioned behaviors to the client's relatives, representatives, or government agencies; delaying or blocking of any questionable transactions or payments; and consideration of reporting requirements and liability concerns under federal or state elder abuse statutes.

Consistent with the Firm's Privacy Policy, Regulation S-P and applicable state law of may permit or require the disclosure of client information to a third party in certain limited circumstances, without the client's consent. Therefore, depending on the circumstances, if a client is suffering from diminished mental capacity or is being taken advantage of, the Firm may be able to disclose certain information to relatives, representatives, or government agencies without being in violation of Regulation S-P or applicable state privacy laws.

Resources such as those provided by each state's adult protective services website will be referenced for identifying any state specific requirements. See <http://www.napsa-now.org/get-help/help-in-your-area/>.

Q&A





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