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**TRUST ESTABLISHED - TRUST BREACHED**

Why do people trust financial advisers and financial institutions? This article examines that question, which raises the issue central to all securities arbitration disputes of merit - breach of trust.

Malcolm Gladwell's bestseller, *Talking to Strangers*,[2](#_bookmark18) noted characteristics in all of us that apply to the customer-broker-trust issue:

* “We start by believing. And we stop believing only when our doubts and misgivings rise to the point where we can no longer explain them away.”
* “We have a default to truth: our operating assumption is that the people we are dealing with are honest.”
* “We fall out the of truth-default mode only when the case against our initial assumption becomes definitive. We do not behave, in other words, like sober-minded scientists, slowly gathering evidence of the truth or falsity of something before reaching a conclusion.”
* “You believe someone not because you have no doubts about them. Belief is not the absence of doubts. You believe someone because you don't have enough doubts about them.”

# \*26 Overview

The primary claim made by most customers is that their trust in the broker was violated. Typically, for whatever reason, the customer was led to believe the representations of the broker and, in the process, suffered financial losses. What distinguishes a case of merit from one of “sour grapes” is whether the establishment of that trust relationship was well-founded or whether the customer should have known her trust had been misplaced.

If the customer understood or could have understood the risks of an investment or investment strategy, the result is often a denial of the claims or the awarding of damages in amounts much less than the relief sought.

From my experience, many potential customer claimants are reluctant or embarrassed to consult with securities arbitration attorneys. They feel it was their fault that they trusted their financial advisor, who, they may believe, was as ill-informed about

the inherent risks of the securities or the strategy as the customer was or that market forces outside of the brokerage firm's control led to the loss.

Embarrassment and betrayal are two common emotions which customers experience when they begin to suspect they have been wronged by their stockbroker. Embarrassment comes from clients feeling they are somehow at fault: “How could I be so stupid?” Feelings of betrayal come from the trust placed in the broker: “How could she do this to me when I trusted her so much?” Like other victims of fraud, both of these emotions keep many people from moving forward to assert their rights even when they know they have been wronged.[3](#_bookmark19)

# How Trust Relationships Are Established

Why do individuals trust stockbrokers? How do brokers win confidence? Indeed, why do we trust any salesman? In “Don't Get Hit by the Pitch: How Advisers Manipulate You”, *Wall Street Journal* columnist Jonathan Clements, quoting Anthony Pratkanis, a psychology professor at the University of California at Santa Cruz, wrote that:

Financial salespeople frequently feign friendship, asking you all about yourself and pretending to have things in common. As salespeople get **\*27** to know you, they will hunt for your hot buttons, whether it's scoring big investment gains, boosting your portfolio's yield or avoiding market losses. That allows them to craft their investment pitch. Once unethical advisers know what to pitch, it's time to sell the deal. Often, they will tout an investment's scarcity, which makes it seem more valuable and desirable. The scarcity pitch can be especially effective if salespeople add that others are clamoring to get into the same deal, or that investors have had great success with the strategy. After making their pitch, salespeople may skip over the question of whether you should buy and instead ask whether you want, say, 100 or 300 shares. ‘In sales jargon, that's called the presumptive close,’ Prof. Pratkanis says.

# Understanding and Appreciating Why Investors Trust

At the early stage of a case, empathy is critical for a customer's attorney. Unless the attorney immediately puts herself into her client's shoes, the case will get off on the wrong step. For example, experienced securities arbitration attorneys who represent customers picture themselves:

1. Just learning that the investment was not as represented and a lot of money has been lost.
2. There is no legitimate secondary market to sell the investment or if there is, it is a shadow market populated by vulture funds.

It is a naked feeling. Remember how it was not wanting to open your brokerage account statements after the market crash of 2008? Not like when the investment or strategy was recommended.

Customers understand stocks; less so with bonds. Fewer understand structured products and other man-made revenue streams. Such investments are *sold* and not *bought* and are often promoted by firms and brokers as the financial panacea to remedy investor fears and the need for safety in volatile markets.

With the sea change in the securities industry's business model from commission-based to fee-based accounts, customers are presented with more reason to trust their financial advisors. They are told their accounts will be “managed” on a continuing basis, with initial recommendations and adjustments motivated solely by market trends and not by the self-serving incentive of commissions. “If you do well, we do well,” say financial advisors who stress that their compensation will be based on the account's value.

Fee-based accounts are so ubiquitous these days that they are even **\*28** recommended by financial advisors for customers who do little trading. And when it is the brokerage firm - and not the customer - making the ultimate investment decisions, the law converts the point-of-sale obligations of a broker to a continuing fiduciary duty, the highest level of trust.

So, the first thing customer attorneys need to do is picture themselves as the person who was solicited for this investment.

At the core of securities law is the obligation of full disclosure of material information by the person soliciting an investment to the person making the ultimate investment decision. And for managed accounts, brokers have the obligation to make sure, as fiduciaries, that the “best interests” of their customers are always at the forefront of account management. For managed accounts, brokers need to make sure the customer understands why a fee-based account makes more sense for the customer than a commission-based one. While the firm is making the investment decisions, it has an obligation to explain why those decisions are being made.

How that material information was conveyed to and understood by the investor are the primary issues in most cases. And in “product cases” (e.g., Puerto Rico bond funds, Exchange Traded Funds), there is a wild card - the financial advisor's testimony. He/she is often the determining factor in the case's outcome. Was there sound reason to trust the broker's representations?

# Insights From Others

In March 2020, the New York State Bar Association presented: *Securities Arbitration 2020 - Deep Dive*[4](#_bookmark20) and the first session, entitled “Human Nature and Securities Disputes,” addressed the question: Why do people trust financial advisers and financial institutions? Seth Lipner, Professor of Law of the Zicklin School of Business, Baruch College, CUNY and a member of Deutsch & Lipner, said, “Wall Street lies near the corner of fear and greed and brokers are experts in marketing.” C. Evan Stewart of Cohen & Gresser LLP was as insightful as he is in his extensive writings when he said that he believes that the concept of trust in this context can be considered in three categories, which he calls:

1. “Madoff Trust” - You want to be involved in something that no one else knows about.

**\*29** 2. “Wells Fargo Trust” - or any similar well-known financial institution - A fabled institution that we assume would never do anything wrong. It would seem unthinkable that they would breach my trust.

3. “Projection Trust” - Once a person decides to invest with a broker, then that act of giving the money to someone is an act of his or her own judgment. The investor made the judgment that the financial adviser was trustworthy with the investor's money. It is a huge psychological step, said Mr. Stewart, to then reverse. That is very difficult and is hard to come to terms with - that the investor made a bad judgment about that person.

William A. Hohauser, Nassau County, New York, District Court Judge, was an in house attorney at major brokerage firms for many years before becoming a judge. He said that when he was a defense attorney, he would explore the subject of trust through cross-examination of the customer, focusing on the customer's sophistication. He wanted to put this question before the arbitrators: Was there a reason for the customer to *blindly* trust what she was told or did the customer have sufficient financial experience to understand and approve the trading? For example, if a customer claimed “I trusted my broker,” the broker recommended securities that were unsuitable and, as a result, the broker is responsible, did the person engage in similar trading before at other firms?

To that, Mr. Lipner asked whether brokerage firm attorneys are blaming the victim. He said that brokerage firms argue, in effect, that you should not have trusted our financial advisers in a trust business. It is not a question of blaming the victim, said Judge Hohauser. The question is this: Did the customer have the ability to question?

Richard W. Berry, Executive Vice President, Director of Dispute Resolution, FINRA Dispute Resolution, added that arbitration remains a forum of equity in which arbitrators assess the responsibilities of all the parties. He said that from his observation of many years, arbitrators want to do what is fair.

# Basis of Liability in Most Cases of Merit

It has been my experience representing investors, brokers and firms, as well as being an arbitrator and mediator in this field of dispute resolution, that *intentional securities fraud* existed only in a small percentage of cases and that, in most cases of merit, liability was based on three things:

1. *Knowledge -* The financial advisor's failure to know or appreciate the risks inherent in a product or strategy.

**\*30** 2. *Disclosure* - The financial advisor's passing on his or her ignorance of those risks to the investor.

3. *Reliance* - The investor's trust that the financial advisor made full disclosure of material information and did not omit such information from the recommendation.

# Stages of Trust

*Trust established and trust breached* is the common characteristic of most cases. How do brokers establish and cultivate trusting relationships with their customers? Why do investors succumb? Brokers have been known to deal with their customers in a certain manner to establish trust and to maintain the trust relationship. Appreciating those characteristics can enable customer attorneys and defense attorneys to see if, in the particular case before them, trust was established and then betrayed.

## Establishing Trust

* + To induce customers into opening accounts, brokers often clothe themselves in the respectability and reputation of their firms.
  + Brokers (without authority) show potential clients the monthly statements or other reports of existing clients - the successful ones - and tell the potential clients that they can be just as successful.

## Creating a Need for the Broker's Services

* + Some brokers sow anxiety and discontentment in clients' minds by insinuating that they can perform better than their colleagues in order to make the customer dependent on them.
  + This often happens when a broker leaves his or her firm and the branch manager rapidly divides up the departing broker's accounts before the departing broker can solicit customers to transfer those accounts to the new firm.
  + Brokers who have just been assigned the departing brokers' accounts often tell the customer how surprised they are with the accounts' past performance, compared to how his own clients fared during the same period.
  + Or they say that if the customer remains, their management fee will be reduced (not saying for how long the discount will apply).

## Exploit Customer Insecurities and Make Them Listen

* + Everyone invests to make a profit of some kind or to generate a greater return than keeping money in the bank.

**\*31** • Some brokers stress the profit potential of a security and lose sight of - or purposely fail to disclose - the risks involved.

* + With a falling stock market, they tell their customers of “cycles” and the need to invest at the market's low. This, they say, is the best time to invest, when the market is at its lowest. It can only go up, they say. You have the greatest opportunity, they add, when everyone else is selling, to “grab bargains.”
  + In a volatile stock market, customers are so unsure about investing that some brokers take advantage of this insecurity and mislead their customers with unreasonable expectations.
  + In the ever-rising market following the 2008/2009 crash, some brokers tout investments that have hidden land mines of risk that a rising market masks.

## Keeping the Customer

* + In a scenario where a new broker has taken over the account, he or she convinces the customer to sell most of what the prior broker recommended for the portfolio, as part of the new broker's strategy for success.
  + What happens when the performance of the new strategy is not as promised? To keep the customer, the broker will blame the “unpredictable market” and will recommend yet another strategy, never attributing poor account performance to the broker's own failed strategy.

# Historical Precedents of Human Nature

The subject of “trust established and trust breached” was examined before the burst of the stock market bubble in 2000.[5](#_bookmark21) Because most transactions between customers and brokers are based on oral, as opposed to written, representations, there is an inherent conflict between the rendition of events, both self-serving. Because of this conflict, arbitrators tend to focus on motive and opportunity.

**\*32** The customer's case emphasizes the broker's motive in gaining commissions or mark-ups by misstating or concealing risk, or promising inflated returns. The broker's lawyer will likely respond with a powerful list of behavioral assertions predictable to those versed in law and economics:

1. A broker's dominating interest is in developing long-term customer relationships in order to generate repeat business in a highly competitive market.
2. For this reason, neither individual brokers nor their firms systematically cheat their customers, because the threat of loss of business that would follow from customer dissatisfaction would deprive them of far more future income than the single cheating opportunity would offer.
3. It is irrational even to try to misrepresent or conceal risks from a sophisticated customer. Since these customers are generally familiar with investment risk-return relationships, they can readily detect such cheating and terminate the relationship.
4. Therefore, the broker's story of sufficient candor is the more credible one.

The customer's lawyer will counter with a simple question: If all this is so, why are there so many examples of broker misconduct over the years?

# The Other Side of Breach of Trust - Taking Responsibility v. Blaming Others

Taking responsibility is the balance point of securities arbitration and mediation. The reality, in customer-broker relationships, is that parties have definable responsibilities. In mediation, getting customers to acknowledge a degree of responsibility can break impasses that occur during the initial caucuses (as opposed to a blanket - “I trusted my broker. He is fully responsible for the result.”)

Arbitrators often find those responsibilities obscured when confronted with the blame game:

1. *Customers blaming brokers and firms* can be the result of customers' laziness to learn how their money was to be invested and to keep abreast of the performance of the investments (either through frequent contact with the broker or by reading trade confirmations and monthly account statements).

**\*33** 2. *Brokers blaming customers* by arguing that the customer ratified the alleged misconduct or failed to mitigate damages sooner. This is a defense strategy utilized to avoid responsibility for problematic conduct of brokers and their firms.

1. *Brokers blaming their firms* for not providing adequate due diligence or pushing particular products or money managers. This is counterbalanced by *firms blaming their brokers* for not reading compliance manuals or for not knowing that the complaining customers were less than forthcoming - about their net worth, investment experience and/or investment objective.
2. *Parties blaming FINRA* for proposing or selecting arbitrators whose records disclose a pattern of decisions strictly for one side or another and for an arbitrator's failure to take seriously the responsibilities inherent in being a conscientious and fair arbitrator (e.g., New York arbitrators who spend long winters in Florida).
3. *Parties blaming arbitrators* who, for example, are unprepared for prehearing conferences, motion practice, full- day attendance at arbitration hearings; who fail to keep an open mind while hearing the case; who decide cases based on preconceptions and biases and not on the evidence presented; and, who render irrational decisions.
4. *Parties blaming their attorneys* for not having the ability or desire to tell clients the weaknesses of their cases, necessitating the hiring of expensive professional mediators to do the attorneys' jobs.
5. *Customer attorneys blaming mediators* for not getting them a better settlement because, they believe, the mediator has an unspoken desire for future mediation business from that brokerage firm.
6. *Attorneys blaming opposing counsel* for frivolous motion practice; for intentional discovery deficiencies; for misstating applicable law to the arbitrators; and, for an unwillingness to commit to the expeditious resolution of the case.

Trust is not a one-way street to success. Individuals who take no responsibility for their decisions and who tend to fall back on the bromide of “I trusted my broker” argue that it is *the other guy* who should be responsible, from the initial decision to make an investment to the reaction on receiving an adverse arbitration Award. However, in the end, the Award should be a reflection of responsibilities, an apportionment of obligations, actions and inactions.

# \*34 Standards of Responsibility

In “Establishing a Reasonable Standard of Responsibility for Broker-Customer Relationships,”[6](#_bookmark22) Texas customer attorney Jeanne Crandall wrote that customers should not be held responsible for acts which are within their brokers' duty of care. However, she added, a customer cannot ignore the information available to him or hold the broker responsible for damages which the customer could have avoided. For example, as the Court referenced in *Durham v. Waddell & Reed, Inc.*[7](#_bookmark23)

In determining questions of apparent agency, the apparent power of the agent is determined by acts of the principal, not by acts of the agent.[8](#_bookmark24) We will not create a right in order to restore a remedy.[9](#_bookmark25)

What duties are owed by brokers and what are the standards of responsibility for customers?

1. *The Principles of Agency Law Apply to Determine Broker Responsibility -* Most courts have held that a broker is an agent for his customer and that the broker owes the duties of a fiduciary for all matters within the scope of the agency.[10](#_bookmark26) This, in turn, depends on the **\*35** extent of the matters entrusted to the broker's care and management. On the one hand, where the broker has *no authority* to transact any trades in the customer's account without the customer's prior approval, those duties include:
   1. To recommend a security only after studying it sufficiently to become informed as to its nature, price and financial prognosis;
   2. To carry out the customer's orders;
   3. To inform the customer of the risks involved in purchasing or selling a particular security;
   4. To refrain from self-dealing or refusing to disclose any personal interest the broker may have in a particular recommended security;
   5. Not to misrepresent any fact material to the transaction; and,
   6. To transact business only after receiving prior authorization from the customer.

On the other hand, a broker who has *discretion* to trade securities, as in managed accounts, has the following duties:

1. To manage the account in a manner directly comporting with the needs and objectives of the customer;
2. To keep informed regarding the changes in the market which affect his customer's interest and act responsively to protect those interests;
3. To keep his customer informed as to each completed transaction; and,

**\*36** (4) To explain forthrightly the practical impact and potential risks of the course of dealing in which the broker is engaged.[11](#_bookmark27)

What, according to Ms. Crandall and the courts, are the factors considered in determining the *extent* of a broker's duties?

1. The degree of control exercised by the broker;[12](#_bookmark28)
2. The degree to which the broker has explained the proposed transaction and requested authorization to proceed only after disclosure of known risks; and,
3. Whether the customer is sufficiently intelligent and sophisticated and apprised of sufficient facts to be able to exercise independent judgment concerning the transaction in advance of the trade.
4. *The Customer's Standard of Responsibility Will Usually be Established in the Context of an Affirmative Defense of the Brokerage Firm*
   * A broker, wrote Ms. Crandall, should be held liable for the damages sustained from his conduct *unless* he can establish an affirmative defense of waiver, estoppel, ratification, statute of limitation, laches or the customer's failure to mitigate damages (where that defense is recognized by the customer's state laws).
   * “The most common factual basis for asserting these defenses is that the customer received confirmations and monthly statements and failed to object in a timely manner to the improper transactions. Although this defense could be successful on claims of unauthorized transactions, it will likely be unsuccessful where **\*37** the customer had no reason to know of the fraudulent conduct underlying the transaction or his ability to rescind the transaction upon receipt of the confirmation.”[13](#_bookmark29)

# NASD/FINRA Investor Alerts

Following the market crash of 2000, the NASD began to make available on its Web site *Investor Alerts*and other educational tools for investors. An ever-growing list of Alerts issued by FINRA can be found on a dedicated website.[14](#_bookmark30)

These tools for investors can provide ammunition for defense attorneys seeking to articulate customer-claimant's responsibilities in response to the customer's allegations of broker wrongdoing and blind trust. For example:

1. “10 Tips to Keep Track of Your Investments” [Sept. 23, 2002]
   * “Whether you work with a broker or advisor or trade on your own, you should always monitor your investments. By keeping an eye on your investments, you can prevent minor mistakes from turning into big problems.”
   * “Read and keep all documents that you receive from your broker, mutual fund or investment adviser. Check to make sure your confirmations and account statements are accurate.”
2. “Bearing Up in a Bear Market: You Still Need to Open Your Account Statements” [Nov. 5, 2002]
   * “Ignoring your [monthly account] statements can blind you to problems in your accounts other than their performance. No one can protect your accounts like you can, and so you need to open your statements and see what is going on in your account.”
   * “Immediately question any transaction or entry that you do not understand or did not authorize. Don't be timid or ashamed to complain.”

**\*38** • “Always check to see if there are problems in your statement that you need to correct. While it may feel better to avoid seeing the losses in your portfolio from the bear market, you can be opening yourself to problems if you don't open your statements.”

1. “It Pays to Pay Attention to Your Brokerage Account Statements” [Dec. 18, 2019[15](#_bookmark31)
   * “You should make it a habit to review online or paper account statements and trade confirmations on a regular basis. You should review your statement as soon as you receive it to confirm it correctly reflects your investment decisions and any actions you made or authorized during the time the statement covers. Also, review your complete account statement; don't just look at the summary page.”
   * “If you receive an account statement or trade confirmation and say nothing, there may be a presumption by the brokerage firm, a regulator or organization such as SIPC that you authorized the trading or other activity in the account. If you did not authorize the trading or other activity, you should contact your broker immediately to question the inaccuracy or discrepancy. Keep written notes of your conversations, including names of people you spoke to, and matters discussed, as well as the time and date of the conversation.”
2. High-Yield CD Offers Can Be Bait for High-Commission Investments [Feb. 21, 2019[16](#_bookmark32)
   * “We are reissuing this alert because, as interest rates have increased in recent months, so have calls to FINRA from investors concerned that promotions for higher-than-average CD rates are in fact pitches for high- commission investment products.”

# \*39 Conclusion

It was Ronald Reagan who made popular the Russian proverb “trust but verify”[17](#_bookmark33) in the context of nuclear disarmament discussions with the Soviet Union. As Malcolm Gladwell writes, our natural default is to trust what others tell us, until the evidence mounts to contradict the representations.

When investors have good reason to trust their financial advisors and the results of the broker's recommendations “turn South,” there may be a case of merit that the investor should discuss with an experienced securities arbitration attorney. That discussion will probably find that, as with life, the matter is not black-and-white but has shades of gray, with shared responsibility for the outcome.

Footnotes

1. David E. Robbins is a founding member of PIABA. He is a partner in the New York City-based Kaufmann Gildin & Robbins LLP and, for over 40 years, he has represented parties in disputes concerning the securities industry, parties in regulatory matters and the negotiation of financial adviser contracts. He is an American Arbitration Association arbitrator and the author of the Securities Arbitration Procedure Manual (Matthew Bender/ Lexis 5th Ed. Dec. 2019, https://store.lexisnexis.com/products/securities- arbitration-procedure-manual-skuusSku7156, and the annual *McKinney's Practice Commentary* on Securities Arbitration for the New York Practitioner, [http://legalsolutions.thomsonreuters.com/law-products/law-books?FindMethod=Menu\_LB\_LawBks.](http://legalsolutions.thomsonreuters.com/law-products/law-books?FindMethod=Menu_LB_LawBks) He co- chairs the New York State Bar Association program on securities arbitration and mediation.
2. Malcolm Gladwell, Talking to Strangers - What We Should Know About the People We Don't Know (2019).
3. Jerome E. LaBarre, *Securities Case Development at the Early Stage*, *in* Securities Arbitration 1998 - Redefining Practices and Techniques (Corporate Law and Practice, Course Book Series Number B-1061, 1998).
4. https://nysba.org/products/securities-arbitration-2020-deep-dive/ (last visited March 30, 2020).
5. *See* Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 Cal. L.R. 3 (1996).
6. Jeanne Crandall, Reyna, Hinds & Crandall, *Establishing a Reasonable Standard of Responsibility for Broker-Customer Relationships, in* Securities Arbitration 2006 - Taking Responsibility, Practicing Law Institute 323-333 (Corporate Law and Practice, Course Handbook Series, Number B-1553 2006).
7. [723 S.W. 2d 129](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987015845&pubNum=0000713&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); 1996 Tenn. App. LEXIS 3246 \*\* (TN Ct. App., Western Section, Aug. 22, 1986).
8. [Kelly v. Cliff Pettit Motors, Inc., 191 Tenn. 390 \*; 234 S.W. 2d 822](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1951102677&pubNum=0000713&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); 1950 Tenn. LEXIS 447 \*\*\* (Sup. Ct., TN, Dec. 8, 1950).
9. [Durham v. Waddell & Reed, Inc. 723 S.W.2d 129](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987015845&pubNum=0000713&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); 1986 Tenn. App. LEXIS 3246 (Ct. App., TN, Western Div., Aug. 22, 1986).
10. [*Conway v. Icahn & Co., Inc.,* 16 F.3d 504](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994048921&pubNum=0000506&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); 1994 U.S. App. LEXIS 2700 (2nd Cir., Feb. 15, 1994). (The relationship between a stockbroker and its customer is that of principal and agent and is fiduciary in nature, according to New York law.) *See* [11 N.Y Jur.2d Brokers § 45 (1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0282929473&pubNum=0114320&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=TS&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); [*People v. Mercer Hicks Corp.*, 4 Misc. 2d 55, 155 N.Y.S.2d 740, 744 (Sup. Ct.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1956121636&pubNum=0000602&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&fi=co_pp_sp_602_744&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)&co_pp_sp_602_744), *aff'd*, [3 A.D.2d 708, 160 N.Y.S.2d 806 (App. Div. 1957)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1957204822&pubNum=0000602&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). (A broker, as agent, has a duty to use reasonable efforts to give its principal information relevant to the affairs that have been entrusted to it.) *See* [Restatement (Second) of Agency § 381 (1958)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0288873338&pubNum=0101579&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=TS&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)). (“Accordingly, because Conway's account was a non-discretionary one, his authorization for all purchases and sales was required. Absent a waiver of notice running in its favor, Icahn had a duty to notify Conway prior to the execution of the sellout and to secure his consent as to the items to be sold.”) [*McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750 (3d Cir. 1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990035106&pubNum=0000350&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); [*Magnum Corp. v. Lehman Bros. Kuhn Loeb, Inc.,* 794 F.2d 198, 200 (5th Cir. 1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986136512&pubNum=0000350&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&fi=co_pp_sp_350_200&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)&co_pp_sp_350_200); [*DeRance, Inc. v. PaineWebber, Inc.*, 872 F. 2d 1312](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989062902&pubNum=0000350&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); 1989 U.S. App. LEXIS 5706 (7th Cir., April 24, 1989). (“A fiduciary relationship exists, within the Wisconsin common law of fraud, when confidence is reposed on one side and there is resulting superiority and influence on the other side. In this case, Paul Sarnoff and PaineWebber are fiduciaries.”). [*O'Malley*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999279172&pubNum=0000162&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search))

[*v. Boris*, 742 A. 2d 845](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999279172&pubNum=0000162&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); 1999 Del. LEXIS 427 (Sup. Ct. DE, Dec. 8, 1999). (“The relationship between a customer and stock broker is that of principal and agent. The broker, as agent, has a duty to carry out the customer's instructions promptly and accurately. In addition, the broker must act in the customer's best interests and must refrain from self-dealing unless the customer consents, after full disclosure. These obligations at times are described as fiduciary duties of good faith, fair dealing, and loyalty. They are comparable to the fiduciary duties of corporate directors, and are limited only by the scope of the agency.”)

1. [Joel Leib, Trustee for the Benefit of Sheldon Leib, and Sheldon Leib v. Merrill Lynch, Pierce, Fenner, Inc. and John Kulhavi*,* 461 F. Supp. 951](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978123929&pubNum=0000345&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); 1978 U.S. Dist. LEXIS 14660 (E.D. MI, 1978). *aff'd*, [647 F. 2d 165](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981211303&pubNum=0000350&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); 1981 U.S. App. LEXIS 19965 (6th Cir., Feb. 23, 1981).
2. [*Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1216-17 (8th Cir. 1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990094347&pubNum=0000350&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&fi=co_pp_sp_350_1216&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)&co_pp_sp_350_1216); [*Newitt v. First Union Nat'l Bank*, 607 S.E.2d 188, 196 (Ga. App. 2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005546863&pubNum=0000711&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&fi=co_pp_sp_711_196&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)&co_pp_sp_711_196); [*Wallace v. Hinkle Northwest, Inc.*, 79 Ore. App. 177; 717 P.2d 1280](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986123807&pubNum=0000661&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)); 1986 Ore. App. LEXIS 2706 (Or. Ct. App., July 3, 1985). *See also, Quincy Co-operative Bank v. AG Edwards & Sons, Inc.*, 685 F. Supp. 78 (D. Mass, 1986) (“However, the broker's obligation to his customer to investigate and disclose all material facts increases in direct proportion to the degree of his participation in the sale.”).
3. [*Fey v. Walston & Co.*, 493 F.2d 1036, 1050 (7th Cir. 1974)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974109751&pubNum=0000350&originatingDoc=Iabb6ac3186b111ea80afece799150095&refType=RP&fi=co_pp_sp_350_1050&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)&co_pp_sp_350_1050) (“Mere failure to read statements and confirmations, or to object to actions revealed therein, could not be deemed sufficient as a matter of law to establish waiver or to raise an estoppel in view of plaintiff's theory of fiduciary relationship and related impositions by defendants. Express consent to churning transactions would not necessarily raise these defenses if such consent were induced by the undue influence of a fiduciary.”)
4. FINRA, Investor Alerts, [https://www.finra.org/investors/alerts](http://www.finra.org/investors/alerts) (last visited Mar. 4, 2020).
5. FINRA, *It Pays to Pay Attention to Your Brokerage Account Statements,* [https://www.finra.org/investors/alerts/pay-attention-](http://www.finra.org/investors/alerts/pay-attention-) brokerage-account-statements (last visited Mar. 4, 2020).
6. FINRA, *High-Yield CD Offers Can Be Bait for High-Commission Investments,* [https://www.finra.org/investors/alerts/high-yield-cd-](http://www.finra.org/investors/alerts/high-yield-cd-) offers (last visited Mar. 4, 2020).
7. Wikipedia, *Trust, but verify*, https://en.wikipedia.org/wiki/Trust,\_but\_verify; [https://www.businessinsider.com/trust-but-verify-has-](http://www.businessinsider.com/trust-but-verify-has-) never-been-more-important-for-investors-2017-9 (last visited Mar. 20, 2020).

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