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OPINION

Today's Business: Options for dealing with an investment adviser's bad conduct

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David A. Slossberg; Contributed photo

Warren Buffett famously said of investing: "risk comes from not knowing what you're doing." For many individuals that observation is intuitive, resulting in hiring a financial adviser.

No financial adviser can eliminate inherent unknowns in financial markets. However, a sound financial adviser can — and should — help investors identify their objectives and risk tolerances, and then design an investment strategy to fit those parameters.

Did you lose money in the stock market because of market conditions or because of a financial adviser's bad conduct?

Problems arise when investment advisers take actions contrary to an investor's personal objectives. That may include misrepresenting the risk of a particular investment, placing trades without authorization, engaging in overactive trading (churning), failing to execute a sell order, abusing margin to place trades, failing to disclose fees or, in the most extreme cases, forging documents and misusing or stealing funds from the investor's account.

Of course, losing money on an investment is not actionable on its own, but dishonest or negligent conduct by an investment adviser may provide a means to recover losses caused by the misconduct.

Certain financial advisers are fiduciaries, meaning they have a legal obligation to place client interests ahead of their own self-interest. A fiduciary is required to exercise the utmost good faith and fair dealing, including duties of care and loyalty. The special relationship between investment adviser and client is often expressly spelled out in the written agreements. In the absence of express language, however, the law may imply a fiduciary relationship where the investor is unable to fully protect his or her interests because of the control the adviser exerts over his or her property and because the unprotected investor has placed trust and confidence in the adviser.

Some financial advisers, such as brokers, may not owe their clients a formal fiduciary duty, but should nonetheless be driven by professional ethics to address a client's investing objectives. These professionals are bound to make investments suitable for the client. Factors that determine suitability include the investor's risk tolerance (from conservative to aggressive), age, present income and net worth.

Many times, the most challenging issue in any dispute between investment adviser and client is proving that the claimed loss was caused by the bad conduct

of the adviser. While that connection is obvious when the loss results from the theft of assets, it may be far less clear when the claim is that investment advice or trades were not suitable. Market conditions or other factors may have contributed to the loss. Investors can attempt to overcome this hurdle by offering expert testimony to explain the complexities of a transaction and establish the causal connection between the bad conduct and the loss.

For investors with claims against a broker or brokerage firm, the legal proceeding will likely be governed under the Financial Industry Regulatory Authority. FINRA provides that disputes must be resolved in arbitration when the parties have signed an enforceable written agreement to arbitrate, the broker or financial adviser is a FINRA member, and the legal claim involves the broker's securities business. FINRA has a detailed set of procedural rules for navigating that process.

Connecticut also provides remedies through the Department of Banking and under the Connecticut Uniform Securities Act, which provides investors a private right of legal action when damages are suffered due to deceptive sales practices of someone who offers or sells securities. CUSA affords the defrauded investor the right to recover the amount paid for the security, plus interest and attorney's fees.

When a relationship with an investment adviser has gone awry, Buffett's advice is equally applicable — get help from someone with knowledge of how to navigate the complicated maze of public and private remedies. While everyone has at one time or another suffered the slings and arrows of volatile markets, there is no reason to suffer from damage inflicted by the bad conduct of an investment adviser.

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