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Planning for Diminished Capacity

By Judy Saxe

It's a perfect storm. Americans are living longer than ever before, and often with more wealth than previous generations. According to the 2016 U.S. Census, individuals who were then age 65 to 74 are the fastest growing population in America. They also have among the highest median net worth, according to the U.S. Federal Reserve.[1] Yet, as people age, cognitive capacity often declines, and they may not be able to manage or make decisions about their own financial matters, which can leave them vulnerable to financial abuse. Stories of such abuse appear frequently in the news, even involving well-known celebrities such as Brooke Astor and Mickey Rooney.

As professional advisors, we need to be aware of this trend and actively protect our clients in advance of any decline. Without proper planning, those experiencing decline risk being taken advantage of by caregivers, family members and unscrupulous individuals such as internet, mail and phone scammers. Older women are particularly at risk, as they often outlive their spouses and can end up living alone, with no family or friends nearby. According to one study from the Federal Reserve Bank of Philadelphia, the cost of financial damage to older Americans is estimated between $3 billion and $36 billion per year.[2]

Indeed, most of us will be affected by this escalating crisis at some point in our lives, either directly or indirectly. In 2015, an estimated 46.8 million people worldwide were living with dementia, based on research from the Alzheimer's Association, and the number is believed to be close to 50 million people for 2017. Worse yet, the number of those afflicted is expected to nearly double every 20 years, reaching 75 million in 2030 and 131 million in 2050.

Be Aware of and Recognize the Warning Signs

Cognitive impairment is not a specific disease, but a broad collection of symptoms that can range from mild to severe. Dementia and Alzheimer's disease are the terms you most often hear but these diagnoses are just a subset of the many conditions that can impact cognitive function. Symptoms of cognitive decline can include some or all of the following:

- Repeated instances of poor judgment or decision-making
- Difficulty following content that was once understood
- Struggling to maintain a conversation
- Inability to recall or remember names, events and places

Many people dismiss the warning signs of dementia for innocent signs of aging. Since these red flags can be subtle and easily covered for in the early stages, especially among highly educated individuals, it's important for advisors to watch for repeated instances of confusion, forgetfulness or poor judgment. In addition, if an area of strength—for example, balancing the checkbook or paying taxes—suddenly becomes a weakness, it may be a sign of something more serious. When an advisor recognizes the warning signs in a client, it's critical to try to determine whether their competence or decision-making capacity is impaired, and if so, to what extent. It may be prudent, for example, to schedule a meeting with a client at home as it is often there that the signs of disorganization and decline are more visible.

This devastating neurological condition no doubt creates a struggle within the families and relationships of those affected, especially when ordinary daily activities and decisions become a challenge. Moreover, those suffering from cognitive decline are particularly susceptible when it comes to managing their finances. Fortunately, as we learn more about cognitive decline, there are proactive steps that advisors can take to prevent the financial hardship that may accompany it.

Have Difficult Conversations Before Cognitive Decline Sets In

As wealth advisors become more aware of and educated about the early signs and risk factors associated with dementia, they should seek to develop and implement consistent policies for addressing this issue with all clients. By having an established process for discussion, the advisor will be able to address the issue more easily, without a client sensing that the advisor is singling them out specifically or making a judgment about their capacity. Though no one expects to lose control over their mental faculties later in life, your goal is to help your clients develop and maintain appropriate strategies in the event of impairment.

For new clients, the advisor may be able to proactively discuss plans for potential cognitive decline at the inception of the engagement. The advisor, for example, can ask the client if he or she would be permitted to talk with a spouse, an adult family member or another of the client's advisors, if there is ever any question about capacity. You can talk about the meaning of capacity, sharing your and the client's own experiences to help you define the parameters of your authority. You can also encourage the client to provide you with copies of legal documents, such as a durable power of attorney, that provide legal authorization for you to speak to another individual.

For more long-standing relationships, it is important to find an appropriate time to discuss these issues, even if you have never raised the topic before. You can advise those clients that you are implementing new best practices with all clients to discuss these issues in advance of any decline.

Family members also should encourage aging loved ones to have these conversations with their advisors before cognitive decline becomes an issue. In some cases, it may make sense for family members to attend meetings to ensure everyone's best interests are considered. However, advisors need to be vigilant, as not all family members may have the client's best interests at heart.

Plan Early for the Worst-Case Scenario

Since the symptoms and effects of cognitive decline vary person to person, planning for the worst-case scenario can help ensure adequate preparation, no matter the circumstances.

With adequate time to plan, advisors can work with a healthy client to assess his or her financial and family situation. A review would optimally include gathering information about the client's assets, understanding the intended beneficiaries and who has the authority to manage each asset during the client's lifetime, when the client is incapacitated and at death. The advisor can use this as a baseline to discuss the client's planning goals and determine if the plan supports that vision or if changes are necessary. Also, this process often enables the advisor to meet and develop relationships with the client's other advisors. Enhanced communication among all the professionals should enable earlier detection of any cognitive decline and help avert unwanted changes to an existing estate plan or other financial abuses.

Advisors should spend significant time discussing fiduciary roles, as this conversation is often rushed in a planning meeting. No matter what a document says, the people named to implement the provisions have the primary authority to act. Careful consideration should be made as to who is named to manage a client's assets not just after death, but during any incapacity, and to what type of care the client desires at different stages of incapacity. A powerholder could be an attorney-in-fact named under a durable power of attorney, or a trustee of a Revocable or Irrevocable Trust. When are these individuals authorized to act and how is incapacity determined? Must they obtain the consent of beneficiaries, or one or more qualified medical professionals? When and how can these individuals be removed and replaced? Should there be any checks and balances, such as having a professional co-trustee, a trust protector or a family appointment committee, to avoid any potential abuse of power? Advisors should encourage clients to introduce them to any family members or friends who are named so that communication will be easier should the time come to do so.

While no one wants to consider the possibility that they'll decline as they age, the statistics are irrefutable. It is essential for advisors to continue to be educated about the realities of aging and financial elder abuse, and to have conversations with clients on these topics early and often. A collaborative team approach can be a powerful support system for clients experiencing cognitive decline and for those who love them.

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1. *U.S. Federal Reserve Bulletin, September 2017.*
2. *Addressing the Financial Well-Being of Older Adults, Federal Reserve Bank of Philadelphia, May 2018.*

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