Five Tips: Protecting Clients with Diminishing Mental Capacity

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An estimated 6.2 million Americans aged 65 and older are living with Alzheimer's dementia in 2021, a number that is projected to rise to nearly 13 million by 2050.* In the U.S., trends show a larger portion of the population living longer—and a noticeable 16% increase in dementia-related deaths over the last 20 years. As a result, more individuals and their families are working through the consequences of loved ones' diminishing capacity. As a wealth advisor to people in decline, it is imperative to recognize the many potential scenarios which these individuals and their beneficiaries may face. Evaluating a client's mental capacity and preparing strategies for handling the challenges associated with aging can be critical for everyone involved.

Wealth advisors play a very important role in helping aging individuals and their families plan for their future. When dementia is either suspected or confirmed, the responsibilities and potential liabilities multiply. There are increasingly more reported lawsuits relating to decreased capacity and undue influence issues surrounding aging Americans.

So, how do wealth advisors safeguard their aging clients' assets—while also protecting themselves?

These five important considerations outline how to recognize and handle age-related changes for clients and their beneficiaries.

1. Look for Fact Patterns or Changes in Those Patterns.

Wealth advisors often enjoy lengthy relationships with their clients, helping them grow financial assets over time. It is not unusual to work with more than one family member, either as a direct client or in a beneficiary role. These long-standing relationships offer wealth advisors the opportunity to study familial rapport. Evaluating family dynamics over time provides a tool for future measurement, helping wealth advisors understand how the aging process is affecting their clients. If there is suspicion that a client is in diminishing capacity, it can trigger a deeper dive into the situation. A few initial points to assess: Are there new or changing behaviors between family members? Is there a dominant caregiver or is someone particularly influential with the senior member of the family? If you are unable to witness family interactions, is there a change in your own relationship with the client? For instance, is someone new present at meetings or is the client suddenly changing how documents are signed? These clues could signal growing external influences or a decline in a client's well-being. They should trigger the wealth advisor's awareness for this client's situation with their beneficiaries.

Case Snapshot: two of three daughters were disinherited by their aging father. Leaving all assets to his primary caretaker daughter caused great stress between her and one of her sisters. The disinherited sister took drastic measures, essentially taking control of the father, having him sign a "new" will, and trying to gain control of his assets. The behavior of this daughter created obvious grounds to invalidate the "new" will in this case (as the court did), but it teaches us to identify relationship issues early when working with a client. This insight could help define strategies that avoid suffering for the senior family member and his or her chosen beneficiaries.

2. Ask Pointed Questions.

Protective legal documents communicate an individual's wishes as to what will happen following their death. Often, wealth advisors are in a unique position to help their clients understand why they need these critical documents. As a trusted advisor, it is important to ask pointed questions of clients about their wishes and to encourage them to procure legal documents that will carry out their personal wishes and financial plans. It is a good practice to ask clients early in the relationship about the status of legal documents such as powers of attorney, healthcare proxies, wills, estate plans or trusts. If these documents are not in place, wealth advisors can explain how these protective documents coordinate with clients' financial plans for their benefit

3. Keep Organized Records.

All professional advisors need to keep organized records of interactions with clients over the lifetime of a relationship. These records should be dated, easy to read, thorough and retrievable. A protective path for both the client and advisor is established through documenting phone conversations, emails, texts and other methods of communication. These records allow for easier evaluation should changes in capacity and behaviors take place. And, should there be future concerns or questions regarding a client, this communications record is incredibly helpful in recreating directives, advice and decisions. Record keeping also facilitates conversations with compliance officials should there be concern surrounding signs of cognitive impairment.

Case Snapshot: an elderly father changed his will to exclude two sons and provided his entire estate to a third son, the father's primary caretaker. The will was changed as the elderly father entered a period of cognitive decline and consequently, the two excluded sons filed a suit on the grounds of undue influence. The trial court ruled that the father lacked testamentary capacity at the time the will was changed, but an appeals court overturned this, finding that the onset of cognitive decline did not mean the father lacked the ability to understand what he was doing when he changed the will. This was a very difficult situation and close case—but it shows that advisors should carefully document scenarios when a will is executed to memorialize sufficient mental capacity that the client understands the purpose of the will.

4. Be a Prudent Investor.

Over time, individuals make a variety of decisions concerning personal wealth, and unfortunately, as individuals age, they become more susceptible to financial exploitation. Wealth advisors that provide prudent advice over time earn trust. It is increasingly critical that advisors recommend portfolio changes that are appropriate with each stage of life. Should there be suspicion of a client's diminished cognitive state, it is crucial to document all recommendations and the results associated with any changes. If you are managing assets held in trusts, you must a.) understand what happens to the funds after the senior generation dies, and b.) ensure that the portfolio is managed appropriately given the circumstances of all beneficiaries and the terms of any applicable trusts. It is also important to consider fiduciary obligations to avoid conflicts of interest. Be very clear with beneficiaries that you are contractually obligated to *only* the client, so that you avoid misunderstandings or advising non-clients.

5. Collaborate with Reputable Trusts & Estates Lawyers.

Should a wealth advisor suspect a client is experiencing diminished capacity, it may be time to consider advising that client to retain a reputable and independent trusts & estates lawyer, particularly if a substantial amount of time has elapsed since the execution of the current estate planning and other documents, or if material changes in the client's life have occurred since the execution of the existing documents. A lawyer's focused attention to documenting the senior individuals' mental capacity and any other important facts and circumstances can protect both the client's estate and the wealth advisor from potential problems following the death of the senior individual.

Case Snapshot: a decedent mother of five left her entire estate to one child and also executed a deed of the family home to that individual. The other siblings challenged the will and deed as the product of undue influence by this child who lived with their mother, noting the mother's diagnosis of "mild dementia." Ultimately, the testimony of the trusts & estates lawyer who prepared the will and the deed played a very important part in dismissal of the claims since he personally supervised the documents and maintained notes of discussions with the client.

No doubt, the relationship among client, beneficiaries and wealth advisor can be a sensitive one. Over the course of working together, there are a range of responsibilities and decisions that can have lasting impacts. Sustained awareness of client needs and behaviors can help wealth advisors act as allies in protecting individuals and their families. Advisors should bear in mind the important steps discussed in this article: observing fact patterns and changes in patterns, asking questions, documenting communications, using age-appropriate investment strategies and collaboration with trusts & estates lawyers. These considerations are critical to protecting both advisor and client.

The Goulston & Storrs Probate & Fiduciary Litigation group can assist both individuals and fiduciaries in navigating these important considerations, in order to minimize risk and provide legal protection to those involved.

*(Alzheimer's Association; www.alz.org)