

Dealing with Client Incapacity



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Mon, 2014-06-02 11:45

Every financial planner will face clients who develop some mental incapacity during their relationship. As we age with our clients, we will deal with this issue with more frequency. I'd like to offer both a medical and a financial planning view towards this serious issue.

Incapacity is Relative

There is a wide spectrum between lucidity with understanding and a dangerous incapacity to think and function responsibly. Forgetting names and numbers (decreased memory) is often a normal part of aging, and not a clear sign of impending dementia. Forgetting important conversations and having difficulty putting together a coherent sentence are yet another thing. Progressive cognitive impairment leads to difficulty in monitoring and understanding one's personal finance, as well as in general interpersonal interactions.

As noted above, mild memory impairment may be a normal part of aging, and if so, is not progressive. It is also normal to have a little more trouble learning as we age. When discussing a "loss of memory", it is also important to note that there are different types of memory, and each is affected differently with dementia. In medicine, we divide memory into three temporal components: Immediate, Recent, and Remote. Immediate memory is often tested by asking a patient to repeat a stream of numbers, both backwards and forwards right after hearing them. Immediate memory is a function of attentiveness. Remote memory is that of many months or years ago. It is fascinating that remote memory can be intact even with significant dementia. It is the Recent memory (something from minutes to hours ago) that is most often impacted with dementia. Recent memory is often tested by asking a patient to remember three words-and even to have the patient repeat them back verbally. Then, the patient is distracted by other talking and testing, and asked for the three words just minutes later. An inability to repeatedly not remember the words is a strong sign of serious memory problems. The inability to have intact Recent memory also implies that long term memories of new events will not occur.

There is an "in between" level of cognitive functioning between "normal" and having dementia. This is referred to as Mild Cognitive Impairment (MCI). MCI should be suspected when the client or the family feels that their forgetfulness is out of proportion to normal. It is important to suggest a medical exam if MCI is suspected, as both a diagnostic investigation and medical investigation of underlying disease may be more effective than once true dementia occurs. Unfortunately, no effective drug therapy exists to prevent the progression to dementia in those patients so destined and there is a higher progression to true dementia than in "normal" aging individuals. But, some patients with this milder impairment may actually improve or remain stable over long periods of time.

We can define true dementia as a brain dysfunction that leads to trouble with thinking, memory, and behavior. A

medical definition includes objective evidence that there is a major impairment in learning and memory as well as other signs of brain dysfunction (such as difficulty in reasoning or speaking coherently). (13) Dementia is usually progressive over months to years. The most commonly known and most common etiology of dementia is Alzheimer's disease (which technically is diagnosed only on brain biopsy, and is probably present in 50-80% of cases). Average survival with Alzheimer's disease is less than ten years, but there is a wide spectrum of life expectancies. Other less common causes of dementia include toxins (alcoholism) and multiple strokes (multi-infarct dementia). None of the causes are usually treatable (more on that below). In some but not all patients with dementia, there are varying degrees of physical changes as well, such as a change in gait and coordination.

Note that dementia is not an acute phenomenon, but an insidious and progressive condition. A major consideration in a differential diagnosis is that of significant depression, and other than this, there is rarely a treatable cause. A good medical exam is essential to prove a diagnosis of dementia, but note that there are no specific laboratory or radiology findings to prove the diagnosis.

Therapy for established dementia is sparse. Since the population with dementia is heterogeneous and the disease itself is somewhat vague in its effects in any given individual, proving efficacy of drugs has been frustrating. Drugs are often prescribed that may provide a barely perceptible benefit in some patients. Many experts feel that some of the drugs should be tried and or continued even in the clear absence of improvement, with the thought that they might be hindering disease progression. Cognitive and behavioral therapy applied early appears to be of some benefit in prolonging the onset of severe disability.

Scope of the Problem

It is estimated that 5.4 million Americans suffer from dementia currently, and that up to one half of your clients over age 85 are affected (1). These patients have a much higher incidence of medical expenses, hospital stays and general financial strains.

Risks for Advisors

Making recommendations and investments to clients with cognitive impairment leads to the future possibility of lawsuits and regulatory enforcement actions. There are also serious privacy issues in communicating the possibility of dementia to other advisors and family members if the diagnosis has not been established by a physician.

Make sure your clients have executed documents allowing someone to act in their stead (power of attorney) and know who in the clients' family can be a trusted contact.

Watch for Estate Document Changes

Beware changes in estate documents that occur at a time when a client has some incapacity. Stories of relatives and/or caretakers taking advantage of clients are legion. As a Fiduciary to the client and their family, monitor for changes, especially soon after the death of a client who had incapacity. Check the dates on their documents and be aware.

What the Advisor Should Be Considering

Every client of suitable age should consider having a number of estate planning documents in place well before the risk of mental changes. Gardner, et.al. (an excellent reference from a legal viewpoint) discuss in more detail: "The modern estate plan includes a: revocable living trust, pour-over will, durable power of attorney for financial matters, durable power of attorney for health care, living will, assignment of personal property to the trust, deed(s) of real estate to the trust, and certification of trust. The client must have capacity (a "sound mind") to execute these legal documents. Otherwise, the validity of the documents could be questioned by heirs and the courts." (12) If the

documents are more than a couple of years old, check with the client and family to assure that they are still in line with their wishes, and that guardians/trustees are still available.

If you suspect that a client has some cognitive impairment, ask the family if they have noticed any changes. Suggest a visit to the doctor to look for a medically reversible condition. Carefully document your actions and thoughts. Establish (if not already present) a strong relationship with those who will become responsible for the client's affairs as incapacity progresses.

The advisor should review Long Term Care insurance (stand alone or hybrid) policies with families. Adequate health insurance should be in place. Disability insurance is important if the clients are significantly younger than the planned retirement age and are still working.

At some point, it may become necessary to put substitutes in charge of the client's affairs. How this is actually done varies from state to state, and is often specifically spelled out in good estate planning documents. It has been my experience that there are two broad categories of individuals with early incapacity—those that “know” and those that don't. Often, the former is disturbed about the acknowledged decrease in mental acuity, and the latter is blissfully unaware (often the latter is much more disturbing to the spouse and other family members). The more aware and disturbed client is actually usually more difficult to deal with in terms of substituting authority to act. They often continue to feel that they can do an adequate job when in fact they cannot.

If the Client is Already Incapacitated

If you are called in to advise for a family with an already comprised individual, or if dementia strikes quickly in an existing client, you need to contact a skilled estate planning attorney. A client needs a certain degree of a sound mind in order to execute documents, especially trust documents. It may be necessary to establish a guardian or conservator for the individual (depends on state law).

1. Financial Advisors and Alzheimer's Disease: What You Need to Know; Alzheimer's Association, www.alz.org.
2. *2010 National Institutes of Health – National Institute on Aging: Alzheimer's Disease Progress Report: A Deeper Understanding*
3. *2011 Alzheimer's Society: Short Changed – Protecting People with Dementia from Financial Abuse*
4. *2011 National Institutes of Health – National Institute on Aging, “Forgetfulness...Knowing When to Ask for Help”*
5. *Alzheimer's Association (www.alz.org) – “The 7 Stages of Alzheimer's”, “10 Early Signs and Symptoms of Alzheimer's”*
6. *Journal of Financial Planning, “Is Your Firm Prepared for Alzheimer's?” – Steve Starnes*
7. *2010 National Institutes of Health – National Institute on Aging: Alzheimer's Disease Progress Report: A Deeper Understanding*
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12. **Defining Incapacity in the Modern Estate Plan , Journal of Financial Planning,**

by Randy Gardner, J.D., LL.M., CPA, CFP®; Leslie Daff, J.D.; and Julie Welch, CPA, CFP®
<http://www.fpanet.org/journal/DefiningIncapacityintheModernEstatePlan/>

13. <http://dsm.psychiatryonline.org//book.aspx?bookid=22>

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