

Clients' Faculties vs. Your Fiduciary Duty

By Margarida Correia

In mid-September, Maggie received an unexpected visit from an insurance salesman. And the 83-year-old widow did something she shouldn't have: She wrote a check for \$10,000 for a policy she didn't need.

Maggie readily admits that her memory isn't what it used to be, but in this case she realized that she needed help. So she called her advisor, Jean Dorrell, a certified estate planner and founder of the estate planning firm Senior Financial Security Inc. in Summerfield, Fla. "I think I made a mistake," she told Dorrell.

It turned out that the insurance salesman was someone Maggie's husband had worked with years earlier, but the policy in question was inappropriate for Maggie given her age and health history, not to mention the fact that she already had plenty of insurance, according to Dorrell. "He knew that she would not be accepted on that policy and was just trying to make a quick commission," Dorrell says of the salesman.

Dorrell, who requested that Maggie's last name not be used in this article, first tried to stop payment on the check. But it had already been cashed, so she and Maggie called the insurance company to cancel the policy and even received a refund.

As baby boomers retire and enter their twilight years, advisors can expect to see more clients like Maggie who are beginning to lose their cognitive acuity or are suffering from dementia-related diseases, such as Alzheimer's.

Research firm Cerulli Associates estimates that advisors on average currently serve seven clients suffering from Alzheimer's, a number that is expected to grow as their clients age and live longer.

The legal challenges such clients raise for advisors can be significant. Clients

suffering from cognitive decline may request transactions that are out of character, or worse, not in their best interests

In such situations, advisors must engage in a delicate balancing act, weighing their obligation of confidentiality to clients against their duty to do what's best for them. They may want to reach out to family members, but because they cannot share information about their clients' accounts with outside parties, they may find themselves in a classic damned-if-I-do-and-damned-if-I-don't legal conundrum.

Indeed, whichever decision they make could open them up to potential legal liability.

Bernard Krooks, a founding partner of Littman Krooks, a law firm that specializes in elder law, recalled such a situation. A longtime client received a call from an individual who "no longer understood what was going on" and wanted to know if it was okay to contact other family members to let them know that "mom was losing it."

It was a sticky situation, he says, but they were able to get the client to consent to having an adult child participate in the decision-making process.

Unfortunately, many financial advisors and their firms are sticking their heads in the sand, unwilling to confront the reality of these legal challenges and prepare for them. "No one wants to talk about Alzheimer's. It's dicey," says Scott Smith, an analyst at



Cerulli Associates and author of a report on the challenges of an older client base. Most advisors, he explained, are uncomfortable questioning their clients' mental capacity.

Their resistance is also tied to the fact that elder-care issues are an evolving area for the financial advisory industry with few state or federal statutes to guide them. With little case law, it's difficult to establish guidelines on how to work with clients with diminished cognitive ability, says Steve Starnes, a financial planner with The Monitor Group Inc., an investment advisory firm in McLean, Va.

The lack of guidance, however, hasn't stopped Dorrell from tackling the issue with her clients head on. "I'll bring it up to the client and say, 'I'm starting to have concerns about your memory. Do you have any memory problems that you're aware of? Do other people ask you this?'" Dorrell says.

In fact, whenever she takes on new clients, she tests their memory by asking them questions about their birthday and wedding anniversary, their children, and other things they should know, including



what they had for breakfast. "If I get any hint at all that there's a problem and this is a new client of mine I haven't worked with, I will always involve a family member," she says.

To make sure they can involve family members and avoid future legal quagmires, advisors should, as a matter of practice, ask for an emergency contact at the beginning of the relationship when setting up the account, say lawyers and other experts. "As a last resort, if all other efforts fail to get permission from the client to reach out to someone else, the financial professional can reach out to the person named as the emergency contact," says Starnes.

Others agreed. "If you get permission of the senior to bring another family member, a trusted advisor, then I think you lower the risk that anybody could accuse you of taking advantage of the other person because someone else was present," Krooks says.

The situation gets even more complicated if the client refuses to give permission. If that happens, advisors should look for creative ways of contacting family members, according to Krooks.

Even though clients have the right to refuse permission, advisors still cannot engage in a transaction that is not prudent or appropriate, says Krooks. "If some 88-year-old client calls you and says they want to sell all their bonds and invest in a mining company in South Africa, you can't be a robot," he says.

In such a situation, Krooks suggests that advisors find a way to let family members know that their loved one might be considering something that is inappropriate without disclosing the substance of the conversation he or she had with the client about a particular investment.

If a family member is also a client, for example, the advisor could ask if everything is okay with mom, hopefully triggering action by the family member. The client might get angry or fire the advisor, but "that's not the worst thing that could happen under those circumstances," says Krooks.

Dorrell would take a tougher approach. If a client denied her permission to contact a family member and she believed that the client was cognitively impaired - a situation that fortunately has never occurred because she is very close to her clients and their families - she would tell the client that she would have to terminate the relationship.

If the client didn't like that, she would give them the option of signing a statement saying that they either agreed to have her contact family members or disagreed and understood that they were being terminated as clients.

"Declining to represent a client with diminished capacity who refuses to involve a family member is a very sound business practice for a financial advisor," Krooks says.

It's also good business practice to document all conversations with the client.

Dorrell, for example, documents every call and office visit, and has a sign-in sheet asking clients to state why they're there. It sounds cumbersome, but it spared her heaps of legal trouble when a client suffering from dementia filed a complaint against her, saying that she put \$600,000 in a place he couldn't access.

The complaint was quickly dismissed when she produced documents to back up her actions, including a typed list of recommendations and a letter sent to one of his children explaining who she was and how she was helping.

Compare that to the unfortunate case of an advisor in Utah six years ago. The advisor discussed long-term care insurance with an elderly couple who decided not to buy it. When they both

developed Alzheimer's and were put into nursing homes, the family sued the advisor for \$600,000, taking him to task for not recommending long-term care insurance. The advisor was unable to produce anything in writing that they declined to purchase the insurance and was held responsible, says Krooks. "It's an extreme case, but it highlights the importance of not only communicating well but also confirming it in writing," he says.

All the legal tips in the world, however, do nothing to relieve the discomfort most advisors feel in broaching the topic of dementia and mental decline with their clients. And the firms and banks they work for are not, for the most part, making the job any easier.

Broker-dealers, by and large, are not providing advisors with the guidance and support they need, says Cerulli's Smith. The firms are not being asked for it in the field, but they also don't want to expose their organizations to legal liability, Smith says.

"Broker-dealers are afraid of everything, even their own shadow," he says, explaining that they approach the issue of clients with declining mental capability from a purely legal standpoint with the goal of minimizing liability.

PrimeVest and LPL, two large third-party marketing firms that work with banks and credit unions, declined to be interviewed for the story. "It's a pretty sensitive topic for FINRA," said Jayson Hron, a spokesperson for PrimeVest, in an email.

One firm that appears to be navigating the choppy waters of elder care is Wells Fargo Advisors. "This is something we're focused on here since it is a very timely and difficult issue. We're dealing with an aging client base and quite often the arrangements aren't in place that permit advisors or firms to intervene when they suspect that a client's mental capacity is diminishing," Tony Mattered, a communications consultant at Wells Fargo Advisors, said in an email.



In addition to training their advisors to spot changes in their clients' behavior and decision-making ability, Wells Fargo has a team in place within its legal department where advisors can report their concerns. The group investigates the reports and, when appropriate, contacts local Adult Protective Services agencies. The firm also supplies its advisors with materials they can provide to clients who might be dealing with family members exhibiting signs of Alzheimer's.

The materials are the types of things that advisors sorely need, says Smith. He cited scripts to start up conversations with clients, forms they could use and best practices as other helpful resources for advisors.

Smith bemoaned the fact that while broker-dealers encourage their advisors to act in a financial planning capacity, they do not have the services in place for a consultative, planning approach in clients' old age.

He noted, for example, that broker-dealers generally have not partnered with outside experts in health care to help serve elderly clients.

"Broker-dealers that take a purely legal approach to clients facing Alzheimer's and dementia will leave advisors to fend for themselves, leading to inconsistent service and the potential for mishandling client accounts," he writes in a report. "Small steps to ensure that advisors have the appropriate resources to share with clients," he continues, can ensure that the client's financial health is cared for.

It can also ensure client satisfaction as it did with 83-year-old Maggie. "With Jean's help, I've done pretty well," she says

Jean Dorrell, CEP and founder of Senior Financial Security, (The Villages, FL.) has more than 20 years of experience working directly with seniors on a variety of financial issues. Her expertise lies within tax services, retirement and estate planning, annuity selection and wealth management.

