How U.S Bank's David Gutzke and other advisors deal with clients who are cognitively impaired.

THE GROWING RETIREMENT RISK: DEMENTIA
DEMENTIA: THE NEW RETIREMENT RISK

Nobody wants to think about the prospect of failing mental capability in later years, but it’s an issue that clients need help in managing if they’re to be fully prepared for retirement.

By Margarida Correia

David Gutzke couldn't help noticing the changes. His longtime client, Ron Dudley, an astute, 62-year-old entrepreneur and an admired figure in his community, suddenly couldn't remember things anymore. At first, he started to miss details of important meetings and conversations but soon couldn't recall even the names of family members.

“It came on fairly quickly,” Gutzke, a wealth management advisor in the high-net-worth unit of Minneapolis-based U.S. Bank, says of his once-sharp client. “He just wasn’t remembering things and also not using the best judgment.”

The onset of Alzheimer’s hit the family hard, but they pulled together and got their arms around it as quickly as they could. Still, Gutzke says, there were flare-ups with the children initially arguing about who should help the beloved family patriarch with financial and health care decisions.

“Initially a diagnosis like this can be almost debilitating for some family members and often they need to work through the shock and adjust for the new normal,” Gutzke says.

No one wants to talk about dementia, but it’s a conversation many people—and their advisors—need to have if they want to be fully prepared for the risks of retirement. Individuals who haven’t thought through what might await them not only face the threat of throwing their families into chaos but also risk putting their assets on the line by making themselves vulnerable to con artists and other financial predators.

Worse, failing to plan for cognitive decline can lead to what many see as the nightmarish scenario of guardianship, with the individual’s financial matters and health care directed by a court-appointed guardian or conservator.

**Repercussions Immense**

For advisors, the repercussions can be immense. Not helping clients plan for possible cognitive impairment can lead to legal dilemmas that can land advisors and their banks in trouble. Privacy issues, conflicting principles and a host of other concerns can easily hobble and paralyze advisors, leaving them unable to act on their clients’ behalf.

As the nation’s 76 million baby boomers continue to retire, advisors can expect to encounter more clients with memory issues.

An estimated 10 million Americans have dementia or cognitive impairment with 2 million new cases reported every year, according to research by David Laibson, a professor of economics at Harvard University. More than 40% over the age of 80 have dementia and almost 70% are cognitively impaired, researchers say.

Banks are certainly seeing the effects of this issue. Wells Fargo, for instance, has seen a tripling in the number of calls it fields from advisors concerned that their clients are either cognitively impaired or being abused.

In 2010, the bank received about 30 calls a month, but now it’s up to about 100, says Ron Long, head of the firm’s Regulatory Affairs unit and the recently launched Elder Client Initiatives group.

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The new seven-member group assesses reports as they come in, guiding advisors on what to do, including whether the reports need to be filed with the local Adult Protective Services office in cases where financial abuse is suspected. The team, which is based in St. Louis, includes a lawyer who manages five elder care associates and one intern.

Advisors working with clients showing early signs of cognitive impairment are “probably in one of the worst places they can be,” says Long. They face legal risks at every turn and often find themselves in damned-if-I-do-and-damned-if-I-don’t situations.

Suppose, he says, that a client with signs of impairment calls an advisor and asks him to sell all his IBM shares. If the client says, ‘Sell all of my IBM. Everything I’m hearing from Silicon Valley is that mainframe computers are not going to be useful anymore,’ the reason for selling at least is rational, Long explains. If, on the other hand, the client says, ‘Sell all my IBM. I heard the Martians are landing tomorrow and they want to take me with them,’ the reasoning isn’t rational and the advisor should heed the clear red flag.

In either case, the decision to sell IBM would be difficult for any advisor to make. If the advisor sells the shares and the transaction proves disastrous, the advisor and his bank could be held liable. If, on the other hand, the advisor doesn’t sell the shares, and the transaction, had it been made, would have
been beneficial to the client, the advisor and the bank could also potentially be liable.

“We don’t ask our advisors to make those calls on their own,” says Long. “We see hundreds of these a month. An advisor might see one every other year. We’re clearly going to be better skilled at what the challenges are, what the possible steps are, what the pitfalls may be.”

In the IBM example, the Wells Fargo Elder Client Initiatives team might have suggested that the advisor get a letter from the client's doctor about the client's mental capacity, a delicate situation that could offend the client.

It’s very difficult for advisors and trust officers to be placed in situations of having to play doctor, notes George Pennock, a regional fiduciary officer for Bank of the West. “We’re not in that business,” he says. “It’s hard for us to diagnose.”

Fuzziness surrounding different standards of capacity makes the issue even more complicated, according to Pennock. The standard of capacity to contract with others, for example, is different than the standard for testamentary capacity, Pennock explains. “It’s just not easy to figure out where exactly the line is when someone has full capabilities and when they don’t,” he says.

Privacy Issues

Another tricky situation advisors navigate when they notice that “something’s not right” with the client, Pennock says, is knowing what to say and when to say it. It’s also not always clear who the right person is to contact.

Indeed, protecting the client’s privacy is one of the biggest challenges for advisors. Without an emergency contact or the client’s permission, advisors cannot reach out to family members.

Bernard Krooks, a founding partner of Littman Krooks, a New York law firm that specializes in elder law, recommends that advisors take the “little bird told me” approach.

“You’re in a sort of catch-22 because you’re not at liberty to disclose the person’s assets to relatives but you could sort of intimate that the relative is not acting the way they usually do when we talk about investments,” Krooks says.

In other words, an advisor can “drop a hint” that the “person is slipping” without disclosing any personal and confidential financial information, Krooks explains. “The client might not be happy and might fire you,” Krooks adds, but at least the advisor sidesteps the potential legal quandary.

Robert Freedman, a partner in the New York office of law firm Schiff Hardin, sympathizes with advisors’ legal predicament. “They’re caught between two competing principles,” he says, explaining that advisors have to honor their clients’ instructions until the clients are officially declared to be incapacitated. However, if they have reason to believe there’s a lack of capacity, the advisor has a fiduciary or semi-fiduciary duty to investigate and not follow the clients’ instructions, especially if the advisor suspects someone is taking advantage of their diminished capacity, Freedman says.

Freedman has worked both sides of the fence, chiding financial institutions in some instances for following through on a client’s instructions and chiding them for not following through in others.

In one situation, he represented a wealthy elderly woman, around 90, whose broker refused to allow her to withdraw $50,000 from her checking account to buy jewelry. “I don’t know that the person had any right to refuse to give her $50,000,” he says.

Freedman wrote a letter to the institution saying that she wanted to buy the jewelry for an upcoming benefit dinner. The broker needed assurance that the woman knew what she was doing and that the money was not being given to someone who might be exploiting her, Freedman states.

In another situation, Freedman reprimanded a financial institution for not spotting potential financial abuse of an elderly woman who requested that a large sum of money be transferred into her checking account monthly to pay for household expenses. The woman had few expenses because they were largely handled by her bookkeeper, says Freedman.

Without the bookkeeper’s knowledge, the woman apparently had arranged for $50,000 to be automatically deposited into a bank account to be picked up in cash, a setup that opened the door to one or more swindlers.

When the bookkeeper noticed the large transfer and withdrawal, he alerted the family. The financial institution should have known that the woman wasn’t capable of handling her finances and should have questioned why she set up the automatic deposit, Freedman explains.

“We believe the investment advisors knew of her increasing memory issues but we’re not sure how much they knew, when, or who at the investment company knew,” he says.

After Freedman sent the financial institution a letter, the institution reduced the automatic deposit to about $13,000, which appeased the son enough to avert a lawsuit.

To do or not to do what the client says isn’t the hardest decision an advisor will have to make. William Benjamin, head of U.S. Bancorp Investments, the brokerage unit of U.S. Bank, paints what he sees as the worst situation an advisor will have to make. William Benjamin, head of U.S. Bancorp Investments, the brokerage unit of U.S. Bank, paints what he sees as the worst situation an advisor and his or her bank can be in.

Suppose, he says, a bank feels that a client is struggling to the point of making potentially harmful financial decisions and refers the matter to the local Adult Protective Services office.

If Adult Protective Services determines that there’s nothing wrong with the client, it puts the bank in a tough spot, especially if the client is adamant about making an imprudent transaction, Benjamin says.

Avoiding Legal Issues

To avoid these challenges, banks are beginning to put procedures and practices in place to bypass the potential legal issues.

Some provide training on how to recognize signs of cognitive impairment, but others are staffing up. U.S.
Bancorp Investments, for example, has a dedicated person in the compliance department who works with financial advisors and sales assistants to help them sort out what to do. And Wells Fargo Advisors has a full team set up to deal with cases of diminished capacity. 

Gutzke of U.S. Bank followed basic protocols when he noticed his client Dudley's progressively worse memory lapses, reporting it to his manager, who then alerted the proper officers at the bank. (The client's name was changed for this article to protect his privacy.)

But, more importantly, he followed a service philosophy that helped him dodge many of the issues that often engulf advisors dealing with cognitively impaired clients. Gutzke had made it a point to know Dudley and his family as well as his lawyer, accountant and other advisors.

When Dudley's memory started to slip, Gutzke knew exactly who to reach out to. In fact, the family came to him before he even had a chance to bring it up with them. Nevertheless, the initial discussion with Dudley and his wife wasn't easy.

“You don't want to paint too bad a picture but you have to be realistic,” Gutzke says of the tough conversation they had. Gutzke introduced basic “blocking and tackling” tools, like powers of attorney, ensuring that the documents were up-to-date, and asked the difficult questions.

“Here's your POA (power of attorney), but as you go down the road, who should it really be?” he asked. “Are these the people that you'd like to have in these roles?”

A power of attorney allows a person to give someone else the authority to manage one's financial affairs, make health care decisions or conduct other business if the person becomes incapacitated.

Gutzke encouraged his client to “think long and hard” about who he chose and discussed a variety of options, including naming two people to the power of attorney. He also suggested having at least one backup.

One question was the toughest for Gutzke to pose: Should the family, he asked, consider a guardianship? A guardianship, also referred to as conservatorship, occurs in cases when there is no one to manage the person's finances or the family disagrees with what should be done.

In such a situation, a court steps in and appoints someone to oversee the person's overall personal and/or financial dealings.

While strong, Dudley's family struggled through a rough period during which they couldn't agree what to do. The children, who were in their 20s and 30s and had never been involved in the family finances, battled to be named in the power of attorney and health care directive, a document indicating the patriarch's end-of-life wishes. Hardest of all, Dudley's relationship with his wife was strained and the couple eventually divorced.

Despite the tensions, the family was able to come together and agreed that a guardianship would not be necessary. At first, a family friend held the power of attorney as well as the health care directive but as the family adjusted to the crisis, the documents transitioned to the children.

“The idea is the children are going to switch off from time to time,” Gutzke says. “The shock of their father’s diagnosis initially pushed them apart but sharing duties has pulled them back together again.”

Unfortunately, for many families, guardianship cannot be avoided because they can't agree on how to care for the individual, according to experts. “If it's not a cohesive family, it could erupt into not a good situation,” says Gutzke.

Guardianships and conservatorships are unfortunate for individuals with dementia for many reasons, say experts. “Nowhere is it good because it takes control of the finances away from the person or away from the agents that person picked and often away from the family and puts it under control of the court,” says Freedman of Schiff Hardin.

It also often requires accounting to strangers as to how the money is going to be used.

“It's a failure of a plan,” adds Mike Longyear, a partner at Seattle law firm Reed Longyear Malnati & Ahrens. The process is not only long and drawn out but also intrusive and expensive, he says. Many attorneys get involved and their fees, largely borne by the incapacitated person, quickly escalate.

Yet, despite its many drawbacks, guardianships happen quite often, occurring across families at all wealth levels, according to Longyear. In King County, for example, where Seattle is located, there are roughly 1,000 guardianships a year.

“Sadly, a lot of people don't do estate planning and therefore
As the baby boomers continue to retire, advisors can expect to encounter this issue more often. For Americans over the age of 80, more than 40% have dementia and 70% are cognitively impaired.

don’t have powers of attorney. So when something does happen, there’s no way to manage the affairs without getting the court involved,” Longyear states.

**Document Everything**

Indeed, powers of attorney are central documents in planning for cognitive decline and advisors are urged to discuss them annually with their clients.

Advisors should encourage clients to name backups in their powers of attorney and guide them in their decision, says Longyear.

“A lot of clients want to name a friend or family member as the attorney-in-fact and that person may not have the skill set to be an effective attorney-in-fact,” he notes.

Sometimes having a professional attorney-in-fact, such as a bank, will be less expensive than a family member who doesn’t have the ability, Longyear explains.

Everyone should also have a will as well as a health care directive, says Longyear. Some people also need a trust, he says.

Gutzke has his clients provide additional planning documents. He encourages his clients to update what he calls their “personal financial statement,” a list of all the client’s assets, including those held at other institutions, as well as all their liabilities and insurance policies, along with a list of their lawyers, accountants and other key advisors. In addition, he urges his clients to create a list of computer logins.

It’s imperative, too, that advisors get an emergency contact when opening a new account and update the contact information annually.

But even with all these documents and measures, advisors have to be extra careful to protect themselves and their banks from legal liability when dealing with the cognitively impaired.

Advisors should document everything and involve as many people as possible, according to advisors and other experts.

Pennock of Bank of the West cites the example of a cognitively impaired former chemist whom the bank serves. The client admits that while he reads scientific journals prodigiously, he can’t recall anything he reads and has trouble remembering one meeting to the next.

While the client has all the planning documents in place, including a will and estate plan, Pennock encourages the trust officer in charge to include the client’s lawyer, other family members and other trust officers when meeting with him.

“The idea is to have several ears on the situation,” Pennock says.

Amid all the challenges, advisors must never lose sight of the fragility of clients and their families in such situations. Good advisors will use both the financial and emotional sides of their brains, says Gutzke.

“It would be a lot easier if I was just managing their financial assets and not doing anything else,” says Gutzke.

Gutzke found himself tending to the needs of Dudley and his family on many levels. For example, while he helped them assemble a team of advisors to them with myriad financial, legal and family dynamic issues, he also encouraged the family’s effort to tap Dudley’s large network of buddies to support Dudley as his disease progressed.

“That’s one of the things that I see as being important to good long-term health,” Gutzke says. “It also makes the family feel better when you see people coming by and having a beer with the person.”

Dudley’s best friends also stepped up to help teach and mentor his children on the basics of budgeting, finance and their father’s business, supplementing the coaching they receive from Gutzke and other longtime advisors, according to Gutzke.

“They laugh a lot,” Gutzke says of the friends who visit Dudley at home to cheer and entertain him.

“What started out as a hugely stressful event with many family issues has now calmed down,” says Gutzke. “There are still issues and challenges, but since my client and his children have surrounded themselves with trusted advisors and friends, they are making the most of their future together.”
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