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Addressing Financial Elder Abuse

Should the bar for protective intervention be lower?

By Michael Gilfix

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Should the bar for protective intervention be lower?

Over the course of two months, my colleagues and I discovered that three of our clients were the victims of financial elder abuse. All three clients showed signs of modest cognitive decline, but all had capacity and insisted on remaining independent and in control of their affairs. Even in retrospect, while some signs of potential exposure were arguably evident, intervention was unavailable for many reasons, including the constraint imposed by the attorney-client relationship and client denials.

At what point should protective intervention be allowed—and by whom? At what point should it be encouraged?

Three Scenarios

Here are three examples of financial abuse based on cases we encountered in our practice.

The "surrogate son." Mrs. P got to know Stan while her husband was still living. Stan was a veteran and a hard drinker, whom she befriended at social events for retired veterans. When Mrs. P's husband died, Stan drove her to volunteer activities, helped her around the house and formed an undeniable bond with her. As a contractor, he also did work on her two rental properties. Mrs. P managed her own affairs, having done so for decades with great success. In preparing her estate plan, she logically insisted that she be the sole trustee. Her successor trustee, a professional, would step in only when she became unable to serve.

Mrs. P suffered some physical setbacks and accepted help at home. My colleagues and I encouraged her also to get assistance with bill paying and to be certain that her rent checks were deposited in her accounts. She reluctantly accepted this help. The individual hired to assist her quickly discovered a number of gifts and loans that Mrs. P made to Stan. There were many other payments made on credit cards that didn't seem right. It turned out that, over the years, Stan significantly overcharged Mrs. P for contractor services that he provided. He obtained loans from her—in excess of $150,000—that he never repaid. He received gifts from her that exceeded $50,000. Mrs. P was aware of the loans and the gifts. "He needed the money and I wanted to help him." Mrs. P took no steps to collect on the loans that she made to him.

When this indiscretion was discovered, the person assisting her with bill paying contacted Adult Protective Services (APS) and our office. Stan is now making sizable payments on the loans. Investigation is ongoing about the propriety of amounts that were paid for contracting services.

The "wonderful personal aide." Professor L resides in an upscale continuing care community. He suffers from Parkinson's and is physically frail. He was behind on his bills and wasn't monitoring his finances. Yet, he rejected suggestions that he allow his attorney's office, his successor trustee or his attorney-in-fact to take over, review his finances and ensure that everything was stable and appropriate. He did hire an aide for personal care assistance through a reputable agency. He was very pleased with her services. He allowed her to help him organize his papers and review his mail.

Later, at the recommendation of the director of the home care service provider, he accepted assistance from an individual who helps elders organize financial papers and pay bills. This person quickly discovered that the favored aide forged checks, used Prof. L's credit card to pay her own personal bills and made withdrawals in his name. Losses approached $50,000. While Prof. L

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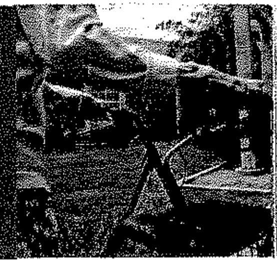

insists to this day that he can manage his finances, he now accepts help on a weekly basis with bill paying and monitoring his credit cards and accounts. APS has been contacted, and criminal charges are likely. The financial institutions that accepted the forged checks are reimbursing the accounts. Other appropriate actions are also being taken.

Loans to a "friendly" swindler. While Mrs. T was never a good money manager, she was adamant about being the sole trustee of the family trust. Her husband was already in a skilled nursing facility and suffered from dementia. Her only child was a public benefits recipient due to her bipolar disorder.

In the course of developing her estate plan, certain "assets" were highly suspect. There were three promissory notes, all secured by a deed of trust on the same property, for a total in excess of $300,000. It became clear that no payments were being made on the promissory notes. Our investigation indicated that the deeds of trust were never recorded and that the borrower sold the property relied on for security shortly after the loans were made. We recommended litigation against the swindler. Mrs. T declined for a combination of reasons.

In the last year of Mrs. T's life, we recommended that she allow her successor trustee to take over management of her affairs. We also made a number of recommendations to Mrs. T to preserve and protect her estate. She rejected most of the recommendations.

Following her death, we discovered that she obtained a $400,000 reverse mortgage. Her bank accounts were virtually empty. There were also additional promissory notes—all unsecured—from the same swindler. He stole virtually all of the money that she obtained in the reverse mortgage. These assets were needed for the special needs trust that would be funded for her disabled daughter.

No family members or advisors knew about the reverse mortgage and loans until shortly before her passing. Litigation against the swindler commenced, but serious questions exist about whether he has assets that can be reached. We also made a referral to the district attorney.

Confidentiality Proscriptions

In all three matters, there were indications that the individuals were losing financial acuity and were increasingly susceptible to abuse. Yet, all three fully understood the size and nature of their assets and had capacity by normal standards. We, as their attorneys, had and expressed concerns. In each matter, we recommended that successor trustees, typically professionals, be allowed to take over management and financial responsibilities. Alternatively, we recommended that the professional trustee or another trusted individual be named as co-trustees with the elder.

When all three clients rejected those recommendations, our hands were effectively tied by confidentiality proscriptions. We couldn't contact APS. We couldn't compel our clients to meet with physicians or geripsychiatrists for competency evaluations. We couldn't even contact other family members to have them intervene.

Put differently, we carefully considered and honored our ethical obligations. We did everything "by the book." Yet, these three clients suffered financial abuse. We also know, from countless studies, that millions of older Americans are victimized annually.[1] Of them, how many have able, responsible attorneys who are similarly constrained?

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Ethical Guidelines

Our ethical guidelines flow from the Model Rules of Professional Conduct developed by the American Bar Association and the Aspirational Standards developed by the National Academy of Elder Law Attorneys. The Model Rules are amplified by the American College of Trust and Estate Counsel Commentaries on the Model Rules of Professional Conduct. They appropriately emphasize and elevate duties of confidentiality and client loyalty.

They also provide that reasonably necessary steps can be taken to protect clients who have diminished capacity, are at risk of financial or other forms of harm and aren't able to adequately act in their own best interest.[2]

If standards are to be liberalized to allow or encourage attorneys to protectively intervene, where's the balance?

The following suggestions are designed to prevent

Drafting Revocable Trusts

Every revocable trust acknowledges the possibility that the settlor may someday become unable to serve as trustee and manage the trust. This status is materially different from becoming incapacitated, although there's generally confusion, often exacerbated by unartful drafting.

The typical approach taken in revocable trusts is to rely on one or more physicians to determine an inability to serve as one's own trustee. For example:

> Incapacity shall mean any physical or mental condition of the Trustee, whether arising from accident, illness or other cause, which renders the Trustee unable to conduct the regular affairs of the trust estate, including but not limited to the endorsement for receipt of funds and writing of checks for disbursement of funds from the trust estate, which condition of incapacity is probable to extend for a period greater than ninety (90) days.
>
> Incapacity shall be conclusively established if either the Trustee's regularly attending physician or two doctors, authorized to practice medicine in the State of California (or in any State or country in which the Trustee is then residing) issue written certification to that effect.

While this is a useful standard in most situations, it's clumsy and inappropriate in many others. Among other problems, it's absolutist. It's a conclusion about complete inability to manage one's affairs. The bar is set very high. It's for this reason, in fact, that many physicians are reluctant to sign letters establishing this level of incapacity or diminished ability.

I suggest a different approach—one that's designed to identify increasing susceptibility to financial abuse, mistakes and financial management malaise that can be detrimental or even devastating.

At what point should an individual be deprived of the power to manage his affairs? There's no "hard line," because the diminution of capacity is on a continuum. If one seeks a physician letter too early, the physician may be reluctant to draw a conclusion. If the request is made too late, some financial damage might already be done.

I, nevertheless, suggest that this problem is relatively easy to address because there's a medical diagnosis.

Use of "triggers." While it's by no means a certainty that we'll lose our ability to manage our finances with acuity as we age, most of us will experience this process even in the absence of dementia.

A trust or a durable power of attorney (DPOA) may identify such factors as "triggers" for increased involvement by a successor trustee, an individual who'll become a co-trustee in identified circumstances or a trust protector or special trustee.

Such triggers may include:

1. A pattern of failing to pay one's bills.
2. Paying the same bills more than once, reflecting a lack of recordkeeping.
3. A change in one's pattern of personal gifting or charitable gifting.
4. Failure to keep receipts and other financial records, particularly when the individual was previously careful about such matters.
5. Increasing physical limitations that render an individual house-bound and dependent on others to shop for necessities and otherwise manage daily financial transactions.

The goal is to identify changes that may render an individual less guarded in managing his financial affairs.

How can you identify such behaviors? Someone or some entity must be given accountings or access to financial information if this approach is to be viable. While banks and other financial institutions have developed systems to flag apparent instances of presumptive financial abuse, those situations are stark and rare.

More troublesome are the invisible, perhaps more modest, transactions that would cause an objective observer to develop concerns but that don't rise to the level of financial loss or financial abuse. The fact is that there are no easy solutions in such contexts. If no one is involved and has authority to monitor bill paying and check writing, such warning signs will remain invisible. If someone is involved, such as a co-trustee or attorney-in-fact, he may be given authority to receive accountings and to intervene when potential impropriety is identified. This arrangement is challenging for many reasons, not the least of which is the need to compensate professionals who may be given this quasi-oversight responsibility. If responsible family members or friends accept this burden, however, the compensation issue may be minimized or nonexistent.

Critical to this approach is acceptance on the part of the client that he may experience such cognition problems in the future. I suggest that this isn't a problem.

financial abuse. Accordingly, there's no discussion of remedies, such as litigation or the imposition of guardianships or conservatorships that might be imposed once clear evidence of financial abuse exists.

Preventive Steps

Nothing prevents you from "beneficent profiling." Clients over age 80, as well as those with troubling diagnoses and/or whose behavior suggests cause for concern, can be separately designated with the use of any standard office management software. You can ask those clients to respond to a series of questions on an annual or bi-annual basis. Questions should focus on the difficulties your clients may have with bill paying and money management, problems of duplicative payments or nonpayment of utility and other recurring bills and other indications of diminished financial acuity. Raising these questions can be challenging and, perhaps, uncomfortable. At the same time, such questions can be presented in a way that's respectful and nonintrusive.

> A trust or durable power of attorney may identify such factors as "triggers" for increased involvement by a successor trustee.

In some instances, perhaps when you become aware of slipping financial ability, you may obtain permission to communicate with your client's successor trustees or other trusted individuals. Needless to say, such inquiries must be managed carefully to respect client confidentiality and not compromise your client's financial security.

Simultaneously, you can identify those who have no children and/or no one seeing to their financial security. This group would include all clients who have no children or who have children who are unable to be responsible for their parents' estate plans. Such individuals are particularly vulnerable to new friends and low-cost caregivers with questionable agendas.

Indeed, in two of the three matters described above, our clients have no children. In the third, the only child suffers from bipolar disorder and was purposely shielded by her mother from any involvement with family finances.

Identify clients who are employing caregivers they locate on the Internet, through friends or through dubious referral sources. While more expensive, you might recommend established home care agencies because caregivers are then screened, managed and supervised.

If clients express particular concerns about the ethics—or lack thereof—of children or other close family members, monitor such clients' decisions and caregiving environments and raise questions about the involvement of such questionable individuals.

If you identify cognitive decline problems, what steps might you take?

Maintaining independence and control is a value that most of us hold dear. An older client who's his own trustee will typically resist giving up control of his assets. Most will hesitate or simply refuse to resign as trustee and allow a successor trustee to assume responsibility.

For such individuals, it needn't be an "all or nothing" exercise. The trust might be amended to name the first successor trustee as a co-trustee with your client so that daily involvement and management responsibilities are essentially retained. The co-trustee, presumably a child or other trusted individual, can then monitor all finances, ensure appropriate bill paying and identify and, perhaps, prevent inappropriate expenditures.

Alternatively, by a trust amendment, you could add a special trustee or trust protector to an estate plan. The trustee may give this professional individual or trusted family member access to monthly bank statements and credit card bills to identify inappropriate expenditures. This individual may be given authority to intervene or even to remove the trustee when patterns of financial mismanagement emerge.

Software and creative developments in the world of financial management are also emerging. For example, True Link is a company that allows an older individual to hold and use a credit card while giving another individual management or administrative control. In essence, this setup allows a limit on the use of credit cards—either in terms of the amount that can be charged or the nature of items or services that can be obtained. Excessive charitable contributions and other categories of arguable inappropriate expenditures can be curtailed or eliminated.

While most will say: "It will never happen to me," they'll simultaneously acknowledge, however, that it could and does happen to others. This inevitable segue opens the door to an admission that it could, in fact, happen to them. Therefore, if carefully and respectfully presented, most clients will be amenable to provisions in estate-planning documents that will allow for some remediation or respectful, protective steps that might be taken if identified behaviors are exhibited.

Model Language

Both revocable trusts and DPOAs can include provisions that call for higher levels of oversight or intervention when certain behaviors are identified. Think of it as an "*Odysseus* clause."

In *The Odyssey,* Circe warns Odysseus about the power of the Sirens. Their singing is so enchanting that it drives men mad and compels them to steer their ships onto the island's deadly rocks. She advises Odysseus to plug his crew's ears with wax so they won't fall victim to their alluring, but deadly singing. Circe further advises Odysseus to have his crew tie him to the mast and not release him, regardless of what he may order, until they pass the Sirens' island. He follows her advice, and because he's tied to the mast, he hears the Sirens' beautiful singing but is powerless to steer the ship toward the isle and certain death. Instead, the ship passes the isle safely.

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Acknowledging one's weaknesses and susceptibilities and dealing with them forthrightly takes both knowledge and strength. Odysseus understood that the intervention was far preferable to the outcome that would have otherwise followed. Those with mental illnesses often share this insight.

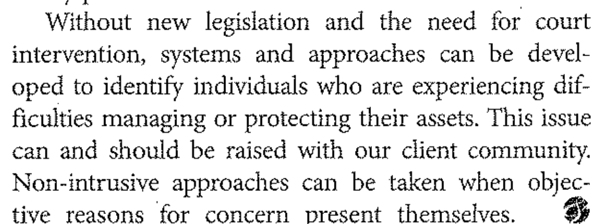
Consider the following model language, which may be included in a revocable trust and adapted for a DPOA:

> My successor trustee shall serve as my co-trustee and have primary responsibility for monitoring and managing my financial affairs if:

1. I have failed to pay my regular, recurring bills or have done so only sporadically.
2. I have paid the same bills more than once.
3. I have written checks that were returned because of insufficient funds.
4. I make investment decisions that are inconsistent with my past investment approach.
5. I make excessive gifts to family members, friends or those who participate in my care.
6. I make large charitable gifts to organizations with which I have had no previous relationship.
7. I enter contests that require payment of my own funds to participate.
8. I am receiving high levels of care in my own home and am increasingly dependent on hired caregivers.
9. I am living in a care facility, such as assisted living, residential care or a skilled nursing facility.

Non-intrusive Approaches

Practitioners are appropriately respectful of the dignity and independence of individuals who are aging. Our responsibility is to prepare estate plans and other documents to reinforce these values. At the same time, there's increasing recognition that elders are susceptible to financial abuse of many types. The extreme solutions of court intervention through guardianships or conservatorships are blunt instruments, typically used after the fact. They're only rarely preventive.



Without new legislation and the need for court intervention, systems and approaches can be developed to identify individuals who are experiencing difficulties managing or protecting their assets. This issue can and should be raised with our client community. Non-intrusive approaches can be taken when objective reasons for concern present themselves.

Endnotes

1. For studies and articles on elder abuse, *see* The Clearinghouse on Abuse and Neglect of the Elderly website, *www.cane.udel.edu. See also* National Center on Elder Abuse, directed by the U.S. Administration on Aging, *www.ncea.aoa.gov.*
2. Model Rule Professional Conduct 1.14(b) and NAELA Aspirational Standards for the Practice of Elder Law With Commentaries (Nov. 21, 2005), "Client Capacity," Part E. 4., at p. 23.