Discerning if your Elderly Client is Financially Incapacitated, and if so, then what?

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Abstract

The capacity to manage financial affairs is a fundamental aspect of individual autonomy in society and represents a cognitively complex set of knowledge and skills that are sadly particularly vulnerable to cognitive aging and dementia.

As yet, there are no published studies of a financial planner’s assessment of a client’s financial capacity. Until recently there have been no pragmatic means to assess a client’s financial capacity. Recent medical discoveries have enabled the financial planner to conduct such an assessment and thereby help their clients both better retain their autonomy and prevent financial exploitation.

This Article illuminates the complex interrelationships of neurocognitive change and functional change and clarifies the extent to which specific cognitive impairments translate into instrumental activity of daily living (IADL) impairments. By analyzing recent medical findings, financial planners can now much earlier identify any financial incapacity impairments in clients with mild cognitive impairment (MCI) and Alzheimer’s disease (AD), and after which provide guidance to reduce the risk of financial exploitation. The early detection of impaired financial competency will better protect both the emotional well-being and the economic resources of clients possibly suffering from some form of dementia, as well as their families.

Introduction

By 2030, there will be 71 million American adults over age 65, roughly 20% of the U.S. population, [1] of which 7.7 million will have dementia due to Alzheimer's disease, and by 2050 over 15 million will be afflicted [2]. While dementia affects only 1 percent of 60-year-olds, that percentage jumps to 30-45% for 85-year-olds [3]. Their sheer numbers will put to the test all conventional assessment methods of discerning diminished financial capacity. From every area of specialization financial planners will be asked increasingly to discern and resolves issues of financial capacity and like it or not will find themselves: 1) determining elderly clients’ financial capacity, or 2) determining whether a transaction or a specific retirement financial plan or product is voided by the client’s possible incapacity; and if so, was any undue influence exerted upon the client's "decision." And yet, financial planners have lacked the education, experiential training, and pragmatic tools to effectively assess clients both in terms of product suitability and the financial acumen of their client to execute an agreed upon retirement plan.

Ultimately, a critical enquiry confronts financial planners in discerning whether a client is can still manage their own finances or whether a guardian should be appointed. However, currently there is not an accepted gold standard for evaluating financial competence [4]. In fact, because traditional test measures in determining financial capacity have been inadequate, several States now require the courts, prior to competency hearings, to first order an assessment of common living skills, which is a functional evaluation that includes financial competence [5].

A credible civil evaluation of financial capacity is desperately needed to insulate clients at risk from being exploited financially due to lack of financial capacity. Today's elderly clients represent a massive transfer of wealth from the World War II generation to the baby boomer generation [6]. The incentive for financial elder exploitation is pervasive, and too often committed by caregivers, friends, and also family members who seek to take financial advantage. This Article endeavors to create an improved client interview/intake to more quickly and effectively assess financial competence in elderly clients suffering from cognitive impairment from within the dementia spectrum. Once financial incapacity is spotted, the financial planner can refer the elderly person to the proper professional groups and/or government agencies for advance-care.

Accurately assessing diminished financial capacity and outright incapacity is critical in preventing elderly financial exploitation. Intuitively, financial planners have long grappled with the issue of financial capacity as to a client's ability to execute a retirement plan, purchase an annuity, disability insurance or a long-term care policy. But cognitive impairment from dementia is particularly dangerous for a financial planner, or anyone working in the financial services industry since neurocognitive research has recently discovered that individuals with dementia are debilitated in core consent abilities of reasoning and understanding while the simple consent ability to express a choice often remains intact well into more advanced dementia [7]. Practically speaking, this means that a client with dementia may express a choice for a particular product or plan,
without adequately understanding, appreciating, or being able to reason about the risks and perks of a product or the relevant alternatives within a retirement plan.

Due to the ever-increasing populace suffering from various forms of dementia and its specific cause for alarm within the financial services industry, this Article will not address physical, psychological, or sexual abuses, or neglect, but rather will exclusively focus on prompt and accurate detection of elderly clients' financial capacity possibly diminished from some sort of dementia: front temporal dementia (FTD), Alzheimer’s disease (AD), and mild cognitive impairment (MCI) [8] since while financial competence involves a broad range of procedural, declarative, and judgment-based skill sets, [9] it is also highly vulnerable to psychiatric and neurological conditions that deter sufficient cognition.

The basis for this narrowing is that although an individual's capacity can be diminished by a variety of causes (motor dysfunction, neuropsychiatric symptoms, and medical illness), the primary driver in the elderly is usually cognitive change. For example, imaging research found that atrophy in the angular gyrus is significantly associated with diminished financial capacity in patients with amnestic MCI [10]. Furthermore, financial skills are highly vulnerable to the cognitive changes found early on in Alzheimer’s disease and mild cognitive impairment (MCI) [11] and so it is particularly important in these cases that a financial planner properly assess an elderly client's financial capacity to prevent subsequent financial exploitation by others.

Financial capacity is particularly susceptible to Alzheimer's disease and other forms of dementias, [12] such that patients with even mild AD experience deficits in complex financial abilities, and in almost all financial activities there is some level of impairment. And most significantly, this decline over a one-year period is quite rapid as evidenced by a recent longitudinal study [13]. As those patients enter the moderate stage of AD, they demonstrate severe impairment across all financial activities both simple and complex [14]. This can cause a structural break down in everyday life since financial competency is an instrumental activity of daily living [15] (IADL) which is comprised of a range of procedural, conceptual, and judgment skills that are foundational to independent functioning in adults both young and old [16]. Thus, these clients would be at significant risk for impairment in complex activities like bank statement and checkbook management, and even simple bill-paying would need verification. While each client suffering from some form of dementia must be considered individually, it is downright improbable that most clients diagnosed with mild, and nearly certainly with moderate Alzheimer’s, would be unable to manage their financial affairs and quickly be vulnerable to financial exploitation, or at minimum, helplessness.

In the past two decades, neuroscience has made a significant progress in the understanding of how the brain represents numerical information and sustains mathematical computation [17]. Initial neurocognitive studies of financial competence indicate 1) how critical working memory processes (story recall) is in relation to financial abilities of AD patients; [18] and 2) patients with mild cognitive impairment reveal diminishment as to their capacity to consent; and 3) and dyscalculia as a key indicator of cognitive deficiency in AD patients [19]. This last discovery cited loss of numeracy skills as a primary shortfall in AD patients comports with the dementia literature, [20] and has been consistently observed in patients with acute, stable or progressive brain damage significantly disabling number processing and calculation (acquired acalculia) [21]. Following this, written arithmetic was discovered to be the primary mediator of the relationship between angular gyrus [22] volume and financial skill. This finding also replicated neuropsychological findings of written arithmetic as the key predictor of financial capacity across control, Alzheimer’s disease and MCI groups [23].

The dominant augur of fiscal competency in the control, mild AD, and MCI groups was written numeracy skills, specifically the WRAT-3 Arithmetic test [24]. Thus, it appears that numeric operations, numeracy and calculation abilities are intellectual skills highly correlated with financial competency in patients with dementia. All three groups (control, mild AD, and MCI) shared the secondary model predictors of declining financial competency with diminishing verbal memory and visuomotor sequencing. More specifically, delayed verbal episodic memory was the secondary predictor, which is essentially story recall and is elemental to both the transmission and retention of multiple forms of monetary data, such as investment and checkbook information, medical deductibles or for instructional forms such as taxes and social security [25]. Such cognitive abilities would also be integral to shopping, making change, as well as more complex financial tasks such as analyzing a bank statement.

As stated, this secondary predictor was associated with complex visual scanning and cognitive flexibility which would be critical to identifying or reviewing on a monthly bank statement the different monetary transactions [26]. And so, the key predictors are numeracy and written arithmetic, and to a lesser degree, visual scanning/sequencing, and story recall. The initial client intake sheet and interview should incorporate these findings to evince clues as to any diminished financial capacity.

Once an interview or intake is completed, an experienced financial planner should be able to reliably distinguish the financial skills of sufficiently cognitive clients and those one must ethically decline to represent unless a guardianship or power of attorney is involved. Yet even when a financial planner makes a determination that the client has sufficient financial capacity for the tasks at hand, precautionary steps should be taken to document the present mental state. During the client interview, the financial planner should keep meticulous notes and, if there are prior dealings with the client, a memorandum indicating how any present action differs from the client’s past actions should be noted. This precautionary step would substantiate the client’s actions and documents in the face of any subsequent capacity attack or any assertion of undue influence. An existing relationship with the client can make this step somewhat perfunctory. If in the past, the financial planner has prepared a financial plan for the client, this initial capacity evaluation will be more self-evident since the client’s behavior and cognitive skills can be gauged by the financial planner as they were or have changed.

If the financial planner is meeting the client for the first time, the client interview takes on greater importance and would possibly also involve speaking with the client’s friends and family. With new, unfamiliar clients, not only must the financial planner must be alert in discerning the client’s financial capacity but also in the assessing the quality of person or persons who brought the elderly client to the financial planner. If someone other than the client is paying, the financial planner must obtain, prior to accepting payment; the client’s informed written consent [27].

The client intake is ideal to collect information in a systematic manner as to the client's functional capacity on everyday financial matters. More specifically, the intake if multifaceted will involve a client’s vocational and educational background, financial purchase
needs, as well as personal history and numeracy testing, enabling the financial planner to then quickly assess any possible cognitive impairment [28] on everyday financial functioning. Assessing a client’s fiscal needs, numeracy skills and responsibilities is imperative. A well-designed client-intake or interview can verify if the client still has basic monetary skills, can engage in checkbook management, conduct cash transactions, understand bank statements, pay their bills, recall what they own and verify if they still make consistent investment decisions. More specifically, these are some questions relevant to financial competency which should be added to a client interview/intake:

1. Are you living week-to-week? Are you in any debt? Do you shop by yourself? Do you make your own phone calls unaided? Do you do your own checking?

2. Do you pay your own bills? If so, online or by mail?

3. Have you recently made gifts or contributions to any person or organization?

4. When it comes to investing and managing your money do you want to stay with what you already know, or are you willing to discuss new investment options?

5. If later on, you need help with your finances, who do you trust to act on your best interests?

6. What, if anything, would you want your agent to know about yourself, if conducting your financial affairs?

7. Does this possible agent handle their own finances in a professional manner? Do they have good credit? Are they in debt? Are they knowledgeable about financial investments?

8. Is there anyone you specifically do not want conducting your financial affairs?

The goal of the client intake is not to establish a score to equal capacity—potentially testing for optimal performance—but to have a sense of what is sufficient performance on specific functional tasks. It simply does not matter how well the prospective clients performs a capacity task relative to other individuals but whether they perform it at a sufficient level relative to what they need to do to execute their retirement plan.

Despite a client having a cognitive impairment, they may very well still be quite capable of conducting everyday financial competencies. Do not discount life history since it is highly indicative of a person’s everyday financial capacity, more so than an IQ test for example [29]. To the inverse, people with damage to the ventromedial prefrontal cortex do well on traditional IQ tests and other problem solving tests, but are unable to make real-life decisions, including financial decisions [30]. The client interview and intake should focus on the specific monetary transactions the client must do to implement the retirement plan, their functional capacity to properly execute these financial transactions, and the support level needed to maintain independence through this process. This will most often involve: checkbook management, and everyday financial judgment and decisions [31].

Number processing and calculation are an essential part of our culture. We use numbers for counting, measuring, comparing, putting things in order, etc. Moreover, we constantly need to calculate, understand fractions, proportions and ratios, and to understand and remember PIN codes, telephone numbers, addresses, shoe sizes, and so on.

Clients that can still execute specific financial functional tasks, such as checkbook management, daily and monthly bill payment, as well as basic investment decisions are qualitatively less likely to be suffering impairment of discrete financial skills indicative of financial incapacity. A capacity judgment is ultimately a decision about the “goodness of fit” between an individual’s current functional abilities and the performance demands of the particular context in question.

This prioritization of functionality is based on the Grisso model [32] which provided an essential conceptual framework that heretofore had been lacking in the capacity assessment field. The model has stood the test of time for over 25 years and represents an enduring contribution to the field of capacity assessment. It has served as the basis for both conceptual model building and instrument development. Grisso argued that the most fundamental objective of capacity assessment is to obtain information about an individual’s functional abilities that are constituent to the capacity in question. The preeminence of function in capacity is arguably the core contribution of his theoretical model and one that has deeply influenced a generation of subsequent capacity researchers. The functional component refers to the individual’s functional abilities—what he or she can do, as well as the knowledge, understanding, and beliefs that support such functional abilities within the individual’s environment. Thus, significantly, the financial planner does not have to distinguish between cognitive abilities and psychiatric symptoms; thereby maintaining an artful practicality in discerning a prospective client’s financial competence.

Broadly construed, financial competency encompasses donative capacity, contractual capacity, and testamentary capacity [33]. Any legal findings as to capacity will alter a person’s legal ability to control their financial assets and estate, and this Article implicitly addressed these issues but primarily has focused on how a financial planner can, practically speaking, better detect a deteriorated financial capacity in an elderly client.

Once detected, the financial planner can recommend the client to an elder law or estate planning attorney who is sympathetic to recent change in guardianship law wherein the preference is for “limited guardianship” to preserve rights within areas of retained capacities—meaning that judges and attorneys need information on specific functional capacities so that specific rights may be reserved. This judicial and clinical emphasis hones in on how the person’s capacity can be supported and enhanced. Familiarity with common interventions to help elderly clients compensate for cognitive, sensory, and physical deficits, including available social services, can significantly influence the capacity decision process and guardianship outcome. Financial planners can add value to this process by competently assessing a client’s financial capacity such that the client interview, intake and profile can be used if need be by either a Judge or attorney to accurately gauge where the everyday financial competencies lie.

But if the lack of financial capacity goes undetected, the elderly client becomes vulnerable to financial exploitation by others. If during representation, a financial planner suspects an elderly client decisions or transactions might be questioned due to advanced age, cognitive impairment; or simply because their actions at times were eccentric or seemed somewhat arbitrary, additional documentary evidence indicative of a sound mind should be secured. Such evidence is particularly critical if client financial capacity is challenged, usually.
after the client is suffering from financial incapacity or is dead. Videotapes and a clinical capacity assessment by a third-party are the most common forms of supporting evidence.

This videotaping, or audio-taping, can be simply done, by merely asking the client for permission. "Ms. Jones, with your permission, rather than having my attention diverted by my note-taking as we go over your financial situation and goals, I'd like to videotape this and future meetings. We'll get you a copy within twenty-four hours so you and I can independently review details we might have missed in the conversation as well as have you approve each video. Does that sound fair to you?" [34].

Although modern technology allows "virtual" meetings by video and/or audio conferencing which becomes more alluring to utilize when documents are going to be executed, these tools should be used with caution since a client might accurately cite all their assets off camera and then, when on camera, forget something obvious. This may be nothing more than nerves or a momentary mistake but could be used to impugn a client's financial capacity.

Conclusion

While most elderly people do not have dementia, the risk of cognitive impairment and dementia strongly increases with age (over 80) and places individuals at particular risk for difficulties in financial decision making; increasing the risk of being financially exploited [35,36]. This can be prevented by a financial planner if detected at the inception of meeting the client.

A financial planner need not and should not render or administer any sort of standardized test performance since they are not a clinical psychologist, and more relevantly, thus far, they do not seem particularly effective in calibrating financial capacity. Perhaps soon, medical science will better understand the relationship between neuropsychological assessment or general psychometric outcomes and specific fiscal abilities [37-39]. However, financial planners should not take that relationship for granted, and pay more attention to functional assessments of everyday financial skills, which can be easily delineated and confirmed in either the client interview or intake. Preferably both.

This Article strongly suggests the client interview and intake involve data about a wide-range of different everyday financial skill sets, which then should be privately assessed with follow-up if need be. To be clear, a financial planner determining that a client does not have the requisite capacity for representation does not alter an individual's legal status, whereas a legal finding of incapacity does. In addition, the client interview and/or intake are not a diagnosis for any sort of dementia, merely a benchmark that if the client chooses can be shared with their neurologist or personal physician. Nor do any of the aforementioned recommendations prevent any sort of dementia whereas certain behavior modifications engaged in for a long period of time seem to assist in that regard, such as not smoking, health body weight, keeping the mind active, regular exercise, good quality sleep, and healthy cholesterol levels and controlled blood pressure.

Preventing elderly financial exploitation is more easily done, more cost-effective and less arduous on the client and family than prosecuting person(s) the victim may know, love or unduly tolerate. But if financial incapacity can be more accurately and promptly detected by financial planners, then given the boon to all from such an assessment, time and energy should be sacrificed toward this laudable goal. The means are already within the financial planner's quiver: the client interview, intake and profile.

As financial planners commonly create a client profile as to goals, retirement preferences and risk tolerances now must be added that of a Financial Competency profile that must include the client's current cognitive weaknesses and strengths to better gauge changes in financial capacity over time, which goes beyond the philistine assessment of mere incompetence but artfully displays degrees of financial competence of inestimable value to a subsequent 3rd party observer (physician, Judge, jury, etc.). When over the years, this profile reaches a certain point, advance-care planning must be triggered, and the financial planner must get aggressive with an Autonomy Plan (power of attorneys, living will, LTC issues, organ donations, caregivers, etc.) for the client, which is an acute sub-component of a competent Retirement Plan.

One day, financial competence assessment will be relevant to a wide-range of people and age groups, but for now fiscal competency should be tailored for use with elderly clients who may have dementia since that is a present need of this aging Nation. For now, a financial planner should use the client interview, intake and profile to discern the capacity to manage financial assets so the client can meet needs consistent with 1) independent living, 2) their retirement plan, 3) their own values and 4) self-interest [36].

References

9. Mild cognitive impairment (MCI) is a clinical construct that denotes the transitional phase between normal cognitive aging and Alzheimer's disease.


