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Issues in Dealing with Elderly Clients

Julie A. Ragatz

Barrett Green was only 45 when he suffered a debilitating stroke that left him without full use of the limbs on the right side of his body. Within months, it also ended his promising and lucrative career in the finance division of a Fortune 100 company. Barrett is now 65 and over the past 20 years, his physical capacities have diminished markedly. Increasingly, Barrett has retreated into an online community of investors looking for “get rich quick” schemes. Five years ago, through contacts in his online community, Barrett was introduced to Jerry, who represented himself as a successful investor in the real estate market. Jerry offered Barrett the opportunity to jointly invest in some promising ventures. Eager to both earn some income and to feel “a part of the action”, Barrett began sending Jerry as much money as he could without attracting the notice of his wife.

After several months, Jean, Barrett’s wife, received a call from their bank informing her that their joint checking account was significantly overdrawn and that the Greens had accrued thousands of dollars in overdraft charges. It was revealed that Barrett had been opening all of the mail from bank and kept the information from Jean.

Jean was furious, and immediately blocked access to their shared accounts. She provided Barrett with a debit card, to be used for his daily expenses, which was attached to an account with funds limited to $200 a month. Barrett, having little choice, agreed to the limitations. Jean informed the couple’s four children about Barrett’s activities, but assured them she has handled the problem. She paid off the overage charges by cashing in her 401(k) funds. Their children were both frustrated and angered by Barrett’s actions, as well as by Jean’s refusal to take more serious actions to protect her future. However, at Jean’s request, they agreed to drop the issue.

Shortly after this incident, Jean’s health began to decline. She was diagnosed with terminal cancer and died months later. Barrett inherited her estate, including the proceeds of a sizable life insurance policy. Between this influx of money and his monthly disability and pension checks, Barrett had the resources to live comfortably on his own for the foreseeable future, provided he managed expenses wisely.

Barrett refused to share his financial information with any of his children, preferring to work exclusively with his newly acquired financial planner, a young man named Jason. Within weeks, Jason began to notice large withdrawals from Barrett’s account. When Jason questioned Barrett about these withdrawals, Barrett assured him that he was working with Jerry, whose interests have turned to an apparently booming housing market in the former Soviet bloc. Although Barrett acknowledged that he had never received a return on any investment with Jerry, he was confident that his faith in Jerry would pay off soon and that he and Jason would be in a position to reap the rewards. Within a couple of weeks, Barrett was sending Jerry so much money that he struggled to pay his bills on a monthly basis. Jason worked with

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Barrett to put together a monthly budget, but Barrett found it impossible to stick with it since these “once in a lifetime opportunities” kept rolling in. Jason pleaded with Barrett to allow him to share his financial information with his children—Barrett refused and the outflows of cash continued.  

The fictional case of Barrett Green presents some interesting ethical challenges for the financial services professional in Jason’s position. Perhaps the most challenging issue that emerges from Barrett’s story is whether he is suffering from some form of dementia resulting in diminished capacity or whether he is simply making poor financial decisions.

But even the appellation “poor” assumes that Barrett’s aim is to assure the sustainability of his assets for the duration of his life. But this may not be the case; he could be seeking wealth accumulation through real estate investments or, perhaps more likely, to use his financial resources as a way to provide meaning to a life that is relatively bereft of agency. If this is the case, his actions may be unwise in terms of his long-term security, but people have a right to be unwise in chasing down impossible dreams or running down blind alleys. The decision that someone suffering from diminished capacity instead of “bad” ends or goals is a difficult distinction to make. And yet this is often precisely the situation in which people like Jason find themselves. In this article, we will review the concepts of dementia and diminished capacity, elder abuse and exploitation, as well as exploring the ethical dilemma in which practitioners in the financial services industry can find themselves.

What Is Dementia?

Is Barrett suffering from dementia? There are many definitions of dementia, but an especially clear definition is the following: “A clinical syndrome characterized by generalized cognitive impairment and a normal level of consciousness (i.e. a normal level of attention and wakefulness).”1 There are several well-established characteristics shared by persons suffering from dementia:2

- Memory loss
- Communication and language impairment
- Inability to focus and pay attention
- Reasoning and judgment loss
- Lack of visual perception

Dementia is not a natural part of the aging process. We often hear people joke about having “senior moments” which are forgetful or absent-minded. Cognitive decline is not an inevitable part of the aging process. In other words, being elderly is neither a necessary nor a sufficient condition for the onset of dementia. It is believed that about 50 diseases can cause dementia, some of which are reversible (such as metabolic dysfunctions, hepatic or renal failure, or benign tumors and other structural lesions in the central nervous system) and some of which are not reversible (such as Alzheimer’s Disease, Parkinson’s Disease, Huntington’s Disease, and Pick’s Disease).

Dementia and Diminished Capacity

The obvious concern is that Barrett’s decision-making, at least in the area of his finances, has been compromised or diminished by the onset of dementia. If this were true, we would likely say that Barrett lacks the capacity to make decisions on his own behalf.

However, it is important to note that competency is not an “either/or” proposition. People are considered incompetent in an area to the extent that they lack the capacities necessary to represent themselves and their interests. However, recognizing the variability of capacity (especially in different spheres, such as financial, legal, and health-care related) the judicial system has moved towards an approach that embraces the
“least restrictive option” in an effort to preserve as much of the individual’s autonomy as possible.³

A well-established definition of financial capacity is provided by Marson, Hebert, and Solomon (2012): “the capacity to manage money and financial assets in ways that meet a person’s needs and which are consistent with his or her values and self-interest.”⁴ It has been established that this capacity is one of the first to decline at the onset of cognitive impairment and dementia. One of the challenges of assessing financial capacity is establishing an appropriate baseline, which requires that we have some understanding of the individual’s previous capacity for financial decision-making. This baseline often depends on the educational, socioeconomic, and occupational experiences of the individual in question. In the case of Barrett, who was once employed in the finance division of a multinational organization, his baseline will be much higher than, for example, an older person of limited education and experience, whose spouse was fully in charge of the household finances.

Moreover, the definition above contains an important phrase, which is that the individual must be able to make financial decisions in a manner that is in alignment with their self-interest and values. This means that in addition to considering an individual’s baseline in terms of their cognitive skills and technical competence, it is also necessary to consider an individual’s values.

“The values and goals establish a benchmark against which capacity can be assessed, but capacity must be judged according to a standard set by that person’s own habitual or considered standards of behavior and values, rather than by conventional standards held by others… In other words, a person does not lack capacity merely because he or she does things that other people find disagreeable or difficult to understand. Indeed a great danger in capacity assessment is that eccentricities, aberrant character traits or risk-taking decisions will be confused with incapacity. A capacity assessment first asks what kind of person is being assessed and what sort of things that person has generally held to be important.”⁵

The above quotation from Sabatino gets at the heart of the conundrum posed by Barrett’s case. Barrett’s behavior may not make him very likable, certainly not in the eyes of his children, but being sympathetic or conventional is not a requirement for having the capacity to make financial decisions.

However, despite differences in individual baselines (both in terms of technical competence and in terms of personal values) it is possible to enumerate common signs of diminishing financial capacity:⁶

- Memory lapses, which lead to a failure to fulfill financial obligations (i.e. failing to pay bills or paying the same bill multiple times).
- Disorganization, which leads to the misplacement of documents and the failure to meet deadlines.
- Declines in checkbook management skills, which lead to the inability to keep an accurate and timely record of expenses.
- Arithmetic mistakes, which lead to incorrect calculations (for example, when making change or calculating a tip).
- Conceptual confusions, which can manifest itself in a lack of understanding of financial products and terms.
- Impaired judgment, which leads to loss of judgment about financial investments and the appropriate use of money.

In accordance with the proposition that the least possible restrictions are the most choice-worthy, it is possible to “fill the gap” in financial capacity through various means which can be placed on a continuum of more invasive to less invasive of individual autonomy. If at one end of the continuum, it is necessary for a guardian to completely take over financial decision-making and at the other end an individual is fully capable of making financial deci-

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sions, it is possible to identify stages at which individuals are capable of making financial decisions, but require assistance with implementing these decisions. For example, these individuals could benefit from assistance with paying bills and accurately recording and tracking expenses. Another possibility is that individuals may be capable of making basic financial decisions and implementing these decisions, but require assistance (in the form of unbiased counsel) regarding sizable purchases, including consumer goods and financial products. 7

Elder Abuse and Exploitation

Returning to the case of Barrett, given the amount of influence that Jerry appears to have over his decision-making, as well as his poor track record of investment, it may be reasonable to conclude that Barrett is being financially exploited in this relationship.

If this were what is going on, Barrett would not be alone. Elder abuse is defined as “doing something or failing to do something that results in harm to an elderly person or puts a helpless older person at risk of harm.” 8 According to a 2010 survey, one in every five Americans aged 65 or older has been abused financially. 9 People 60 years and older made up 26% of all fraud complaints tracked by the Federal Trade Commission (FTC) in 2012, the highest of any age group. In 2008, the level was just 10%, the lowest of any adult age group. 10 A 2011 study by the MetLife Mature Market Institute and the National Committee for the Prevention of Elder Abuse revealed the financial losses suffered by victims of elder financial abuse were estimated to be at least $2.9 billion dollars, a 12% increase from 2008. These are startling numbers and many experts believe that the problem is getting worse. Many elderly victims who suffered financial losses during the recent downturn may be more willing “to roll the dice” or more ready to believe in the false promises made by the scammers. Older adults present a ripe target for perpetrators; not only on account of their wealth, but research shows that older adults may be less able to pick up on visual cues that someone is untrustworthy. 11

It is important to recognize that many of our preconceptions of elder abuse are incorrect. For example, when many people think of elder abuse, they think of an elderly person who is abused or maltreated in an institutional setting, such as a nursing home. This is not the case and the research shows that most cases of elder abuse occur in the home by caregivers whether these caregivers are family members or paid caregivers. 12 The private home makes it increasingly likely that the elderly adult is isolated and that the caregiver has little accountability.

Financial Abuse of the Elderly

Financial abuse is defined as the improper act or process of an individual using the resources of an older person without his or her consent for someone else’s benefit. 13 Financial abuse can take multiple forms, some of which are the following:

• Taking money under false pretenses
• Forgery
• Forced property transfers
• Purchasing expensive items with the older person’s money and without the older person’s knowledge or permission
• Denying the older person access to his or her funds or home.

Barrett Green represents a new and alarming trend of the online targeting of seniors. It is clear to see why seniors represent such an attractive target, as Willie Horton famously responded to the query as to why he robbed banks, the savings accounts and assets of seniors are “where the money is.”
fact, research shows that individuals over the age of 50 control over 70% of the nation’s wealth. They also may lack financial sophistication or not fully understand the value of their assets. Moreover, it is estimated that the vast majority of financial elder abuse cases go unreported. This may be because elderly victims are ashamed and anxious about losing what remains of the financial and functional independence. The situation is complicated by the fact that money is not an end in itself, but rather is a means to achieve goals that are important to the individual. For many people, financial security is the most important of these goals because it secures the possibility of all of the other good things people want. But other goals are important as well, and money can provide the means for people to experience social connections and a feeling of community with others. William Brisk raises just these issues when he describes the experience of a “hoarder:”

“What about the lonely housebound elder who finds the human contact he craves by ordering over the telephone an endless stream of costume jewelry, electronics, “art,” clothing and other goods because the people on the other end of the line are trained to personalize the sale, refer to former purchases and make the caller feel like he's contacted a friend? In some cases, making these purchases are the day's highlight: packages accumulate, many unopened, taking over a garage, then a spare room, and ultimately all of the living space.”

The hoarder as described by Brisk presents a dilemma similar to the one posed to by Barrett Green. The thorny and dark underside of these forms of elder abuse and exploitation is that the relationships are mutually beneficial in the short-term (while potentially devastating to the victim in the longer term). Intervention in these types of situations raises challenging ethical questions and it is to these questions that we now turn.

The Central Ethical Dilemma

The regulatory system that governs the financial services industry is based on the principle that individuals are in the best position to determine what decisions are in their best interest. The role of financial services professionals, in both an ethical and a legal sense, is to create the conditions under which individuals have the best opportunity to arrive at an accurate determination of what course of action aligns with their self interest.

The ethical obligations of financial professionals are rooted in an understanding of their role-specific obligations. There is a difference between what we can call “general ethical obligations” and the narrow “role obligations.” A general moral obligation is shared by all human persons, for example, the obligation to avoid unnecessary harm or to promote the good of others where possible. Role-specific obligations are particular duties that are generated as the result of roles that individuals inhabit (for example, professional obligations and the obligations entailed by being a friend or a family member). Most role-specific obligations are voluntarily assumed, but this is not always the case (for example, obligations to siblings or parents).

Financial service professionals have an obligation to increase the autonomy of the client. To act autonomously means to pursue one’s self-interest (as one understands it) in an uncoerced manner. The following conditions can be said to promote autonomous choice:

- **Not overwhelmed by emotion** (either positive or negative): Importantly, this requirement may limit some sales techniques that rely on arousing powerful emotions (usually negative) in the client or potential client. Advisors may object that the decision to purchase financial products and services is an emotion-based decision, making it perfectly acceptable to appeal to emotions in persuading people to purchase a suitable product or service. It is ethically unacceptable, however, to attempt to overwhelm a client’s rational capacities through emotional manipulation. Just as peo-
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people can be “blinded by passion” they can be “blinded by emotion.”

- **Free from unwanted interference:** Clients should be provided the assistance they actively seek and desire. It is inappropriate for an advisor to interject himself or herself into a decision-making process where his or her assistance is not explicitly sought. This freedom from unwanted interference should also apply to family members and other interested parties.

- **Armed with all of relevant facts:** Depriving an individual of relevant facts is a form of manipulation. To see why this is the case, consider why someone would withhold information in the first place. People tend to withhold information because they suspect that if this piece of information were disclosed, the client would make a decision that the advisor does not want them to make. So for example, an advisor may refrain from telling his client about the surrender charges on a product under consideration, because she believes (rightly or wrongly) that if the client knew about this charge, he would not purchase the product. It is important to note that it is violation of autonomy to withhold relevant information even if the intention is to promote (what the advisor believes to be) the good of the client.

- **Relevant facts are placed in the appropriate context.** As we know, facts take on different importance when placed in a particular context. For example, consider the true statement that the United States Treasury does not have sufficient cash on hand to make good its pledge to guarantee money deposited in FDIC-backed savings accounts. There are clearly ways that this fact could be presented which would lead unsuspecting investors to believe that their money was not safe and secure in an FDIC account. In other words, it is a true statement, used to persuade people on an incorrect or highly debatable conclusion. The lesson is that it is not sufficient to present the facts to clients, but it is necessary to present the facts in the appropriate context that allows people to easily reach an accurate and reasonable interpretation.

- **Providing sufficient time to reflect upon alternatives.** It is not sufficient to provide people with the correct information in the appropriate context. Ethics demands that we do not create a false sense of urgency and encourage people to take the time that they need in order to make a good decision. There are certainly reasons for an advisor to encourage a client to “act now,” some of these reasons are altruistic (i.e. advisors are well aware that clients may put off important decisions about financial matters due to fear or discomfort), but some of these reasons are selfish (i.e. the advisor’s dominant interest is in closing the sale). But part of what it means to promote autonomy, however, is to allow clients to determine the pace of the decision making process. Following this process does not ensure that the resulting decision will be what the advisor would have chosen or that it will lead to be most optimal outcome. The emphasis is on the moral obligation to create a just or fair process.

**The Dangers of Paternalism**

Paternalism occurs when we replace the client’s judgment with our own judgment about what is in the best interest of the client. Financial advisors (and other practitioners) act paternalistically in a variety of ways:

- Failing to inform the client about other options
- Sharing financial and/or other sensitive information about the client without the client’s consent
• Lying or withholding information from the client or otherwise being deceptive
• Making important decisions for the client without his or her knowledge
• Presenting information or portraying options in a way that the client cannot make an objective decision.

But, while paternalism has gotten a “bad rap,” many thoughtful commentators from other professions (such as the medical profession) argue that under some circumstances it is appropriate to act paternalistically. Some physicians use the example of a patient who refuses a life-saving treatment on account of a statistically insignificant risk of death. The patient is clearly acting irrationally, likely on account of their physical and emotional distress. In cases like these, isn’t it morally appropriate to suspend the ban against paternalism?

This is a tricky question, but the moral risk to acting paternalistically can be high. The decision to act paternalistically places the professional in a position where they are both “judge and jury” on what is in the best interests of the client. It is easy to see how this could lead to a slippery slope in which the professional simply usurped the rights of the client or patient altogether.

The central ethical dilemma when dealing with elderly clients is that the standard model used to promote the best interest of the client creates outcomes that potentially harm the client (according to a reasonable standard of harm). Instead of promoting the client’s good, it does the opposite.

Simply put, there is a conflict between promoting the autonomy of the client and promoting the good of (or avoiding harm to) the client. This is the paradigmatic definition of a dilemma, which occurs when two values or obligations are in conflict in a particular situation and you cannot fulfill one without failing to fulfill the other. The unfortunate result is that a model that usually works to promote the client’s well being, actually contributes to his or her harm. Moreover, since the promotion of autonomy is at the heart of our legal and ethical framework, it can be difficult to imagine solutions that lie outside of this framework. But the conundrum posed by Barrett Green, and the difficult situation faced by Jason, his financial advisor, demand that we try.

Thinking about Solutions

Jason, like any professional in his situation, must feel as though he is between a rock and a very hard place. His dilemma is that he is torn between their legal and ethical obligation to protect client confidentiality and the obligation to act in the best interest of their clients. Financial service professionals experience this conflict more acutely than other professionals (such as attorneys or physicians) because they interact with the client more frequent-
ly and therefore notice more readily when something is amiss, for example, when a previously conservative client is requesting large disbursements, or when a client known to you for her meticulous recordkeeping is past due on her bills or finds it difficult to give an account of her expenditures.

However, it is clear that this issue is moving onto the agenda of regulators. Representatives of the Office of the Investor Advocate of the Securities and Exchange Commission (SEC) cited “preventing the financial abuse of elders” as one of the six priorities of 2015. The North American Securities Administrators Association (NASAA) formed a new “Committee on Senior Issues and Diminished Capacity” to explore the problems of elder abuse. The goals of this committee, led by Montana Deputy Securities Commission, Lynne Égan, are to assess the extent of the problem and determine a set of best practices, which may result in the publishing of a model law. The federal government has gotten involved in the issue with the Department of Justice working in collaboration with the Department of Health and Human Services to announce the Elder Justice Roadmap, a comprehensive plan to combat different aspects of elder abuse, including financial abuse. Finally, the Financial Industry Regulatory Authority (FINRA) announced a call for public comment on a proposal that would allow financial firms more authority to place client funds on hold and contact a trusted person when a client is the suspected victim of elder abuse.

However, regulatory intervention alone is not sufficient to address the problem of the financial abuse of the elderly. Organizations and individual practitioners are going to need to do their part as well. Wells Fargo, for example, is developing a Department of Elderly Client Initiative to help financial advisors detect and prevent elder financial abuse. Other organizations are working closely with their compliance and legal divisions to offer better advice and counsel to their agents and representatives. It is hoped that the changes proposed by FINRA will make it easier for other companies to follow suit.

The professional virtue of diligence, found in almost every code of ethics that govern the behavior of financial services professions, demands that professionals act prudently and preemptively to avoid ethical dilemmas, particularly those that harm our clients. The fictional case of Barrett Green and the struggles of his financial advisor, Jason, are just one story of many that could be told. While these situations are not common, the damage and misery they inflict is disproportionately large. It is clear that every individual and group associated with the financial services industry should take this as a call to action.

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Endnotes for this article can be found at www.financialpro.org/members/Sections/FP/2015/issuesindealing.cfm.