Fiduciary, Due Diligence and Long Term Care: Are your financial advisors talking about long term care?

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Since the market crash of 2008, Americans age 50+ have been focused on re-building and preserving their assets for a not-so-distant retirement. Many have turned to financial advisors for additional guidance and assurance, determined to divert losses of a similar magnitude. What has caught most of America by surprise – including financial advisors – is the impact of long term care (LTC) on families, its potential to deplete assets, and the resulting increase of lawsuits as individuals, states and healthcare providers seek to recover their costs.

If your bank's financial advisors aren't talking about long term care planning issues and solutions with their clients, they may be putting themselves, and potentially the bank, at risk.

In an article published by elder-law and long-term care expert Harley Gordon, President of CLTC entitled, The Coming Wave: Professional Liability Lawsuits for Failure to Recommend a Plan for Long-Term Care, he specifically points out that failure to talk with families about long term care planning issues, "may subject financial planners to a claim of breach of due diligence".

Due to the high cost of LTC expenses, especially for extended care (more than 4-5 years), adult children across America are witnessing the spend down of their parents' retirement savings and unfortunately, their inheritance as well. Many find themselves juggling work schedules and personal savings to help pay for the expense of their parent's care. For the so-called "sandwich generation" (supporting children and parents), LTC has become an overwhelming strain on both family and finances.

As a result, adult children are now digging deep to find documentation that would indicate whether or not their parent's trusted financial advisor discussed the future risk of LTC expense and recommended solutions during the creation of their retirement plan. Due to its complexity, it is not uncommon for financial advisors to forego a discussion on long term care with their clients. Without clear documentation by the advisor that the future risk of LTC expenses was presented along with solutions to manage that risk, legal action may present itself as an option for those seeking recovery from financial losses. This may place the advisor and the bank he/she is associated with at risk.

In one case a financial planner received a call from a good client's son, a local attorney. He proceeded to tell her that his dad was in a nursing home and paying for it with his life savings. He then told her: "You have 15 minutes to produce evidence that you recommended a long-term care plan in general and long-term care insurance in particular."[1]

Steve Moses, Center for Long-Term Care Reform president, in a Journal of Financial Planning article titled Long-Term Care Due Diligence for Professional Financial Advisors stresses that, "financial advisors should be held professionally and legally accountable for giving bad advice about long-term care planning". Mr. Moses offers a cautionary warning to advisors who ignore full disclosure of long term care funding options:

> "A story in Registered Rep detailed the travails of a registered advisor who recommended long-term care insurance to his clients. The problem is that he did not put it in writing assuming the clients would take note. They didn't, but the children did. They sued the advisor for malpractice after both parents were diagnosed with Alzheimer's. The article made a number of points that are relevant to financial service professionals, first among them is that failure to discuss a plan for long-term care…."

State Filial Responsibility Laws and Federal Estate Recovery Mandates

A little known law in place in 28 states and Puerto Rico is the Filial Responsibility Law. This law looks to the children to pay the expenses of their elderly parents if the parents become unable to pay.

Filial support laws aren't new; they have been lying dormant for decades. In fact, over the years, the number of states with these statutes has been reduced down from 45 to 28 after Medicaid assumed the cost of providing care to the elderly who are without financial means.

States Currently with Filial Responsibility Laws	
Alaska	New Jersey
Arkansas	North Carolina
California	North Dakota
Connecticut	Ohio
Delaware	Oregon
Kentucky	Tennessee
Louisiana	Utah
Maryland	Vermont
Massachusetts	Virginia
Mississippi	West Virginia

However, with long-term care expenses rising and federal and state funding sources on a likely downward spiral, health care providers and nursing homes may have increasing incentive to apply this law to recover their costs.

In 2012, The Pennsylvania Superior Court ruled in a case that a son was liable under the filial-support law for nearly $93,000 in nursing-home costs incurred by his mother. The Superior Court of Pennsylvania found in favor of the nursing home based on "filial responsibility law" and the son was forced to re-pay the entire cost for his mother's care.

In the July 30, 2012 issue of the New Jersey Law Journal it was reported that "New Jersey's filial responsibility statute has rarely been enforced, and not to date, in a reported case, in favor of a nursing facility. In this era of "runaway" Medicaid long-term care spending, it is certainly possible that the right facts could awaken this slumbering giant".

Due to the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) and the Deficit Reduction Act of 2005 (DRA), states have the authority, and the obligation to recover money within a family for Medicaid dollars spent on a family member's care. States have had this authority for over two decades, but with growing budget pressures combined with the number of people who will become Medicaid recipients, not necessarily due to a low income situation, but due to poor planning or no planning for LTC, it is this author's opinion that states will more aggressively pursue the recovery of their costs.

Reducing Risk With Third Party LTC Specialists

In Harley Gordon's article,The Coming Wave: Professional Liability Lawsuits for Failure to Recommend a Plan for Long-Term Care, he cites four areas for potential breach of due diligence by a financial advisor:

1. Failure to talk about a plan for long term care as part of a financial retirement plan.
2. Simply selling long term care insurance disconnected to a plan for long term care.
3. Failing to talk about the subject with wealthy clients who have been given the impression they can self-insure the cost.
4. Selling the wrong type of policy and amount of coverage.

According to Paul Werlin, President of Human Capital Resources, Inc., "Selling LTC requires a different discipline. For the most part, bank FAs are investment people. This is a very complicated area and partnering can be a very smart decision.[2] An advisor's focus is on aspects of serving their clients investment needs and goals. Long-term care planning is a separate specialty and one that cannot be overlooked in a retirement discussion.

The element of surprise caused by a sudden need for thousands of dollars in long term care expenses is not the kind of surprise a person welcomes in retirement. A third party LTC specialist can be brought in to planning discussions to educate, answer questions, discuss the consequences to family and finances if and when a long-term care need arises and offer alternative product solutions. While wealthy clients often plan to self fund LTC, the risk of extended costs that can reach into the six to seven figure range has caused many to reconsider the strength of their portfolio.

The best plan for LTC is one that addresses all of the issues and is shared with family members in advance of a crisis so that no one is caught off guard and documentation is ready if and when the need arises. A comprehensive plan is a relief to clients of all income levels.

Finally, if a client understands the potential consequences to the family and their finances, and still chooses not to create a plan for the expense, a 'Declination of Coverage' signed by the client and advisor may prove to be valuable for both the advisor and the bank.

Bottom Line for Financial Advisors

Reduced state budgets, the federal deficit and filial law all represent additional threats to the one that most Americans will face — the threat of long term care expenses. As part of their fiduciary responsibility to clients, financial advisors are wise to have a plan for providing all of their clients with LTC education and to be aware of the added risk to families in states with filial laws, as few parents want their medical bills left to their children. Advisors who want to remain focused on investment growth and preservation apart from LTC, would be wise to partner with a qualified specialist to provide sound education and alternative product solutions. This will provide additional safeguards for their clients and may help protect themselves and the bank from the potential risk of long term care legal battles – not to mention the trusted relationship with clients, famililies and the community.

Susan W. Aumiller, CLTC is committed to educating clients on the relevance of planning for long term care and addressing the magnitude of its impact on individuals, families, finances, and employees. To learn more, contact Susan at susan@srsgllc.com or by phone at (614) 738-4297.

[1]The Coming Wave: Professional Liability Lawsuits for Failure to Recommend a Plan for Long-Term Care, Harley Gordon
[2]Three Certainties in This World: Death, Taxes & Long-Term Care. Paul Werlin, President of Human Capital Resources, Inc.

Disclaimer: Susan W. Aumiller is not a lawyer. The content of this article is for general information purposes only and is not intended to convey or constitute legal advice. It is not a substitute for obtaining legal advice from a qualified attorney.