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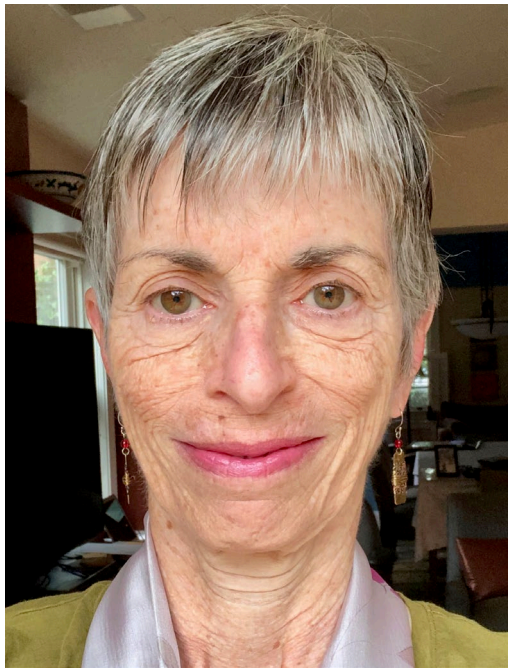
Recognizing and Addressing Participants with Diminished Capacity

Testimony of Naomi Karp
before the ERISA Advisory Council
September 17, 2020

Naomi Karp, JD



- 35+ years experience at intersection of law, aging and policy
- 10 years representing low-income and older clients
- Research, policy and advocacy at American Bar Association Commission on Law and Aging, AARP's Public Policy Institute
- 2011-2019: Senior Policy Analyst, Consumer Financial Protection Bureau Office for Older Americans
- Currently: Consulting Research Scholar, Stanford Center on Longevity; independent consulting for AARP, Department of Justice and others
- Areas of expertise: elder abuse and financial exploitation, advance planning for incapacity, surrogate decision-making

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Naomi Karp, JD

…and caregiver and agent under
Power of Attorney for my 95-year-old mother
with dementia

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Today's testimony

- Capacity and financial capacity
- Elder Financial Exploitation
- Recommendations for employers, plan sponsors, plan service providers, Department of Labor, and other key stakeholders

For more detail, see written testimony

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Capacity and financial capacity

- Capacity is specific to task at hand – different domains
- Examples: financial capacity, consent capacity for healthcare, independent living capacity
- Financial capacity: “The capacity to manage money and financial assets in ways that meet a person’s needs and which are consistent with his/her values and self-interest.” (Marson et al., 2011)
- Financial capacity = range of knowledge, performance and judgment skills, including identifying and counting money, understanding debt, paying bills, maintaining judgment to act prudently and avoid abuse

Declining financial capacity

- One of first abilities to decline as cognitive impairment encroaches
- Individual and families may not realize it – people with mild cognitive impairment remain functional and look “put-together”
- Once diagnosed with dementia, financial capacity declines rapidly
- Risk of adverse consequences: things don’t get done, costly mistakes, fraud and financial exploitation

As Arthur Packel’s dementia grew worse, he forgot how to handle money, and his wife, Renee, could not find where it all went. Ryan Collerd for The New York Times

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Elder financial exploitation (EFE)

- Widespread
- Under-reported
  - Studies likely underestimate prevalence
- Costly

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New source of data: Suspicious Activity Reports (SARs)

- Filed by financial institutions with federal government – like crime tips
- Study of data from 180,000 SARs
- Key findings
  - EFE SARs quadrupled from 2013-2017
  - Average amount lost by older adult = $34,200
  - One third of those who lost money were 80+
  - Losses much greater when older adult knew suspect
  - Suspicious activities lasted considerable longer when targeted person had diminished capacity
  - Fewer than one third of SARs indicated that FIs reported suspicious activity to federal, state or local authority

Recommendations

- *Mandatory training* for staff of employers, plan sponsors, service providers on diminished capacity and financial exploitation
- *Educate plan participants on risks* posed by diminished capacity and ways to plan in advance to protect against risks—without scaring them into inaction
- *Institute practices, policies and resources* to prevent and respond to elder financial exploitation
- *Develop protocols on holding transactions*

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Recommendations, continued

- *Honor powers of attorney*, but monitor for abuse
- *Provide resources and referrals* to low-cost legal services providers, daily money managers, and other key services
- *Build on lessons learned during the COVID era*
- *Support research and evaluation* of interventions introduced to minimize the financial impact of diminished capacity

Contact me with questions

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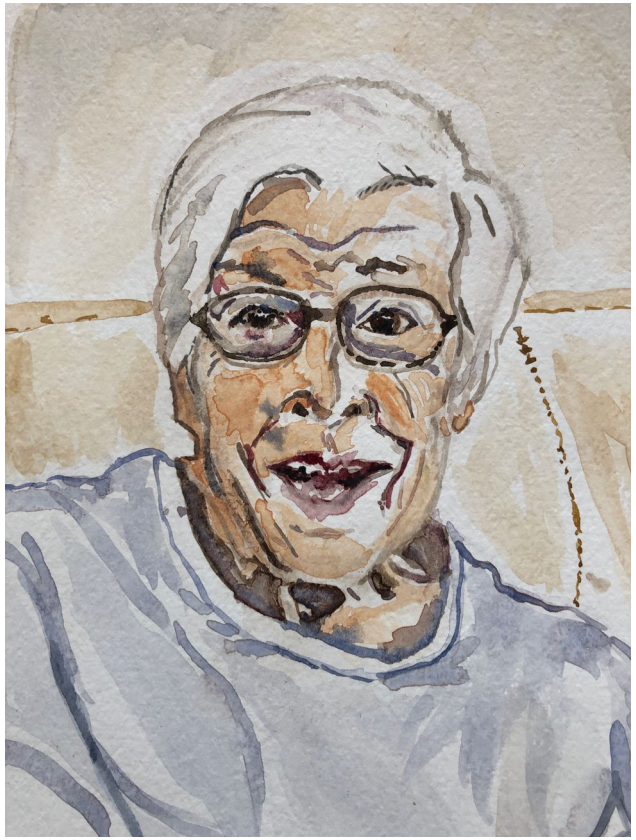

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Questions/Discussion

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