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Five ways financial advisers can assess mental capacity in vulnerable customers

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The Financial Conduct Authority's (FCA) measures around duty of care to the vulnerable outlined that financial advice firms must take action to understand and assess the needs of their vulnerable clients, including those that lack capacity. It has also now stated it will consider client vulnerability when investigating expert misconduct too. These measures are testament to how much the pressure is ramping up across the financial services industry to take reduced mental capacity seriously and, indeed, demonstrate a duty of care between financial adviser and their client.

For financial advisers, being able to robustly assess the mental capacity of a client before they engage with them is, of course, absolutely vital. They will need to be able to demonstrate, beyond doubt, that their client has the clarity and capacity to make their own decisions, both in a way that can satisfy the FCA and hold up under clinical scrutiny too.

However, the nuanced nature of mental capacity has made this process very difficult for financial advisers. And this has been further exacerbated by the pandemic too, not least given the rising levels of mental health issues we are currently witnessing in the UK. In fact, symptoms of depression, anxiety and other potentially debilitating conditions have almost doubled in the UK during the pandemic.

Over recent years, financial advisers have relied heavily on The Mental Capacity Act 2005 (MCA) which provides a robust structure for assessment but can of course be interpretated and impacted by bias. However, given the increasing mental health crisis that this country now faces, it is becoming more and more vital for advisers to factor in the unique circumstances of each and every client when assessing their mental capacity to ensure any conclusions they make are fair, measurable and consistent. This demonstration of due diligence will be of particular importance if their engagement is challenged in court at a later date.

So, how can financial advisers consistently and measurably assess their clients' mental capacity in a way that protects their rights and preserves their dignity, whilst also ensuring they are giving them the best possible advice.

Here are five ways financial advisers can begin to assess mental capacity in their vulnerable clients.

1. **Be mindful of the specific decision in question.** The adviser will need to be specific about the decision in question and only that decision. Mental capacity is always item specific, and this is due to something called the threshold of understanding i.e., what does a person need to understand to make that specific decision. The adviser will need to hone down on what the specific decision is and how it specifically relates to their client. It is paramount that the adviser doesn't make any assumptions here; just because an individual has capacity to make a decision regarding one aspect of their life, does not mean they have the capacity to decide on everything.

2. **Gather evidence based on the decision.** The adviser will need to gather all the evidence relative to their client's capacity for that specific decision. They can do so by considering the following four questions; Can they understand? Can they retain? Can they weigh up and apply? And can they communicate? The evidence that the adviser will acquire will vary depending on whether they are working with a client making a 'Macro' or 'Micro' decision. A Macro decision, for instance, would look at an accumulation of all their actions, behaviours and functions over a period of time, whilst a Micro decision would just focus on that specific point in time.

3. **Identify causative nexus.** It is essential for the adviser to do their due diligence to identify the link between any impairment to the functioning of the individual's mind or brain and their ability to understand, retain, weigh up and communicate. This causative nexus is the link between the person's inability to make the decision and the mental impairment. If there is no causative nexus, we have to assume the person has capacity.

4. **Invest in tools to avoid human error.** Humans, through no fault of our own, can be prone to bias. As a result, conducting these assessments can prove difficult. By using innovative technology, advisers can ensure their assessments are more consistent and reliable and present the results in an objective and holistic way. Technology is a financial advisers most valuable asset when it comes to removing subjectivity and human error from the assessment process, thereby creating a de facto industry standard when assessing mental capacity. Advisers need to be able to base their assessments on facts and real-time insights in order to make accurate determinations and fend off any potential challenges. These technologies aren't

there to replace human involvement or oversight, but rather to supplement it, to improve outcomes and make roles more manageable and less vulnerable to error.

5. **Cross the Is and dot the Ts.** Any decisions made about a client's mental capacity should always be recorded and this should be done no matter whether the adviser believes there is reduced capacity or not. Likewise, a reliable log should be kept up to date should the FCA come knocking. Firms must be in a position to clearly demonstrate their 'working out' should one of their decisions be called into question and this should be consistent across all cases. Having a tech-based, objective system in place for making consistent assessments across all clients is the best possible way for a firm to protect itself, should a challenge be made.

The nature of the capacity assessment landscape needn't be something financial advisers should fear. After all, it's there to enable them to carry out their work effectively and prioritise their clients' interests and wellbeing. However, staying ahead of the curve when it comes to justifying decisions will be made much easier if experts use the right processes, and employ the right technology.