

THE VOICE OF EXPERIENCE

A Publication of the American Bar Association Senior Lawyers Division

Maintaining Mental Wellness

By Mikol S. Davis and Carolyn L. Rosenblatt



The challenges of maintaining mental wellness and getting older involve increasing effort with the passing years. It is quite common for us to experience a sense of loss as our physical body diminishes in strength and function. In addition, we experience loss in our families and friends as those close to us pass

away and we live on. How do we stay mentally healthy with all this change going on?

Maintaining a Sense of Purpose in Life Is Critical

People sometimes lose their sense of purpose when they stop working. Particularly for men, the loss of identity as a worker can be very

difficult. Men may not have a strong identity outside the role of worker and provider. Once they stop working, they may find themselves having trouble structuring their time, looking for things to do, and generally feeling lost. This often leads to increased tension or friction in relationships, specifically, marriages. Consequently, the individual experiences frustration, fear, self-doubt, feelings of worthlessness, difficulty sleeping, and a belief that things will only get worse. It is therefore imperative that an individual in this state seek help. The best place to get this is from a medical provider. It is wise to start with your regular physician. The doctor who knows you can help you find out if there is any physical process or disease process that could be contributing to the problem. Once physical problems have been ruled out, you must ask for a referral from your doctor to a medical specialist who deals with the emotional challenges of getting older.

The importance of finding something that one can do to contribute in the community is essential to regaining a sense of purpose. Most communities provide volunteer bureaus or organizations that give one a choice of volunteer options. Get involved in your favorite organization. If you do not have a favorite organization, consider your church or temple, your local school, or your local social service or homeless help organizations. You will never run out of places to volun-

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FROM THE TOP

By T. Maxfield Bahner

Join the SLD and Make a Difference

The members of the Senior Lawyers Division invite experienced lawyers who continue to have an appetite for life and for making a difference in our world to join our Division.

So long as humankind has been on the earth, some individuals have had significant influence on their peers. Each of us has been influenced by persons who are an important part of our individual history. Plato had his Socrates, an older friend for whom he had great respect. The way Socrates reacted to his own unjust condemnation by Athenian leaders made its mark on Plato. Thomas Jefferson had his John Locke, and read his "Second Treatise on Government" at least thrice. Locke's influence on Jefferson is reflected in the Declaration of Independence.

As a senior practitioner at the bar, whether as a judge or a practicing lawyer, you are observed by more people than you think. Probably you could not name or even calculate the number of people who are aware of who you are and what you stand for. Like it or not, we are influencing other people.

The great Chief Justice John Marshall has had a large influence on me. Although our lives are separated by more than a century, I am impressed by the way he responded to the challenges, urged by Thomas Jefferson, of a weak judiciary and states' rights. Under Marshall's leadership, the Supreme Court became a vigorous and equal branch of the federal government, able to override laws and actions of states when their interests clashed with those of the national government. His strength of character has fasci-



T. Maxfield Bahner

nated me since I read *Marbury v. Madison* as a law student. He gave structure and sinew to the idea that the Supreme Court has power to declare laws unconstitutional.

Other lawyers have influenced me. U.L. McDonald, a great lawyer and my partner early in my career, taught me how to try lawsuits. Jac

Chambliss, my senior partner, now age ninety-nine, has been a remarkable mentor during more than forty-five years.

To be able to practice law is a privilege. The law is the monarch of our nation in a way that distinguishes it from all others. Because you are a part of the legal system, people observe what you do and how you do it. Our influence, for good or ill, strengthens the law or weakens it.

Our Division welcomes men and women who, whether or not they continue to practice law, are not ready to retire from the field of life and are interested in taking on challenges. Whatever your practice background, our Division can accommodate you. We are an active leader in elder law, which addresses a plethora of issues. These include family law; financial planning for older people, as well as their children; guardianship and fiduciary issues; and health care, including long-term care issues. Medicare, Medicaid, and the future of health care are a significant part of this portfolio of issues.

We have an active committee on international issues, formed and led by Leigh Middleditch, who has for several years sponsored further education for young South African black lawyers at the University of Cape-town Law School. Teachers of the

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THE VOICE OF EXPERIENCE

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Elder Law—Then and Now

Then: 1979

- Didn't exist as a field or even as a term.
- Americans over sixty-five numbered 24.4 million and made up 11 percent of the population.
- The Older Americans Act (OAA) authorized funding for "legal services" for older persons starting in 1973.
- The Administration on Aging (AoA) funded a few fledgling national support projects, such as Legal Research & Services for the Elderly and the National Senior Citizens Law Center.
- About 120 publicly funded legal services for the elderly projects existed nationwide.
- Bar projects serving the elderly existed in about twenty states, most often as no cost or low-cost lawyer referral programs.
- No association or certification of elder law lawyers existed.
- No state bar had an elder law section. About half had committees on the elderly.
- Ten law schools were known to have law and aging seminars or clinical programs.
- No elder law journal existed. Only two lawyer practice guides were available.

Now: 2009

- Is now a widely recognized area of practice.
- Americans over sixty-five number 38.9 million and make up 12.8 percent of the population.
- The OAA continues to fund legal assistance in all states plus hotlines in twenty-six (plus D.C. and PR), and model approaches programs in thirteen (plus eleven new ones in 2009).
- AoA funds a collaborative National Legal Resource Center composed of the Commission on Law and Aging and four other national groups.
- All 655 area agencies on aging fund some legal assistance.
- Bar projects exist in every state.
- The National Academy of Elder Law Attorneys (NAELA) and an ABA-approved certification program thrive today.
- Thirty-two state bars have active elder law sections and an additional seven have committees.
- More than 100 law schools nationwide teach elder law courses or have clinics.
- Two law schools (U. of Illinois and Marquette) publish dedicated elder law journals, as does NAELA. Several state bar elder law sections and all major law publishers publish practice manuals.

Over the years, the ABA Commission on Law and Aging has:

- ✦ awarded nearly 100 "mini-grants," totaling \$730,000, to local nonprofit law-related organizations to enhance the rights of older persons, with co-funding from the Borchard Foundation.
- ✦ been funded by the U.S. Administration on Aging for twenty-five years to serve as a national legal support center for the aging network.
- ✦ successfully brought forty-two major policy resolutions on law and aging to the House of Delegates in thirty years.
- ✦ published the first *ABA Legal Guide for Older Americans* with the Public Education Section.
- ✦ provided online comparative charts, updated annually, of state legislation in health care decision making, guardianship, and elder abuse.
- ✦ tracked and supported bar committees on elder law and provided the *Bifocal* e-journal and CLE support.
- ✦ tracked and promoted bar emeritus and pro bono attorney programs.
- ✦ sponsored major national conferences and reports on access of the elderly to the courts and other topics.

This table was submitted by Charles Sabatino, director of the ABA Commission on Law and Aging, and originally appeared in Bifocal newsletter.

Considerations When Choosing a Nursing Home

By Jerry B. Chariton



As we, loved ones, or clients grow older, the possibility exists that we will be asked, or will ask, to review a nursing home contract. Presumably, most people enter a nursing home with the anticipation that it will serve as a final residence. Experience suggests that most people would prefer to have home care for as long as possible.

Home care ordinarily only is feasible when a surviving spouse or willing child has the physical and emotional strength to shoulder the burden of caring for a mentally and/or physically enfeebled person and there are sufficient resources to provide full-time or almost full-time professional care. Though it is dangerous to overgeneralize, the likelihood is that most people who enter nursing homes (other than on their way home after recuperation from a hospital stay) otherwise would be living alone.

When considering a nursing home for oneself, a loved one, or a client, it makes sense to divide one's concerns into two main areas: quality of care and contractual conditions for residency. Determining which area of concern

should be more important may seem like asking: Which came first, the chicken or the egg? Prioritization of concern can have significant consequences. If one is concerned with obtaining the least onerous contract when entering a nursing home or facilitating someone else's entry into a nursing home, one may be more willing to tolerate quality-of-care situations that are not as good as might be obtained if one's priorities were reversed.

In an article of such short duration, it is impossible to list all of the factors that should be considered in quality-of-care issues. But, at a minimum, one should visit a prospective nursing home at various times, preferably unannounced, to see what happens on a floor on which the person for whom you have concern is likely to be a resident. Staff numbers, demeanor, experience, responsiveness, and so forth all play a role in quality of care. Particularly if the prospective resident is capable of enjoying some physical and social activity, check to see what kind of residents populate the nursing home. Some of this can be gleaned from the common room, library, and so forth. Some of this only can be determined by peeking in rooms of residents. See who comes to meals and what they are served. Eat a meal with a prospective resident.

On a less personal basis, ask to see the most recent inspection reports by the licensing agency of the state in which the nursing home is located. If the administrator or social worker is reluctant to share the report (or the last few reports, if one is more inquisitive), that may be a bad sign. Perhaps, the nursing home currently is only provisionally licensed. The federal government's Medicare Web site is www.medicare.gov/nursing/overview.asp. The site includes a "Nursing Home Compare" tool that provides information about past performance of all Medicare- and Medicaid-certified nursing homes in the country.

Like in many other areas of life and law, ask yourself whether the nursing home passes the smell test. This does not only refer to a possible smell emanating from the nursing home. Instead, it is asking yourself your overall impression. And if the nursing home entry is also a voluntary choice of the person who is entering and giving up former independence that, presumably, was cherished, what is the overall impression of the person who is going to become the resident? But remember that a reluctant potential nursing home resident is likely to find fault with aspects of even fine nursing homes in a reflexive defense mechanism against being forced to enter a nursing home.

Nursing home care is expensive and, presumably, will become more expensive as time goes on. Some people are fortunate enough that the cost is irrelevant,

either because they are extremely wealthy or because they have no assets to use up before qualifying for Medicaid assistance. But if the likelihood is that Medicaid assistance will be required, either immediately or, more likely, at some point in the future, it also makes sense to speak with the social services director or other person charged with processing Medicaid applications and providing information on when Medicaid assistance should be applied for. If that person seems on the ball, knowledgeable, and has worked for the same nursing home for a number of years, the likelihood is that such person will be helpful in the process of applying, and applying at the right time, for Medicaid assistance. Ordinarily, if the social services director or other person charged with qualifying Medicaid applications will not provide much information before a person becomes a resident, it is not a good sign about how helpful he or she will be once residency already exists.

Finally, in terms of quality of residency, check to see what kinds of activities exist. Is there an auxiliary with volunteers who come and provide recreational benefits? Does the nursing facility take its residents on field trips? Does the nursing home provide transportation for visits to doctors and so forth? To the extent that transportation is provided, are extra charges imposed for all or any portion of transportation provided? What policies exist for taking residents off the premises for an hour, a day, or more than a day? How does a nursing home protect one resident from another wandering resident with sticky fingers? Can one use private doctors or must one use the home's doctor, and is the doctor on staff? What is the nursing home's policy with respect to end-of-life treatment? For example, will the nursing home engage in resuscitation if resuscitation is necessary? Will the resident be taken to a hospital? How does a prospective resident feel about such policy and other policies of the nursing home?

Assuming that there is a choice of viable nursing homes from which to select, what conditions in a contract should one be concerned about that might influence the selection, or, at a minimum, cause some contract language negotiation to take place. Nursing homes often are caught in a squeeze between the time that a resident's private resources are supposed to be paid to the nursing home and the time when the resident is eligible to receive Medicaid assistance. In a smooth transition, the Medicaid application is forwarded to the appropriate state agency (called the Department of Public Welfare, or DPW in Pennsylvania), called "agency" in this article. Even though using federal money, agencies seem cash strapped, and, like many third-party insurers, look for reasons to delay payment, even payment that eventually will be required to be made. So, when private pay money runs out, or runs out except for recurring alternative public benefits (such as Social Security payments), the nursing home is going to be caught between a rock and a hard place. Maybe the agency will conclude that there are available resources that must be tapped before the resident actually is quali-

The "Nursing Home Compare" tool on the federal government's Medicare Web site (www.medicare.gov/nursing/overview.asp) provides information about all Medicare- and Medicaid-certified nursing homes in the country.

fied to receive Medicaid assistance. Such a situation could occur if the agency claims that the resident is entitled to receive benefits from a trust and the resident or person who will sign or has signed a contract on behalf of the resident and/or the trustee claims that the trustee is not required to pay for nursing home care. Perhaps the agency will claim that the resident was required to elect against a deceased spouse's will.

When someone is signing a contract on behalf of a nursing home resident to gain admission, whether or not the person signs under an express power of attorney, the nursing home contract is likely to contain a provision by which the person signing guarantees payment of the resident's obligations. By federal law, nursing homes that accept Medicaid assistance payments may not require a guarantee as a condition of a resident's acceptance. But, the applicable regulations do not appear to preclude requesting a guarantee and then attempting to enforce the guarantee if payment is not forthcoming. Because the nursing home may not insist on a guarantee, if a guarantee provision is found in the contract, the person signing should require such a guarantee provision to be stricken.

Striking a guarantee provision does not insulate a person who has control of a resident's assets from being responsible for their proper application. By way of illustration, if a son controls the assets of his mother under a power of attorney, and he otherwise would be authorized to make present interest exclusion gifts to himself and his two siblings, it is not clear that such gifts that the agent for his mother made would not make him personally responsible, even if he did not sign as a guarantor.

Even as a disclosed agent, he might be constructively charged with knowledge that the gifts would constitute a fraudulent transfer upon an existing or future creditor if made within a time period that would prohibit recourse to Medicaid assistance.

Another provision that a nursing home might insert in a contract that one might wish to challenge is a provision that requires disputes to be arbitrated, rather than permitting them to go to court. If the contract requires arbitration of disputes, the contract also might seek to limit damages that could be recovered by or on behalf of a resident, including in a survival action or by permitted claimants in a wrongful death action.

An attorney seeing such provisions presumably would offer the same reasons for not signing such a contract as the attorney would give if providing advice with regard to other contracts that might have similar provisions, such as contracts for admission to a ski resort or contracts for provision of professional services generally. There is a difference between going to a ski resort where one might assume the risks inherent in skiing and entering a nursing home. Private-pay patients are valued by nursing homes because they pay more than the Med-

icaid rates negotiated by an agency. Therefore, telling a nursing home administrator before admission that you would hate to think that the nursing home is trying artificially to limit its responsibility for its own negligence may have some persuasive influence.

Finally, by federal regulation, nursing homes may not charge an agency rates that exceed the lowest rate charged by a non-Medicaid resident. Therefore, in working out a compromise in a disputed bill, do not expect a rate reduction commensurate with the alleged quality of service received. Some more creative ways of reaching an accommodation must be sought, as the nursing home understandably should fear that a one-time settlement could jeopardize its entire fee structure with the nursing home's applicable agency. **VOE**

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six-week course are volunteers from the United States and South Africa who give their time to further the education of younger lawyers in critical areas in which they need mentoring and instruction, such as business

organizations and transactional law.

We are working with Brooksley Born and her committee to gather and preserve the histories of Women Trailblazers in the law. The product of these interviews is being kept

at the Library of Congress and the Schlesinger Library at Harvard.

Come join us! Become active. We are doing exciting and important things. You will be glad to be an active part. **VOE**



Check Out Our New and Improved Web site: www.abanet.org/srlawyers/home.html

Please visit the NEW version of our Web site at www.abanet.org/srlawyers/home.html. Send suggestions for links and other ideas for improvement to judgeeds@gmail.com.

WASHINGTON SCENE

By Warren Belmar

It is with great pleasure that, after completing almost three years of public service as the deputy general counsel for Energy Policy at the U.S. Department of Energy, I can resume writing this column once again. My last Washington Scene columns in early 2006 addressed developments involving lobbying reform, government ethics, and the judicial confirmation process. Since then, progress has been made on all three fronts: The laws governing lobbying now provide for greater transparency; the Congressional Ethics Committees and the Obama administration have each issued additional guidance to congressional and Executive Branch officials on the ethics rules governing their conduct; and Justice Sonia Sotomayor has experienced a confirmation process far less contentious than that which the two preceding successful Supreme Court nominees experienced. However, whatever void might have been

created by progress in these areas has quickly been filled by even more contentious matters that will be the topics for future columns.

As I write this column, Congress is in the midst of its August recess and Washington is relatively quiet. However, great attention and concern are being expressed throughout the country about four complex and controversial subjects that will be on the front burner in Washington this fall and winter. Specifically, these are health care reform; global warming/climate change and energy policy; tax policy and the exploding federal deficit; and economic recovery. As senior lawyers, we have much to bring to these debates, not the least of which is to insist that the discourse on these momentous subjects be substantive and civil. To achieve that objective, it is incumbent upon us, our elected representatives, Executive Branch officials, and the media to master the details as well

as the policy ramifications of the momentous decisions under consideration, and then to speak clearly so as to avoid possible misconceptions as to what is and is not being proposed. Such clear speaking would be even more effective if done through extended debates by experts on each side of these issues, as opposed to resorting to short television and radio speeches and resulting sound bites. And to maintain public trust in the process and avoid last-minute surprises, Congress should not, as is too often the case, waive its longstanding rules that afford senators and representatives ample time to review the full text of legislation before they are to vote upon it.

The next months will tell whether the public, the Obama administration, and Congress will be able to reach consensus on legislative solutions addressing one or more of these four critical subjects. Will you participate in the upcoming debates? **VOE**

CLE Podcasts From the 2008 National Aging and Law Conference

Download podcasts at: <http://www.abanet.org/aging/cle/home.shtml>

The Commission on Law and Aging has been a cosponsor of the National Aging and Law Conference since its inception eight years ago. For the most recent conference held in December 2008, select CLE sessions are now available as podcasts at no cost from the Commission's Web site. Each podcast is delivered in a single zip file, consisting of (1) the MP3 audio file, (2) written course materials in PDF format, and (3) self-study CLE certificates for the program.

Some of the available podcasts are:

Issues for Low-Income Medicare Beneficiaries Who Also Receive Medicaid

Presenters: Patricia Nemore and Hilary Dalin
Run Time: 01:13:24



Coverage for Assisted Living Facility Care in Medicaid HCBS Waivers

Presenters: Eric Carlson and Gene Coffey
Run Time: 01:26:25

SENIOR LAWYERS

Meet in Chicago

Passing the Gavel



Charles A. Collier Jr. passing the gavel to T. Maxfield Bahner.

The 2009 Annual Meeting of the Senior Lawyers Division featured three excellent continuing legal education (CLE) programs; a dinner at the University Club; the Pickering Award presentation; and various governance meetings, including the election of new officers and council members.

“An Ethical Approach to the Sale or Closing of a Law Practice,” organized by Robert Ostertag; “Lawyers’ Personal Investment Plans and Related Tax Issues,” prepared by Bruce Mann with co-chair Paul McKenney; and “Reformation of Social Security, Medicare, and Medicaid—An Oxford-Style Debate,” organized by Leigh Middleditch Jr. were the CLE offerings. The last program will be adapted into videos and educational guides for use in high school civics classrooms.

Annual Business Meeting



Division Council and members, from left to right: Anthony Palermo, Ruth L. Kleinfeld, John P. Driscoll Jr., and T. Maxfield Bahner.

The annual business meeting was held Saturday, at which time officers and Council members were elected and changes to the bylaws were ratified. The gavel was passed to T. Maxfield Bahner of Chattanooga, Tennessee, whose term as chair began at the close of the ABA Annual Meeting.

John H. Pickering Award

Chair Charles A. Collier Jr. presented the third annual John H. Pickering award to Leigh Middleditch Jr. of Charlottesville, Virginia, for his many contributions to the practice of law, including his work as founder and supporter of the South African Lawyers Association Commercial Law Project, in which U.S. commercial law specialists present seminars for black lawyers in South Africa.

Division projects and plans for the coming year were discussed during numerous committee meetings, as well as at the Council Meeting the morning of Saturday, August 1. Volunteer leaders presented status reports on recent committee activities and announced new projects for the coming bar year.

Members are always welcome to join the Division's substantive committees. Please contact Division staff for more information about volunteer opportunities.



Charles A. Collier Jr. presenting Leigh Middleditch Jr. with the third annual John H. Pickering Award.

Dinner at the University Club



Division members and guests dine at the University Club while Charles A. Collier Jr. speaks at the podium.

The elegant University Club was the setting for a dinner enjoyed by nearly seventy Senior Lawyers Division members and guests.

Next year's Annual Meeting will be held in San Francisco. All members are invited to attend and participate in Division activities. [VOE](#)

Planning for Retirement: Core Capital

By The Investment Strategies Committee

How should we think about our retirement nest eggs in the wake of the incredible volatility that we have experienced for the past two years in the capital markets? Some answers to this question were provided by Thomas J. Pauloski, national managing director in the Wealth Management Group of Bernstein Global Wealth Management, Chicago, during a continuing legal education program presented by the Senior Lawyers Division and the Tax Section at the 2009 ABA Annual Meeting. The following interview conducted by Bruce Alan Mann, chair of the Investment Strategies Committee, reflects the views expressed by Mr. Pauloski during that meeting.

BAM: Tom, is planning to live off portfolio income in retirement the best strategy?

TJP: If by “income” you mean interest and dividends, that’s probably not going to be a viable strategy for most people given where the markets are these days. Today, a \$1 million portfolio that consists of 60 percent stocks (represented by the S&P 500) and 40 percent bonds (represented by ten-year Treasuries) yields pre-tax income of just over \$28,000 per year. In 1982, that same portfolio would have generated over \$88,000 of pre-tax income. Furthermore, dividend yields and bond interest tend to vary quite a bit over time, so living off the income just doesn’t produce reliable enough cash flow for most people. Based on current yields, a retiree who expects to spend \$100,000 per year after taxes would need a nest egg of about \$5 million to generate sufficient income. Some of us may be fortunate enough to be able to save that much, but for many, that’s an unrealistic goal.

BAM: So, if we can’t maintain our lifestyle with just the income from our investment portfolio, what’s the alternative?

TJP: I advise our clients at Bernstein to set aside an amount for spending that we call “core capital.” That amount, allocated prudently, will allow them to spend what they need to spend each year, indexed for inflation, for the rest of their lives with a very high level of confidence—say 90 or 95 percent—that they will never run out of money. I use sophisticated wealth forecasting software developed by Bernstein to make that determination, based on three variables: (1) how much risk the investor is willing to take—an important issue in the wake of what’s been going on in the capital markets, (2) how old they are, and (3) how much they want to spend. If I know these three things, I can arrive at an asset allocation and compute an amount of core capital that will last as long as the investor needs it to in 9,000 or 9,500 of the 10,000 capital market trials we run in our software.

BAM: What do you mean when you say you run 10,000 market trials? And shouldn’t you be basing your analysis

on something closer to 100 percent confidence? Ninety percent sounds a little shaky.

TJP: In our software, we simulate 10,000 plausible future paths of returns for each asset class and produce a probability distribution of outcomes. Our market forecasts are based on the building blocks of asset returns, such as inflation, yields, yield spreads, stock earnings, and price multiples. We incorporate the linkages that exist among the returns of various asset classes and take into account current market conditions at the time of the analysis. In addition to all that, we factor in a reasonable degree of randomness and unpredictability. And we create 10,000 new market paths every time we run an analysis. I don’t know of any other capital market simulator that works quite this way. In terms of whether a 90 percent or 95 percent confidence level is good enough, the short answer is that it tends to be sufficient when we will have the opportunity to reanalyze the client’s situation periodically, and will be able to recommend adjustments to asset allocation and spending when necessary. One problem with solving for a higher level of confidence—say 98 percent—is that our recommended core capital amount at that level is probably going to be much larger than it ultimately needs to be. We want to be conservative but also realistic in terms of how much more the investor needs to save to ensure a secure financial future. But striking the proper balance between conservatism and realism is indeed a big challenge.

BAM: So, with the answers to these questions you create a model portfolio. A lot of us are nervous about relying entirely on historical experience to avoid running out of money before we die.

TJP: That’s why our model does not draw randomly from a set of historical returns. I think it would be fair to say that history informs, but does not control, our thinking. But I don’t want a discussion of the underlying math to get in the way of the broader concept. The key here is that core capital is a “sinking fund.” Each year, the investor will spend the after-tax income of the fund and, to the extent that income is insufficient, some principal. My objective is to make that fund big enough so that it won’t run out of money, even if the investor lives for a very long time and experiences periods of high inflation, and even if the capital markets perform poorly. For the vast majority of our clients, this conservative approach is very effective—it gives them peace of mind that they will be secure.

BAM: How secure do your clients feel with core capital recommendations that you made for them two years ago? Aren’t they worried now that their portfolios have lost so much?

TJP: Absolutely they are worried. And I’m worried

for them because a 60/40 investor—even one who stuck with her allocation through all the recent turmoil—is down about 20 percent since October 2007. If she went into the crisis with a portfolio value right at her core capital threshold, she is well below that threshold amount today. But the good news is that we don't believe that she needs to make spectacular portfolio returns or huge spending cuts going forward to get back to her core capital requirement. History shows this to be true for similarly situated investors who faced disastrous market downturns starting in 2000, in 1987, in 1973, and even in 1929. Investors who remain disciplined with respect to asset allocation and spending usually recover—often quickly—and that seems to be playing out again in the wake of the recent crisis. The people I'm more concerned about are those who lost a ton of money in the market drawdown and then fled to cash, so that they are missing the current run-up in equities—the S&P is up more than 50 percent since March 9, 2009, as of this writing. They need to get back to a sensible asset allocation as soon as possible.

BAM: Of the three variables on which you base your core capital computations—asset allocation, longevity, and spending—I think the most important, or perhaps the most underappreciated, is longevity. Do you agree?

TJP: Well, I think spending is the most important—it's the one variable we can control, and it has a significant and quantifiable impact on the core capital amount—but longevity is by far the most underappreciated. Recent actuarial data shows that for a typical married couple in the United States, there is a 50/50 chance that at least one of them will live to age ninety-two, and a one-in-four chance that at least one of them will live to age ninety-seven. That means that a retirement portfolio for a typical sixty-five-year-old couple probably needs to last at least twenty-seven years, which implies an annual spending rate of no more than 4 percent. By a 4 percent spending rate, I mean that the couple will spend 4 percent of their portfolio in the first year, indexed for inflation each year thereafter. Most people understand spending rates and they generally get asset allocation once it's explained to them, but longevity always seems to catch people by surprise. That's one reason why we compute the core capital amount so conservatively. The portfolio has to be able to survive both poor markets and a potentially long-time horizon.

BAM: You've talked a lot about core capital. Can you



give us an example of how much a typical investor might need?

TJP: Sure. Say you and your spouse are both sixty-five years old and that you want to spend \$100,000 per year, adjusted for inflation and after taxes, until the death of the survivor of the two of you. If you invest your assets 40 percent in stocks and 60 percent in bonds—and maintain that allocation—you could set aside \$2.6 million today and have a greater than 90

percent chance, based on our model, of making it to the second death without running out of money. If you're a fifty-five-year-old couple, the required amount is about \$3 million, and if you're seventy-five years old, the core capital amount is about \$2 million. Notice that core capital decreases as you age because the portfolio probably won't need to last as long. Now a lot of assumptions go into those figures, including how much of your assets are in qualified plans or IRAs, what income tax rates will be in the future, and whether you will outlive actuarial assumptions, but directionally those numbers are about right. Interestingly, the core capital requirement is almost exactly the same if your asset allocation is 60/40 or 40/60, but the key difference is this: A 60/40 investor has about a two-in-five chance of incurring a 20 percent peak-to-trough loss in portfolio value over the next thirty years, whereas a 40/60 investor has a less than one-in-ten chance of incurring such a loss. So, while you give up potential upside by tilting your portfolio slightly toward bonds, you are likely to sleep a lot more soundly. This is one of the most important lessons we learned in the recent crisis: Clients believed prior to the crisis that they could bear a 20 percent peak-to-trough portfolio loss, but by and large, we discovered that they could not. As a result, many of our core capital asset allocation discussions today begin at 40/60 rather than 60/40.

BAM: This sounds pretty mathematical, but I've noticed that you haven't said anything about the impact of taxes on an investment decision.

TJP: Because I'm not practicing law anymore, I can't give legal or tax advice, and neither does Bernstein. But taxes obviously play a huge role, and we do take taxes into account in our modeling. Of course, not everyone is in the same position at retirement, so when deciding what's right for you, you should discuss your individual circumstances with your own legal and tax advisors. I find that clients get the best advice when their investment and tax professionals work together to develop an integrated solution. **VOE**

Le Palais Magnifique

The French Lady of a Certain Age

By Stephen D. Potts



The Eisenhower Executive Office Building in Washington, D.C.

It wasn't love at first sight; my mind had been captured by the mantras of the modernist architects—form follows function and less is more. Clearly, she did not meet those standards; she represents the French Empire II style of architecture. I thought I was avant-garde. Hadn't I been introduced to the work of Gropius, Mies Van Der Rohe, Buckminster Fuller, and my prep schoolmate Cy Twombly in North Carolina in 1952 at Black Mountain College before they became famous? And hadn't I accepted "form follows function" and "less is more" as gospel?

Nine years later when I moved from Nashville to Washington, D.C., to practice law, I was still in their thrall. Modern office buildings were beginning their march down K Street with great enthusiasm and fanfare. The more they marched, the less enthralled I became. Already it was clear that most of them did not age well. On the

other hand, "The French Lady," at that time known as the Old Executive Office Building, subtly began to catch my eye. But still I resisted. Part of the problem undoubtedly was that she was French. My two older brothers, both bomber pilots, viewed France as an effete country for having surrendered prematurely in World War II. I thought that they had a point because the things I prized most about the French were champagne, the negligee, and enticing perfume. Wonderful stuff, but they did not portray an image of steadfastness and courage.

A trip to France with my daughter Stacy changed that image. She accompanied me to Paris for a senior tennis competition. We flew to Luxembourg on Icelandair and then traveled on to Paris by train. Our bargain was that she would endure watching tennis in exchange for an evening at the Folies Bergère, some castles/cathedrals

sightseeing, and a visit to Rheims to observe the production of champagne. I agreed, with one proviso: We would visit the Verdun battle site on the way back to Luxembourg for our flight home.

When I observed the seemingly endless graves of French soldiers who had valiantly resisted the German onslaught in World War I and pondered the valor of their forefathers—Charlemagne, William the Conqueror, Napoleon, and the men who fought under their commands—I realized I had misjudged French soldiers. I was free of my French prejudice. I was free to enjoy *The French Lady of a Certain Age*.

She is a complicated lady. As the U.S. General Services Administration (GSA) pamphlet about her describes: “She is set apart by her articulated gray granite facade with tiers of porticos, paired Doric and Ionic colonnades and dramatic slate covered Mansard roofs.” Wow! Take that, “less is more.” Impressive, yes; but a passionate love demands more—a hint of intrigue, mystery. What better place to find it than in the name of *The Lady*.

“The Eisenhower Executive Office Building” seems appropriate and well deserved. Eisenhower worked in the building, freed France in WWII, and is said to have used *The Lady*’s precipitous steps for exercise after his heart attack. He also appointed a commission that decided she should be torn down and replaced with a modern office building, and he requested the money to accomplish the task in his next budget to Congress. Thankfully, determined historic preservation groups and budgetary shortfalls combined to save *The Lady*. It is not clear from the record whether President Eisenhower himself ever changed his mind. The irony remains: The building is named for the president who sought her demolition.

Another ambiguity yet to be definitively explained involves the unforgettable “Indian Treaty Room.” Entering this strikingly elegant and unusual room, you are greeted by an intricate tile floor; framed marble wall panels; and bronze angels in each corner, representing peace and war, liberty, arts and sciences, and industry. It has been used for presidential receptions and ceremonies, conferences, lectures, and the signing of international treaties. Mysteriously, there is no record of a treaty with India or any Indian tribe being signed in the room.

I admit—I am in love with the beautiful, complicated, intriguing French Lady. I hope you are persuaded to give



The Eisenhower Executive Office Building, East Rotunda. Photo courtesy of the U.S. General Services Administration, www.gsa.gov.

her your love and respect as one of Washington’s grandest landmarks. Perhaps *the* grandest. A French visitor to the White House complex, after completing his tour of the East and West wings, in my version of the story, said to his host, “Monsieur, now that we have seen the barns, may we see *Le Palais Magnifique*?” **VOE**

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More Resources

For more information on the Eisenhower Executive Office Building, including an extensive photo gallery, visit the U.S. General Services Administration Web site:

www.gsa.gov > Buildings & Real Estate > Historic Preservation > Historic Buildings

Mental Wellness

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teer. It is important to do volunteer work you like doing. If, for example, you hate physical labor, it does not make sense to volunteer to clean the local homeless shelter. If you dislike paperwork, it is unwise to volunteer to stuff envelopes or fill out forms for an organization in the community. If computers are not for you, choose volunteering that does not involve them. Match what you like with what is needed. If you have talent for something that can be shared, consider doing it on a volunteer basis.

The loss of a sense of purpose can also be overcome by learning something new. Most communities have adult education programs through local high schools, community colleges, community centers, senior centers, or other locations. Sign up for a class. Discover something you might have been curious about but never had time to pursue when working. The benefit of getting involved not only restores a sense of purpose, but it also enables an individual to socialize with other people in a way that creates a new support system outside the former workplace. You might make a friend who has an interest in common with you.

As elders experience loss in their lives, including loss of friends, loss of family members, and loss of spouses, they can also lose a sense of connectedness, which equates to loss of a sense of purpose. It is important to recognize the normal grieving process all human beings experience with loss. Mourning takes time and must be respected. It is critical to understand that if the mourning process exceeds a year or so, and the person is still very immobilized by sadness, a sense of loss, crying, anger, and the inability to move forward, the grieving process has led to depression that needs to be treated. If you or your loved one is unable to move forward after the normal sort of grieving that most people do, it can be very

dangerous. Untreated depression among seniors can lead to suicide more frequently than among other age groups, partly due to the overall sense of loss in numerous areas of life, including loss of good health, loss of purpose, and the inability to address these without help. Fortunately, depression is highly treatable, especially for seniors.

The importance of finding something that one can do to contribute in the community is essential to regaining a sense of purpose.

Seniors have a tendency to respond well to anti-depressant medication. Research supports that seniors who are successfully treated for depression live longer than those who are not treated for this illness, and their quality of life is better as well.

Structure Is Essential

With retirement, some may lose the structure that has governed their lives for most of their adulthood. Before adulthood, most had school to provide structure for their days. In older age groups, with neither work nor school nor child-raising responsibilities, the loss of structure can directly affect self-esteem. Self-esteem is promoted by individuals feeling productive in their world. When one feels productive, self-esteem can thrive. When the feeling of productivity is lost or diminished, the sense of self-esteem can erode. Without structure, it is difficult to be productive, so self-esteem and structure go hand in hand. When structure is not imposed by school, family, or work, one must strive to create structure in life. Because we are mostly creatures of habit, creating structure is easier than it may seem. If, for example, one is used to getting up every day to go to work, one can sub-

stitute fun activities, volunteer work, or physical activity in the time that was previously occupied by work or other activity. However, maintaining structure is much more difficult than simply creating it. Maintaining structure requires a different kind of self-discipline than it does to cook the family meals or work for a paycheck. One might, in older years, have to deal with physical pain, transportation issues, chronic illness, or lack of familiar companions to initiate and maintain structure. Self-discipline to maintain structure poses these and other obstacles.

Seniors experience much difficulty, when they have been independent in their lives, in permitting others to create structure for them and to accept this. Self-acceptance is key to dealing with the diminished independence that often accompanies aging. We simply have to give up seeing ourselves as we once were, totally on our own, if we are to maintain mental wellness when aging changes us. Planning a day ahead of time, at least; scheduling an activity for every day; using a visual cue, such as a calendar to track schedules; and not allowing oneself too much empty time can be very protective of your mental health. Too much empty time on one's hands can lead to depression, for the reasons mentioned above.

Creating or Maintaining a Sense of Community Is a Cornerstone

Being part of a community can serve a multitude of needs. Mental stimulation, socializing, a sense of spirituality, a forum for physical activity, and a feeling of belonging are some of the benefits of community. Our society is mobile, and the sense of community once provided by families has changed over time for many because families are now scattered. Daily or weekly time with family may not be available to the aging person. Most elders in our society do not live with their adult children

or other family. As physical decline occurs, the family home may be sold, and the senior may move elsewhere, giving up proximity to neighbors and others with whom one had a sense of belonging in a younger day. It may not be a quick process to adapt to communal living in a care facility. There are issues regarding territoriality, privacy, noise, and the loss of independence one must exchange for the needed physical help one receives in the facility. For persons who are not habitual joiners, and those who did not gravitate to groups when they were younger, it may be much more challenging to feel a sense of community than for those whose habits were always to join groups. Lack of religious affiliation is another obstacle to feeling a sense of community, as religious organizations are of themselves a kind of community. Some elders feel reluctant to bother others for transportation or company to attend a new group activity. Some may be embarrassed to have to rely on others. For some, joining a seniors' group, for instance, may be unpleasant, as it means they are "old." Not everyone is ready to face that thought. Seniors may need to push themselves, or be pushed by those who love them, to become part of a community. Their mental health is

at stake, and it is worth pushing for, so that resistance can be overcome. We do not advocate forcing anyone to do or join something they do not want. We do, however, suggest that urging the elder to take care of his or her mental health by being a part of something larger than himself/herself is worth doing.

Mental wellness usually coexists with some degree of physical wellness. Physical wellness in this context does not mean freedom from impairments, nor being free of chronic illnesses. Most elders have some physical limitation or must manage chronic conditions. However, one of the worst threats to mental wellness is poor nutrition, which includes fluid intake. The brain needs food. If we think of mental wellness as a product of our efforts to maintain it, just as a healthy body is partly a product of our efforts to be well, we understand that mental wellness is not a passive gift we get. We do have to work at it. We have to exercise our bodies, sleep enough, get good nutrition, and try to maintain a proper weight to be physically healthy. The same factors apply to mental health as well. A routine for maintaining mental wellness is part of good overall health practice. Inadequate nutrition or the wrong foods can wreck our bodies, but these

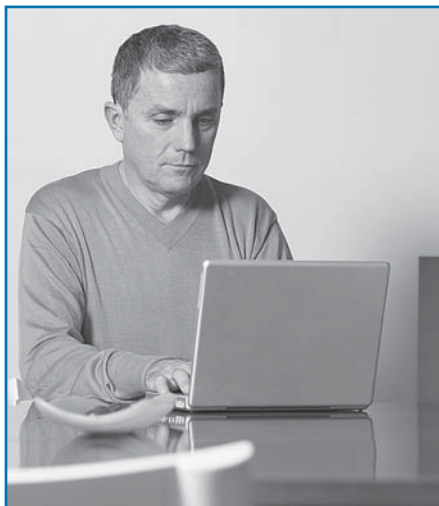
problems also damage our mental health by depriving our brains of the nutrients we need to think, make mental effort, participate in activity, and keep connections with others. "A healthy mind in a healthy body" is an old adage, but it is true. The "spirit" of a person is more than a healthy mind. It is more than thinking. Mental wellness is a combination of a healthy spirit in a healthy organism that makes the whole of us.

Mental wellness, like good oral hygiene, like muscle tone, like proper weight, is achievable at any age for most of us. Like those other healthy conditions, it takes work and regular vigilance. It takes doing what we may not feel like doing every day. Mental wellness allows us the ability to love, to enjoy, and to make the most of who we are. **VOE**

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