Evaluating Client Capacity & Representing a Client with Diminished Capacity

- *Aging demographics with increasing probability of diminished capacity*
- *Role of family members, advisors and other representatives*
- *Discussion of PRC Rule 1.14*

CINDY A. WOLFER, ESQ.
ROTHBERG LOGAN & WARSCO, LLP
Fort Wayne, Indiana
www.rlwlawfirm.com

September 3, 2014

Cindy A. Wolfer, Esq.; ROTHBERG LOGAN & WARSCO, LLP

Cindy's law practice focuses broadly on trust and estate matters in both the planning and administration stages. Her practice includes income tax, in addition to, transfer tax planning. She represents corporate and individual fiduciaries outside of court and also before the court for various matters including petitions for instructions, modification, approval of accounts or termination and discharge. Cindy also represents beneficiaries of trusts or estates to assert beneficial interests in property and damages for breaches of trust. She represents petitioners in guardianship proceedings to obtain court authority to help an incapacitated person. Cindy is licensed to practice law in both Indiana and Ohio and before the United States Tax Court. She is an Indiana Trust and Estate lawyer, certified by the Indiana Trust and Estate Specialty Board.

Cindy has extensive accounting and tax background that began more than a dozen years before she became a lawyer. She has audit and tax preparation experience while at public accounting firms but she also has accounting and tax experience working on the controller's staffs for public and closely-held corporations. She maintained a small public accounting practice until she began practicing law. Cindy passed the Ohio certified public accountants test in May 1979, a few weeks before graduating from college, and maintained this license until after she had been practicing law for several years. A natural progression of Cindy's passion for problem-solving (which began in the accounting field) continues today in helping individuals plan their estates, helping with administration issues and effectively avoiding (or efficiently resolving) disputes or disagreements along the way.

A graduate of Wittenberg University in Springfield, Ohio, Cindy attended University of Cincinnati College of Law where she was named to Order of the Coif, a national scholastic honorary society.

Bar Admissions

Indiana, 1991
Ohio, 1991

Professional Associations

Indiana State Bar Association

Property, Trust and Real Property Section *(District Representative*)
Probate Review Committee
Taxation Section

Ohio State Bar Association

Estate Planning, Trust and Probate Law Section

Allen County Bar Association

Past President, Vice-President, Secretary
Past Co-Chair, Probate, Trust & Tax Section

Fort Wayne Rescue Mission

Board Member

Legal Alerts & Other Works

IRS Grants Broad Relief For Electing Portability - *February 2014*

Evaluating Client Capacity and Representing a Client with Diminished Capacity

By *Cindy A. Wolfer, Esq.*
Rothberg Logan & Warsco LLP
September 3, 2014

Providing legal services for individuals with diminished capacity in estate planning matters requires awareness of the nature of the incapacity and its effect on the client's judgment and reasoning and the type of legal service requested. Rule 1.14 of Indiana's Rule of Profession Conduct ("RPC") provides specific guidance on dealing with clients with diminished capacity, summarized below (emphasis added):

Rule 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, *the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.*

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer *may take reasonably necessary protective action*, including consulting with individuals or entities that have the ability to take action to protect the client and in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), *the lawyer is impliedly authorized under Rule 1.6(a) to reveal information* about the client, *but only to the extent reasonably necessary* to protect the client's interests.

(d) This Rule is not violated if the lawyer acts in good faith to comply with the Rule.

I. Evaluating a Client's Capacity

A. Presumptions of Capacity

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.

Comments to RPC 1.14 at ¶1. Indiana has various presumptions of an individual's capacity to act such as an individual is *presumed* to be of sound mind to execute a will until the contrary is shown. *Verdi v. Toland,* 733 N.E.2d 25, 28 (Ind.App. 2000). A written power of attorney document that purports to be signed by the principal named in the power of attorney is presumed valid. *IC 30-5-8-2.* Accordingly, absent any indications of incapacity, it is reasonable to assume that a client has legal capacity to execute necessary documents to affect an estate plan.

B. The probability of diminishing mental capacity with age

In most cases we can reasonably assume a client has capacity to make important decisions; nevertheless, statistics show that there is a greater likelihood that our mental capacity will diminish as we grow older. As our body ages, to maintain the same physical activity is harder, and even if we can, we may be a little slower or take longer to recover. It is also common for our brains to not function quite as well as when we were twenty or thirty-somethings. Our recall may take a little longer. We forget what it was we walked across the room or house to fetch. We misplace things. And it seems that these moments of forgetfulness are occurring more and more frequently. Yet, these minor incidents do not mean we cannot currently perform the ordinary functions of life. These episodes, even if infrequent, cause concern that this forgetfulness will increase and the day will come when we can no longer make these important decisions for ourselves. We fear will lose some or all of our autonomy or freedom.

Take comfort. Severe memory loss is *never* a normal part of growing older. Based on the best studies available only, seven (7) to eight (8) percent of older people have severe intellectual impairment and statistics also show that only ten (10) to fifteen (15) percent may

have milder impairments.[1] While diseases that can cause dementia become more prevalent in people who survive into their 80s and 90s, fifty (50) to seventy (70) percent of those who live into very old age never experience a significant memory loss or other symptoms of dementia.[2]

Attorney Robert B. Fleming from Tucson, Arizona spoke at 48th Annual Heckerling Institute on Estate Planning this past January 2014, and the following is the introduction of his materials of dealing with an aging client:

> *Dementia is a degenerative disorder of the brain characterized by the loss of the ability to think, reason and remember. Of the elder population in the United States, estimates suggest that about 1.5% of those aged 65-69 are afflicted with dementia. That rate of dementia increases steeply as age progresses, doubling perhaps every five years. Dementia is present in about half of seniors in their 90s. Most individual patients' dementia gets progressively worse with time. Eventually, the symptoms of dementia become severe enough to interfere with work performance, social activities and daily functioning. With a better understanding of dementia and its relationship to capacity, attorneys can better communicate with clients and serve their interests, as well as provide more useful advice and support for family members and caregivers of afflicted individuals.*

Fleming, Robert B., *Dealing with the Aging Client, Materials of the 48th Annual Heckerling Institute on Estate Planning, (Jan. 2014).*

C. Brain Disorders and Causes of Dementia

The following summary of brain disorders and causes of dementia are from Chapter 18 of *The 36-Hour Day (5th ed.)* authored by Nancy L. Mace, M.A. and Peter V. Rabins, M.D. Symptoms of these diseases manifest gradually. It may be difficult to tell the difference between mild cognitive impairment and the early stages of Alzheimer's disease.

1. **Mild cognitive impairment** ("MCI") or sometimes referred to as **cognitive impairment not dementia** ("CIND") is used to refer to individuals with a mild

[1] *The 36-Hour Day: A Family Guide to Caring for People Who Have Alzheimer's Disease, Related Dementia and Memory Loss* by Authors Nancy L. Mace and Peter V. Rabins, p. 7.
[2] *Id.*

memory impairment who have memory problems but do not meet criteria for dementia. MCI typically occurs at the beginning of diseases causing dementia, including depression, and it may also describe the most extreme changes that are part of normal aging. Yet, from this group 40 – 50 percent five years after diagnosis may actually improve or return to normal cognition.

2. **Dementia.** Dementia is a medical term for a group of symptoms having three (3) characteristics: (1) several areas of intellectual ability are sufficiently impaired so as to interfere with daily functioning; (2) the symptoms begin in adulthood; and, (3) the person is awake and alert, not drowsy, intoxicated or unable to pay attention. A summary of various types of dementia is set forth below:

    a. **Alcohol Abuse Associated Dementia** – Persons with a history of drinking problems are at increased risk for developing dementia. Usually they can express themselves well, but personality change, irritability and explosiveness are common. Some aspects of Alcohol Abuse Associated Dementia are reversible if the person stays sober, has a balanced diet and avoids head injury.

    b. **Alzheimer's Disease** – The disease develops very gradually, but usually is noticed due to the individual's memory impairment, which impairment is more significant than minor forgetfulness. In the early stages of the disease, new skills may be difficult to learn and abstract reasoning becomes challenging. Alzheimer's disease can be associated with personality changes or depression. An evaluation by a professional may reveal other, less noticeable impairments. As the disease progresses, speaking abilities may become

impaired. During the late stages of Alzheimer's (usually six or seven years), the individual becomes severely impaired, both physically and cognitively.

c. **Cortical Basal Ganglionic Degeneration –** rare form of dementia.

d. **Depression –** Occasionally, depression is the cause of dementia. More often than not, it is an early symptom of dementia.

e. **The Frontotemporal Dementias ("FTD") –** About five (5) percent of people with dementia have cell loss and brain shrinkage in the frontal lobe or the temporal lobes. There are two common forms of FTD: *behavior form* (begins with prominent changes in personality) and *language forms* (develop symptoms of aphasia).

f. **HIV-AIDS** – Dementia occurs in patients in connection with HIV-AIDs, is now uncommon due to new drug therapies.

g. **Lewy Body Dementia** – Lewy Body Dementia is typically (but not always) associated with Parkinson disease. Lewy Body Dementia accounts for five (5) to fifteen (15) percent. A majority of people with this form of dementia experience visual hallucinations and wide fluctuations in their level of alertness, which symptoms may last for days.

h. **Primary Progressive Aphasia** – A form of dementia in which the person losses the ability to express themselves. Primary Progressive Aphasia is often associated with Alzheimer's disease.

i. **Progressive Supranuclear Palsy –** A person with this form of dementia has difficulty moving his eyes and holds a rigid body posture. Progressive

Supranuclear Palsy is also characterized by mental slowness and inflexibility although memory is usually relatively normal at onset.

j. **Traumatic Brain Injury** – Cognitive impairment, personality change and behavior change can occur. Head trauma can also trigger Alzheimer's disease and possibly frontotemporal dementia. Traumatic Brain Injury is a relatively high profile medical condition in as much as recent news reporting and medical study has focused on contact sports, in particular, the NFL.

k. **Vascular Dementia -** In Vascular Dementia, multiple strokes or inflammation of blood vessels in the brain destroy small areas of the brain. The cumulative effect leads to dementia.

l. **Young or Early Onset Dementia** – Term of dementia occurring in individuals under age sixty (60). Care issues associated with young or early onset dementia are often times different than for our older population.

3. Other Brain Disorders

a. **Delirium -** Usually begins suddenly. Symptoms include changed levels of concentration and alertness in addition to difficulty thinking.

b. **Korsakoff Syndrome** – Impairment of memory functions only but not in other mental functions.

c. **Stroke or other localized brain injury** –When there is a specific injury to the brain caused by a stroke, persons can get better with rehabilitation training over time and making any remaining impairment to their brain less severe.

d. **Transient Ischemic Attack ("TIA")**

Each of these conditions are described in more detail in the book, *36-Hour Day*. If you suspect a client has dementia and it is unclear how far it has progressed, it is important for them to have a competent and thorough medical evaluation and diagnosis.

D. Projected aging population in Allen County

Population projections from the Indiana Business Research Center at IU's Kelley School of Business highlight the impact that aging baby boomers will have on the aging demographics in the State of Indiana and in our local community. *See "In Context, a Publication of the Indiana Business Research Center at IU's Kelley School of Business," May – June 2012, vol. 13 no. 3.* These projections show the population of persons age 65 and older will increase 82%, from 12.1% of our population to 19.9% between 2010 and 2030, in Allen County. *Id.* Allen County's population in the 2010 census was 355,329 meaning that in the age 65+ category there were 42,995 persons. This category is projected to grow to approximately 70,710 by 2030. By 2030, the entire class of baby boomers will be of traditional retirement age. *Id.* After 2030, the growth of the 65+ age group category is expected to level off; however, the 85+ age group will have large increases between 2030 and 2050 as the baby boomers continue to age. *Id.*

Irrespective of the legal presumptions of capacity previously mentioned, as lawyers we need to be aware of recognizing signals of incapacity that we may observe in our representation of clients and in the intake of new clients.

E. Evaluating the extent of diminished capacity

The comments to PRC 1.14 provide the following guidance to a lawyer in evaluating the extent of a client's diminished capacity:

> *In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.*

Similarly, the American Trust and Estate Council ("ACTEC") comments to PRC 1.14 state:

> *In determining whether a client's capacity is diminished, a lawyer may consider the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client's values, long-term goals and commitments. In appropriate circumstances, the lawyer may seek the assistance of a qualified professional.*

Our contact with our best clients, with whom we have a long-term relationship, may occur every two (2) to five (5) years to discuss estate planning matters. But over the course of our representation, we have communicated with and listened to our clients' expression of short and long term goals, financial needs, asset management, wishes concerning care for possible incapacity, and asset distribution at death. There is usually a durable financial power of attorney in effect, naming one or more trusted family members or other trusted advisor with authority to act for our client. Given our long term legal representation for such a client, we may understand the history of decisions that have been made over the years, and, importantly, we helped develop a plan for taking care of our client in the event of incapacity in consultation with our client. Often times, it is a family member who has frequent contact with our client (and who may also be named as attorney-in-fact) who calls to inform us that our client is suffering from diminished

capacity. A visit with the client can often times confirm these circumstances. Because of our long-term relationship with our best clients, lawyers are often in a position to have information to help us gauge the level of our client's capacity and to the extent to which it may be diminished. Importantly, in these situations, we have had conversations about planning for incapacity with our client. There is, in fact, a plan in place to help with necessary decision making that is consistent with the client's goals. Finally, the individuals with whom the client has confidence in his or her abilities to carry out his or her wishes are prepared for, rather than surprised, by the responsibility.

The more difficult situation is presented in appropriately representing an older individual with whom you have only a new or limited relationship. What tools can you use to evaluate whether this individual is suffering from diminished capacity and whether this individual is able form an attorney-client relationship with you?

In your initial meeting, it is important to listen to your client and as they articulate what they wish to accomplish and, their reasoning for these decisions as well as their general state of mind. During this initial face-to-face conference, it is important to develop a good understanding of the client's goals. In subsequent meetings it is important to note whether those goals are staying fairly consistent and their level of understanding and ability to respond appropriately.

With first time clients, it is also necessary to determine what prior legal representation they have had with respect to their estate plan. Does another lawyer have an attorney-client relationship with your prospective client, and, importantly, does this prospective client have the capacity to terminate a prior representation to retain you?

When individuals are meeting with a lawyer for estate planning work, often times they are putting on their best appearances. It is important to be alert to possible issues regarding a client's diminished capacity. Here are some of the subtle signs that may indicate a problem:

1. Client is confused about money, bills, property and depends upon others to explain his or her situation to you.
2. The client keeps talking about events that occurred 40, 50 or more years ago, in vivid detail, but if you ask about what they did the day before, they cannot remember.
3. The client is easily distracted and randomly wanders from topic to topic discussing matters that are not relevant to the reason they are meeting with you.
4. The client has not made the appointment on their own; instead, a family member called to make the appointment.
5. The client is unable to drive and relies on a family member to bring him or her to the appointment with you.

While these signs may indicate a problem, it does not necessarily mean that if faced with one or more of these situations the individual lacks capacity. It is, however, an indication of diminished capacity that should be better understood before you commence legal representation. Understanding the scope of legal services requested and understanding the scope of the representation are a necessary first step in evaluating how to proceed.

If in the course of these contacts, the lawyer reasonably believes that the individual has borderline capacity, the lawyer can recommend or require before performing services, that the individual undergo professional evaluation by a neurologists or similarly qualified medical professional.

In the book, the *36-Hour Day* (previously cited), gives an example of an individual with dementia who can no longer manage money and, may accuse others of stealing from her:

> *Said Mr. Fried, 'My wife has kept the books for the family business for years. I knew something was wrong when my accountant came to me and told me the books were a terrible mess.'*
>
> *Mr. Rogers said, 'My wife was giving money to the neighbors, hiding it in the wastebasket, and losing her purse. So I took her purse – and her money – away from her. Then she was always saying I stole her money.*
>
> *36-Hour Day* at pp. 55-56.

F. Capacity depending on action taken

Whether a client is "capable" and has "capacity" depends on what it is the client intends to do. Indiana law has different levels of capacity for executing a last will and testament and a revocable agreement versus making an irrevocable gift of property or transferring property to an irrevocable trust or executing a general power of attorney document.

Indiana's probate code (IC §29-1) provides that anyone of sound mind who is eighteen (18) years of age or older, may make a will[3]. *I.C. §29-1-5-1.* Case law defines capacity to execute a will being that the testator (or testatrix) has the mental capacity at the time of executing his will to know (1) the extent and value of his property; (2) those who are the natural objects of his bounty; and (3) their desserts, with respect to their treatment and conduct towards him. *Verdi v. Toland,* 733 N.E.2d 25, 28 (Ind.App. 2000).

Indiana's Trust Code (IC §30-4 *et. seq.*) defines a settlor's level of capacity to create a trust. IC §30-4-2-10, provides:

[3] Persons younger than eighteen (18) may also make a will provided that they are either a member of the armed forces or of the merchant marines of the United States or its allies.

(a) If a trust is created by will, the settlor's capacity that is required to create the trust is determined by the applicable probate law.

(b) The capacity of a settlor that is required to create, amend, revoke or add property to a revocable trust is the same as the capacity of a testator that is required to make a will.

(c) To create or add property to an irrevocable trust, the settlor or transferor must be of sound mind and have a reasonable understanding of the nature and effect of the act and the terms of the trust.

(d) To direct the actions of the trustee of a trust, the settlor or other person must:

(1) Have the capacity to hold and deal with property for the settlor's or person's own benefit;

(2) Be at lease eighteen (18) years of age; and

(3) Be of sound mind.

In addition, reviewing prior estate planning documents executed by potential new clients, like wills and trusts and powers of attorney, help you assess what changes are being requested and how this change relates to the client's historical preferences.

G. Measurement tools to help assess capacity

Measuring capacity of an individual is not an easy task for an attorney who suspects a client is suffering from diminished ability to understand the consequences of proposed action. Particularly, some persons can mask cognitive decline with exceptional social and verbal skills, making it difficult even for persons professionally trained to determine incapacity or diminished capacity.

The Folstein Mini-Mental Status Exam ("MMSE"), is a short exam that can be given by medical professionals or attorneys. The test is a brief 30-point questionnaire that is used to screen for cognitive impairment. In about ten (10) minutes, it samples functions of arithmetic, memory and orientation. If a new client is residing in a nursing home, the nursing homes

typically administer either this test or a similar test to an incoming patient/resident. A copy of this can usually be obtained either through a family member or the client.

Another tool is to schedule several different meeting times with your client. It may take a series of meetings over several days, weeks or months for the attorney to reasonably understand the client's capacity. An attorney should note whether decisions be remembered from meeting to meeting and whether there a consistency in goals or a natural development of testamentary wishes.

If the attorney believes that impairment exists and is reasonably concerned that the client lacks capacity to form an attorney/client relationship and/or does not have testamentary capacity, the attorney can recommend that the individual undergo further mental evaluation by medical professionals.

II. Representing a Client with Diminished Capacity.

Situation: A family member (of Mary's) provides the following summary of a visit with an estate planning client of yours, "Mary", who is now residing at a nursing home with her sister, "Jane":

> *I visited "Mary" and her sister, "Jane" at the nursing home on Easter weekend. Both sisters were sitting in the same room. I sat between them. Both ladies had a walker in front of their chairs. Neither got up while I was there.*
>
> *Mary was pretty much non-responsive. She would shake her head no when asked questions, if she responded at all. She did not know me. I talked about some of the times we spent together, but she did not comment. She did not even have much facial expression. She sat in a recliner chair, somewhat slumped to one side. I gave her a little gift of an Easter chick that peeped. She was not interested in it and just let it lay in her lap. I did get about a half a smile out of her when I said goodbye.*

Her sister, Jane, was talkative and we interacted quite well, even though I had only met her once before. She seemed to know a lot more about her surroundings and could answer most questions. When presented with a question she could not answer, she replied "I am not aware of that". We talked of many things, and she told me things about the nursing home, about where she grew up, etc. During all this time, Mary never entered the conversation.

In talking with the gentlemen who let me in and out and escorted me to their room, on the way out, I remarked to him that Mary seemed in much worse shape than Jane, and he indicated that she had "gone down hill" pretty fast.

Indiana's RPC 1.14 is the starting point for any discussion about your ethical responsibilities for legal representation of an individual with diminished capacity.

In its comments to RPC 1.14, the ACTEC commentary's state:

If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case, the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.

In this example, it does not appear that Mary has testamentary capacity. She does not recognize a family member and resides in a nursing home for patients with dementia. It is less clear based on the report whether Jane has testamentary capacity. If an individual like Jane asks you to draft a new will or codicil for her, how you would proceed once you reasonably believe she has testamentary capacity?

A. Representing client's with diminished capacity able to execute documents/give informed consent

1. Maintaining a normal relationship as reasonably possible

RPC 1.14(a) instructs lawyers who has a client with diminished capacity, to maintain a normal client-lawyer relationship with the client, to the extent possible. Attorney Fleming, who spoke on *Dealing with the Aging Client* (previously cited), suggests a few practical solutions in communicating with a client with dementia:

- Speak distinctly, keeping sentence structure simple (but no baby talk!), pause before changing topics or concepts, avoid abstract vocabulary, metaphors and plays on words. Stay in the client's line of sight and make strong eye contact. Face the client at the same level, even if they are in a wheel chair.
- Repeat critical information two or more times, and in different words. Written materials, including flowcharts, may help.
- Take time, do not rush, and review these matters through multiple contacts, varying the time of day and perhaps even the location.
- Make the substantive portion of interviews as private as possible. However, often times a client may demand that family members participate in the meetings.
- Ask for and accept the client's direction on legal matters. When asking yes and no questions, phrase the question differently at least a couple of times. Since many persons with dementia will answer "yes" to all questions, be sure to work some questions in or where you are rephrasing a question for a "no" response to confirm the client's wishes.

2. The role of family members/advisors and other representatives

Elderly clients often bring family members with them to appointments and request that the family members participate in the meeting with you. While the Rules of Professional Conduct are not written especially well in the context of estate planning matters, RPC 1.6(a)

allows an attorney to disclose confidential information relating to your representation of your client, provided your client gives you "informed consent." Informed consent involves being able to discuss the advantages and disadvantages of including third parties in the attorney client discussions. It is usually recommended to receive your client's consent outside the presence of these family members or other individuals or advisors. The comments to Indiana's RPC 1.14 provide that when the presence of such persons are necessary to assist in the representation, the presence of these other individuals does not affect the applicability of the attorney-client evidentiary privilege.

When family members or others are participating in these meetings, the attorney should keep the client's interests foremost, even when the family members are suggesting a different preference. It is important to observe and to listen to the wishes of your client and give these wishes preference over other ideas that may be raised by family members during the conference.

What about a family member, like a child, who did not participate in estate planning discussions and subsequently contacts the lawyer for information? PRC 1.6(a), requires you to receive your client's informed consent before you can release any information. What if the person contacting you is the designated general financial attorney-in-fact for your client? It is good practice to get a consent in advance from your client of who you can release information to and under what circumstances.

3. Who is your client? In circumstances where your client has provided you informed consent to the participation of family members or other representatives in your meetings or communications, when you are dealing with a client with diminished capacity, the participation of these other members may obscure the identity of your client. By virtue of their participation, these other family members/individuals may feel you additionally represent them.

It is important to be clear with both your client and these family members about whom you consider to be your client and whom you do not represent.

In considering who your client is, consider these factors:

- Who has actually consulted the lawyer, and in what stated capacity?
- Who has called and made the appointment?
- Who is paying the lawyer's bill and from what source?
- Who has the regular communications with the lawyer?
- Who personally benefits from the representation?
- How easily can the others obtain representation?
- What do each of the clients and potential clients believe with regard to the representation?

An engagement letter and a discussion at the outset concerning the identity of your client and the focus of your representation will help avoid misunderstandings. But, over the course of the representation, these concepts are worth repeating over again. Also, if another person is paying your legal bills for your legal services to client, under PRC 1.7 (dealing with conflicts of interests with current clients), the client must be informed of that fact and consent to the arrangement. The arrangement must not compromise the lawyer's duty of loyalty or independent judgment to the client.

B. Representing a client who has no testamentary capacity or incapacitated.

If a legal representative, such as a guardian, has been appointed, the attorney should ordinarily look to the representative to make decisions on behalf of the client. *Comments to RPC 1.14.* If the lawyer reasonably believes that the client has diminished capacity, has no legal representative, is at risk of substantial physical, financial or other harm unless action is taken,

and cannot adequately act in the client's interest because the client is unable to enter into an informed consent as legal representation, a lawyer is permitted to take reasonably necessary protective action, and consult with others regarding doing so.

The term, "incapacitated person" is defined under Indiana law to include an individual who is unable:

> (1) to manage in whole or in part the person's property;
>
> (2) to provide self-care; or
>
> (3) both,
>
> because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other incapacity.
>
> IC §29-3-1-7.5(2).

While an individual who meets these criteria should have a guardian appointed to prevent harm to the incapacitated client, the Rules of Professional Conduct do not *require* the attorney to initiate these proceedings. Rather, the rules are permissive. In addition, because these rules are written as to the lawyer's duties to his or her *client*, this presupposes that an attorney-client relationship has been formed during a time the client could consent to the representation.

In, *Cashill v. Nevada, 2012 Nev. Unpub. LEXIS 241* the Nevada court, considered an attorney's request for legal fees in his efforts to protect his client pursuant to Rule 1.14(b). In this case, the attorney represented a client in the dissolution of her family corporation over a period of eight (8) or nine (9) years with a favorable outcome and created two (2) separate trusts for her benefit. The attorney subsequently learned that the client had been institutionalized and diagnosed with having major depressive episode with a psychotic reaction. Several months after

client's release, the attorney received some information that led him to believe that two (2) advisors were exercising undue influence over the client. As a result, the attorney took actions under Nevada's comparable Model Rule 1.14 to protect the client's financial assets. The appeal by the attorney was made to the Nevada Supreme Court for his own fees and costs in his actions to protect his client which the lower courts had denied finding the Attorney did not have an attorney-client relationship. The Supreme Court of Nevada held that, based on the previous representation, the attorney had performed for the client, and there was an implied attorney-client relationship in the proceedings related to protections of the client's assets and, furthermore, that the attorney was entitled to reasonable fees for his efforts under Rule 1.14.

When an attorney takes action to protect a client under PRC 1.14, the comments provide that the attorney is directed to advocate for the least restrictive action on behalf of the client.

C. May an attorney represent the attorney-in-fact for the former client who is now incapacitated?

The quick answer is: maybe - it depends. Generally speaking, PRC 1.9 describes an attorney's duty to "former" clients.

Rule 1.9 states:

> *(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.*

Under Indiana law (and unless otherwise stated in the power of attorney document), an attorney-in-fact is required to use due care to act *for the benefit of the principal* under the terms of the power of attorney instrument. *IC § 30-5-6-2.*

Given the fiduciary duties imposed on the attorney-in-fact for the benefit of the principal, it seems more likely than not that in most cases, an attorney may represent the attorney-in-fact

for an incapacitated client. However, in the event the attorney becomes aware that the attorney-in-fact is not acting in the best interest of the principal (the incapacitated client), a conflict can arise. In such a case, the attorney should withdraw. Whereas RPC 1.14(b) would permit an attorney to take action to protect client lacking capacity (and under the Nevada case, argue that there is an implied attorney-client relationship), the attorney represents the attorney-in-fact for the former, now incapacitated client now has independent obligations to the interests of the attorney-in-fact that he represented before the conflict arose. RPC 1.6(b)(2) and (3) permit an attorney to reveal information obtained during representation of attorney-in-fact to the extent the lawyer reasonably believes such disclosure is necessary to prevent the client from committing a crime or fraud on another that is reasonable certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

D. Preserving evidence of capacity.

It is recommended that the attorney keep good notes in any engagement dealing with estate planning matters. This is particularly important when dealing with a client with diminished capacity. The greater the concern, the greater the preservation of evidence is recommended.

Attorneys should keep any doctor's letter stating opinions of a client's capacity or lack of capacity or reports of physicians concerning capacity issues. Keep notes of the conversation with the client and who was present, if anyone. If someone was specifically excluded from conversations due to concerns of undue influence, provide that information in the notes to the file.

Consider videotaping the execution of the instruments, including video of you asking the client some basic questions showing reasoned decision. However, be aware that sometimes these tapes are counterproductive and may not prove capacity. Keep hand written or typed notes that your client provides to you regarding his or her wishes.

This evidence of capacity will be helpful in the event you are required to testify as to your client's capacity to execute his or her will, trust or other estate planning instruments.

* * * *

In sum, the determination of a client's capacity for estate planning relies on attorney's good judgment, recognition of increasing elderly populations facing declining capacity, and being aware of and alert to warning signs of dementia or serious cognitive impairment. Lawyers should act in good faith to determine the client's capacity and ability to execute an estate plan. Recognize that borderline cases will permit an attorney to proceed, albeit cautiously. In so moving forward diligently, thoughtfully and taking due care, the elderly client, can have testamentary freedom in executing wills, trusts and other testamentary instruments.