An attorney, referred to as “Attorney A” for purposes of this opinion, has submitted an inquiry to the Committee regarding his relationship with a financial planning firm (the “FP firm”). The description of the business arrangement presented in Attorney A’s letter is referred to herein as the “Submitted Facts.”

In the Committee’s opinion, the proposed business arrangement, as described in the Submitted Facts, violates Rule 7.3 of the Indiana Rules of Professional Conduct, may violate Rules 5.4 and 5.5(b), and possibly conflicts with several other rules.

**The Submitted Facts**

Attorney A is licensed and in good standing to practice law in the State of Indiana. His continuing education activities are focused largely on tax and estate planning issues. Attorney A is also stated to be “... licensed and in good standing as a Certified Financial Planner” (although Indiana law contains no explicit provisions for the licensing or certification of financial planners).

Attorney A is one of the owners of the FP firm, whose other owners and employees are non-lawyers. In delivering financial planning services, non-attorney personnel of the FP firm may decide that a customer also needs estate planning services. In such cases the representative of the FP firm may recommend that the customer retain Attorney A to perform these legal services.

The next step calls for Attorney A to prepare an “engagement letter,” which would include statements that “none of the legal fees will be shared with non-lawyers,” and that the FP firm’s financial planning fees “do not change if the legal documents are prepared by client’s long-standing attorney elsewhere.” Upon engagement, Attorney A prepares the legal estate-
planning documents and charges the client for those services separately from the financial planning services performed by the FP firm’s other personnel.

Attorney A also accepts referrals from an outside financial planning firm, for “stand-alone estate-planning services,” and charges the same document-drafting fees to such “outside” clients as to FP firm clients.

The FP firm does not advertise legal document drafting services and does not solicit document drafting engagements by its non-attorney representatives.

Submitted Questions

The primary question submitted is, “Does [Attorney A’s] conduct in this scenario comply with the Indiana Rules of Professional Conduct?”

The inquiring party has also submitted three subsidiary questions, each of which follows from the primary question. Because the response to these subsidiary questions depends on the same analysis as the primary question, they are addressed individually below in the “Conclusions” section of this Opinion.

Analysis

The scenario outlined under the Submitted Facts raises issues concerning “multi-disciplinary practice” (“MDP”) -- that is, whether and to what extent attorneys may ethically practice law as part of a business venture that is partially owned by non-lawyers, including members of other disciplines such as accountancy or financial planning.

The Committee recognizes that MDP is the subject of intense interest and discussion within the legal profession and has been addressed recently by, among other things, proposed amendments to the Model Rules recommended by the American Bar Association’s Commission
on Multidisciplinary Practice, which were rejected by the ABA House of Delegates on July 11, 2000. See e.g., William J. Harvey, The gathering storm: MDP versus the legal profession, legal ethics and the Indiana lawyer, Res Gestae, Sept. 2000, at 24; Caryn Langbaum, Will attorneys vote themselves out of the competition?, Res Gestae, Oct. 2000, at 12; The Future of the Profession: A Symposium on Multidisciplinary Practice, 84 Minn. L. Rev. 1269 (2000); Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership, 13 Geo. J. Legal Ethics 217 (2000). In Indiana these issues have also been studied by the ISBA’s Indiana MDP Task Force.

Nevertheless, the Committee also recognizes that its role is to respond to specific inquiries raised by attorneys and to interpret the Rules as they exist today. Therefore, the present opinion is limited to addressing the particular circumstances set forth in the Submitted Facts; it is intended to express no broader opinion about the future or ethics of MDP.

The Committee’s opinion is that the proposed arrangement outlined by Attorney A violates Rule 7.3(a), and may conflict with Rules 5.4 and 5.5(b), for the reasons discussed below.

A. Rule 7.3 -- Rule 7.3(a) provides, “A Lawyer shall not seek or recommend by in-person contact (either in the physical presence of, or by telephone) the employment, as a private practitioner, of himself . . . to a nonlawyer who has not sought his advice regarding employment of a lawyer, or assist another person in so doing.”

Under the Submitted Facts, staff of the FP firm may, and for reasons discussed below are likely to be, recommending Attorney A’s services to their non-lawyers clients. This practice may violate Rule 7.3(a) in two ways. First, because Attorney A is a part owner of the FP, at least some of the recommending personnel would be his employees, who could be deemed to be acting
on Attorney A’s own behalf in making an in-person recommendation of his services. Second, even if such personnel were not acting as his agents, Attorney A would be participating in this arrangement by “assisting another person in” recommending Attorney A’s employment to a non-lawyer, in violation of the last clause of the Rule. See e.g., State Bar of Mich., Comm. on Professional and Judicial Ethics, Informal Op. CI-1058 (1985) (advising that lawyer may not enter into arrangement with debt consolidation corporation that interviews clients, evaluates their needs for legal services, and refers those requesting legal services to lawyer); N.Y. State Bar Ass’n, Comm. on Professional Ethics, Op.565 (1988) (advising that lawyer may not hire public relations and marketing firm to solicit potential clients in person, and may not compensate firm on basis of legal business so generated).

Although the Submitted Facts do not suggest that employees of the FP firm will be directly compensated based on their referrals to Attorney A, these employees can be expected to know that Attorney A is a part owner of the FP firm. [Thus, they may feel impelled by economic pressure, or induced by hope of financial reward, to recommend that a client retain Attorney A, regardless of whether retaining Attorney A -- or hiring any lawyer -- is in that client’s best interests.]

Furthermore, the prospect that employees or the other, non-attorney owners of the FP will be rewarded -- even indirectly -- for referring clients to Attorney A creates the potential for violation of Rule 7.3(f). Under that Rule, a lawyer may not “compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client . . .”

Such rules reflect the principle that the selection of an attorney must “result from a free
and informed choice by the client" and the concern that "when a nonlawyer has a monetary interest in referring cases to an attorney, then it is the referrer's and not the client's best interests that are being considered." Trotter v. Nelson, 684 N.E.2d 1150 (Ind. 1997) (holding that alleged contract between attorney and non-attorney for referral of clients was unenforceable as against public policy embodied by Rule 7.3(f)) (citations omitted).

It should also be noted that under some circumstances, the "engagement letters" sent by Attorney A to prospective clients he has never met should be treated as solicitation letters governed by Rule 7.3(c). If one of Attorney A's co-owners or employees at the FP firm (or someone at the "outside" FP firm) simply gives a customer's name to Attorney A, without making a prior recommendation to the customer, or a recommendation is made without the customer having a "family or prior professional relationship with Attorney A and does not indicate a willingness to be contacted," then an ensuing written communication from Attorney A would appear to be within the reach of Rule 7.3(c). That Rule provides in relevant part, "Every written communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words 'Advertising Material...'")

In an analogous case, Matter of Anonymous, 630 N.E.2d 212 (Ind. 1994), unsolicited letters soliciting employment with respect to a need to avoid mortgage foreclosures were held to be subject to Rule 7.3(c)'s "Advertising Material" requirements.

**B. Rules 5.4 and 5.5 --** This Committee has considered in the past the ethical issues raised by attorneys who offer legal services as part of non-legal businesses, and we have noted that such arrangements may violate a range of Rules in addition to 7.3. See, e.g., Opinion No. 4
of 1992 (concluding that attorney's relationship with financial services organization that referred prospective investors to attorney did not appear to violate Rule 5.4 or 5.5 so long as attorney prepared all forms and made independent assessment of client's legal needs, but that such arrangements created great potential for violation of Rules, and might implicate prohibitions on fee-splitting and referral services); Opinion No. 5 of 1991 (concluding that, notwithstanding fact that attorney labeled his business a real-estate management firm, and that certain tasks were a hybrid of lawyer and lay functions, arrangement would constitute practice of law, but attorney could advertise himself as offering property management services so long as he complied with Rules 7.1, 7.3, and 7.4).\(^1\)

In the instant case, the Submitted Facts do not contain sufficient detail for the Committee to determine with certainty whether the proposed scenario would violate these other Rules. Moreover, there is often no clear line between the limits of financial-planning tasks that are merely "law-related services" and thus properly provided by non-attorneys, and other tasks so closely related to estate planning law that they constitute "the practice of law" and are foreclosed to non-attorneys. As the Indiana Supreme Court noted in *State ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Assoc.*, 244 Ind. 214, 191 N.E.2d 711, 714-15 (1963):

Although the practice of law is one of the oldest and most honored professions, the law itself is by no means an exact science, the practice of which can be accurately and unequivocally defined . . . There is a twilight zone between the area of law which is clearly permitted to the layman, and that which is denied him. Thus, the

\(^1\)Other states' bars have grappled with these issues as well; see Utah State Bar Ethics Advisory Opinion Committee, Opinion No. 97-09 (considering whether lawyer's plan to provide legal services in conjunction with non-lawyer estate-planning professionals violated Rules 1.1, 1.2(b), 1.6(a), 1.7(b), 5.3, and 5.5(b)); Report of the Illinois Bar Ass'n's Corporate Law Section to the Illinois State Bar Ass'n (www.illinoisbar.org/mdppro.html); report of the Boston Bar Ass'n's Ethics Committee (at www.bostonbar.org/pw/ethics/1999b.html).
question which this court must determine is where, within this ‘twilight zone,’ it is proper to draw the line between those acts which are and are not permissible to people who are not lawyers.

Notwithstanding this zone of uncertainty, the Submitted Facts present a danger that the activities of the FP firm and its non-attorney representatives, by providing services in conjunction with Attorney A, could cross over the line into the practice of law. If so, Attorney A’s actions could be considered as assisting those persons in violation of Rule 5.5(b), which provides that lawyer shall not “assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”

For example, after non-attorney financial planners gave advice to the customer, only the final drafting of the recommended documents might be left to Attorney A. (In an extreme case: “Here are some standard forms that you can use, but you will have to get an attorney to look them over and re-type them before you sign them.”)

Rule 5.4(c), which prohibits an attorney from allowing a person who “recommends the attorney’s employment from influencing the attorney’s professional judgment,” might also be violated by these arrangements. For example, in Matter of Thrasher, 661 N.E.2d 546 (Ind. 1996), where an attorney regularly accepted referral of bankruptcy matters from a business management company specializing in financial and tax planning. The attorney signed and filed papers prepared by non-attorneys without having actually met or consulted with the client in question. The Court found that such a practice violated Rule 5.4(c) as well as Rules 1.1, 1.4(b), 1.8(f), 3.3(a)(1), 5.5(b), and 8.4(c).

Even if Attorney A took care to consult with the client and prepare documents personally,
and thus avoid the specific practice disapproved of in Thrasher, the danger of compromising Attorney A's professional judgment could arise when non-attorney personnel of the firm advised their customers that they need particular types of estate planning documents, and then referred them to Attorney A for the drafting of such documents. If Attorney A finds that the suggested documents are in fact not the best answers to the clients' needs, he might nevertheless feel constrained against making alternative suggestions. Such suggestions would tend to discredit the expertise of his employees and thereby reduce the FP firm's reputation and the value of his ownership interest.

In addition to constraining the exercise of independent legal judgment as prohibited by Rule 5A(c), these circumstances could also present Attorney A with a material conflict between his own interests and those of his client, in violation of Rule 1.7(b). That Rule provides, "A lawyer should not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests." If the non-attorneys in the FP firm sell the client on the idea of buying certain items (e.g. annuities, stocks) there may be commission income involved which would at least indirectly benefit Attorney A. This would conflict with Attorney A's duty to independently evaluate the client's estate plan.

There is also a danger, depending on the details of the FP firm's structure and operations, that the scenario outlined by Attorney A would violate Rules 5.4(a) (prohibiting fee-sharing with non-attorneys) and 5.4(b) (prohibiting partnerships with non-attorneys "if any of the activities . . . consist of the practice of law").

**Conclusion**

For the reasons above, the Committee's opinion in response to the primary question
posed by Attorney A is that the proposed arrangement violates Rule 7.3(a), and presents serious risk of conflict with Rules 5.4 (a)-(c) and 5.5(b), as well as the other Rules noted in the past cases cited above. The structure of this business arrangement seems inherently conducive of violations of several parts of the Rules of Professional Conduct and therefore may not be permitted.

The Committee’s response to the three subsidiary questions set out below, all of which are presumed to be also governed by the Submitted Facts, follows the same analysis.

The first subsidiary question is as follows “Assuming arguendo that [Attorney A] can ethically provide legal services in this scenario, what is the extent to which [Attorney A’s] financial planning co-workers can recommend [Attorney A] and/or other attorneys (who are not associated with the financial planning firm) for their clients’ legal document drafting needs?”

For the reasons given above, the Committee believes that any referral by employees or co-owners of the FP firm to Attorney A would violate Rule 7.3(a). Rule 7.3(a) uses the term “shall not,” and thus does not permit an “extent” or “degree” of recommendation or solicitation.

The second subsidiary question is, “Would the Committee’s answer change if [Attorney A] kept an office or location separate from financial planning firm’s office? . . . In other words, does [Attorney A’s] physical proximity to the financial planning firm have an impact on the attorney’s compliance with [the Rules]? [Is there a] “minimum physical proximity” [or] “minimum contacts” test in this regard?”

The answer to this question, and each of its three sub-parts, is no; the Committee does not believe that the physical configuration of Attorney A and FP firm personnel has any bearing on the policies behind or interests protected by Rule 7.3 or 5.4 and 5.5. Rather, it is the economic relationship between Attorney A and the FP firm, and the ability of the client to receive
independent, competent legal advice, that governs the permissibility of these practices.

The third subsidiary question is, "Is [Attorney A] within the Rules of Professional Conduct if he/she works part-time in the financial planning firm and part-time as a solo legal practitioner?"

To the extent that this question refers to Attorney A's practice under the scenario contained in the Submitted Facts, the Committee believes that such practice is not within the Rules, for the reasons stated above.

To the extent that this question asks whether it is a violation under any circumstances for an attorney to practice part-time within a financial planning firm and part-time as a solo legal practitioner, the Committee believes that there is no per se prohibition on such dual employment, but that the circumstances of an attorney's particular practice must be evaluated with respect to the Rules cited above. The Committee's present Opinion must therefore be limited to the particular Submitted Facts presented by the inquiry, and not broadly applied to every situation in which an attorney maintains business interests or relationship beyond his law practice.
Opinion No. 2 for 2001

Editor's Note: The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued solely for the education of those requesting opinions and the general public. The Committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.

Facts

Grandfather is a wealthy 88-year-old widower whose only child is deceased but who has a granddaughter and a grandson. For five years, Grandfather has used Attorney Jones to draw up and implement an estate plan, including a trust, a will, a health-care power of attorney and a financial power of attorney. Jones has also helped Grandfather transfer real estate into the trust, sell real estate and make gifts.

The financial power of attorney provided that it would not be effective except upon Grandfather's incapacity, as certified in writing by a physician. The trust had a similar mechanism whereby Grandfather was trustee, but upon his incapacity as certified, successors would assume the administration of the trust. The power of attorney provided that Granddaughter and Bank were to serve jointly once Grandfather could not; the trust provided that Granddaughter, another individual and Bank would serve as successor co-trustees in the same event. Grandfather told Jones that while he loved Granddaughter and appreciated her care and attention, he did not want her to serve alone as attorney-in-fact or as successor trustee because of Granddaughter's financial problems and because he did not care for her husband. Grandfather had loaned Granddaughter considerable sums over the years, which Granddaughter had not repaid, and Granddaughter owed a large amount of unpaid taxes from a failed business venture. Granddaughter had also made demands upon Jones to make Grandfather follow through on a promise Grandfather made that he would make a gift to Granddaughter of a life estate in certain real estate he owned which Granddaughter wanted to develop. Further, on several occasions Granddaughter had brought Grandfather to Jones' office to change Grandfather's will and trust to leave Granddaughter her shares under the will and the trust outright and not for life, but on each occasion Grandfather told Jones he was still thinking about it and did not want to make the changes.
Grandfather’s health deteriorated, and because of chronic pain Grandfather went into a depression, no longer wanted to get out of bed or get dressed, and was not bathing or eating regularly. Jones became concerned and arranged for a physician visit and a home health aide, though Granddaughter complained that Jones was "interfering." Grandfather was also not paying quarterly estimated tax payments, and utility bills went unpaid.

Granddaughter came to Jones' office and demanded that she be made sole attorney-in-fact. Jones explained that a physician needed to certify that Grandfather could no longer handle his own affairs, which would trigger the power of attorney with co-attorneys-in-fact and trigger the need for successor co-trustees, and Jones said he would begin that process.

Granddaughter, unsatisfied with Jones' approach, then consulted Attorney Smith, telling Smith that Grandfather wanted a new power of attorney making Granddaughter sole attorney-in-fact. (It is not clear whether Granddaughter told Smith that Jones had been approached on the matter of a new power of attorney and that Jones declined to draw up a new power of attorney; for purposes of this Opinion, the author will assume she did not.) Smith prepared the new power of attorney. Smith sent a paralegal who was a notary to Grandfather to secure Grandfather's signature, but Smith never saw or consulted with Grandfather, and considered Granddaughter to be Smith's client. The paralegal brought a letter from Smith to Grandfather and read it to him; the letter stated Granddaughter was Smith's client, and that if Grandfather had any questions or reservations about the power of attorney, Grandfather should contact his own attorney. In the presence of the paralegal and the home health aide, Grandfather indicated he understood the document and wanted to sign it, and he did.

Jones did contact Grandfather's physician, who certified in writing that Grandfather was incapacitated. The letter from the physician was dated one week before Grandfather executed the new power of attorney which Smith prepared.

Granddaughter as purported sole attorney-in-fact is now beginning to take action. She has fired Jones as Grandfather’s attorney and hired Smith to be Grandfather’s new attorney to do a new estate plan for Grandfather, and she is demanding that Jones turn over all files relating to Grandfather and the trust. When Jones received a letter from Grandfather instructing Jones to turn over his documents to Granddaughter, Jones went to visit Grandfather to seek
clarification. Grandfather told Jones he remembers signing the letter and the power of attorney because Granddaughter wanted him to, but that he didn't understand them.

Issues

Smith wants to know whether his client Granddaughter as attorney-in-fact and successor trustee is entitled to Grandfather's files and the trust records from Jones (and whether Jones is committing an ethical violation by refusing to provide the information), and Jones wants to know whether he can resist the demand for the files and otherwise take steps to protect Grandfather's interests. Certain other ethics issues which neither Smith nor Jones have raised are implicated by the facts and merit discussion. A statement of the issues is as follows:

1. Who is Smith's client in the preparation of the power of attorney, Granddaughter or Grandfather?

2. Is Grandfather a continuing client of Jones as to estate-planning and incapacity-planning matters? If so, was Smith obligated to contact Jones as Grandfather's attorney and not to contact Grandfather directly? If not, has Smith provided advice to an unrepresented person?

3. May Jones take any protective actions regarding Grandfather?

4. Did Smith properly supervise his paralegal in delegating any obligation to ascertain Grandfather's capacity and freedom from undue influence?

Discussion

Issue 1 – Who is Smith's client?

A. Granddaughter as Smith's client

It may be that Granddaughter is Smith's client, as Smith asserts. In other cases where a lawyer represents a fiduciary (a personal representative or a guardian), the lawyer represents the fiduciary as such and not the beneficiary, though there are special considerations short of a lawyer-client relationship which run from the lawyer to interested persons. Some agency relationships are really contractual arrangements for professional services, such as a property manager or a bank or trust company agent for managing a portfolio. With these, the agent's
lawyer may well have prepared the agreement. The agent expects compensation, being in
business to render the services sought, but the agency is ultimately for the benefit of the
principal.

A power of attorney with a layperson agent, especially a family member helping a frail older
person, is distinguishable from such a professional-services agency contract. A layperson agent
is not in the business of being an agent, the arrangement is not negotiated at arms length, the
principal may already have some dependence on the proposed agent (perhaps even
approaching undue influence), and often the agent is expected to serve without
compensation, though an attorney-in-fact by statute is entitled to a reasonable fee for services
rendered. With a frail-principal-type power of attorney, it is at least a stretch to reason that a
lawyer may serve a client’s objective to become an agent and a fiduciary for another person,
but it may be possible.

Smith may have violated Rule 1.2 with Granddaughter’s initial consultation by failing to make
further inquiry into her true objectives. A lawyer should not undertake a representation
without making further inquiry if the facts presented by a prospective client suggest that the
representation might aid the client in perpetrating a fraud or otherwise committing a crime. The
fact that a proposed client in drafting a power of attorney was the agent and not a frail
principal should have suggested to Smith the possibility that the client’s real objective might
be fraud. Smith then had an ethical responsibility to find out whether the proposal was above-
board before performing the services. By failing to make further inquiry, Smith violated Rule
1.2.

If Smith reasonably concluded that Granddaughter was the client, Smith did indeed need to
advise Grandfather that Smith did not represent Grandfather. The problem with the
advisory, however, is that Smith under these circumstances had a due diligence requirement
to ascertain whether Grandfather had the mental ability to appreciate the advisory, in
addition to ascertaining whether he had the ability to execute the document, and Smith did
neither. Paragraph 8 of the Comments to Rule 1.2 states that where the lawyer’s client is a
fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.
The special obligation is clearly meant to put a lawyer on heightened alert as to a beneficiary’s
capacity and circumstances where the client is a fiduciary, because of the existence of a
confidential relationship between the client and the beneficiary. Smith’s failure to ascertain
either Grandfather's capacity to appreciate the advisory or his capacity to execute the
document is a violation of this Rule 1.2 special obligation, notwithstanding the fact that
Granddaughter is the client.

Smith also violated R.P.C. Rule 4.2, which prohibits a lawyer from communicating with a
person the lawyer knows to be represented by another lawyer in the matter.6 While it may
sometimes be difficult to identify the outer bounds of the same matter for Rule 4.2 purposes,7
the preparation of a new power of attorney is clearly the same matter as Grandfather's existing
estate plan and incapacity plan, which for five years were handled for Grandfather by Jones.
Smith certainly knew that there was an existing power of attorney, because Granddaughter
said Grandfather wanted a "new" one. Further, the circumstances strongly suggest that
Grandfather either actually had or might well have had a lawyer for an estate plan and an
incapacity plan, because Grandfather was wealthy, had complicated property affairs, and had
only recently fallen into ill health. Prudent persons of means almost invariably avail themselves
of the assistance of many professionals including lawyers to organize and manage their affairs.
It would not be reasonable here for Smith to claim he did not know Grandfather had a lawyer
already; a lawyer may not avoid Rule 4.2 by simply closing his eyes to the obvious.8 Smith
further could not reasonably claim that Grandfather had discharged Jones, even if
Granddaughter had said so; Smith should have taken steps to confirm any representation that
prior counsel had effectively been discharged,9 at the very least by inquiring of Grandfather
and probably by attempting to contact the discharged lawyer as well.

If, however, Grandfather could be said not to have a lawyer on the matter of the new power of
attorney, it may be that Smith's submission of the proposed new power of attorney to
Grandfather constituted the giving of legal advice to a person not represented by counsel, in
violation of Rule 4.3.10 The advice Smith was impliedly giving Grandfather by tendering the
power of attorney was at the very least the advice that in Smith's opinion Grandfather had the
capacity to execute the power of attorney, and perhaps also the advice that the arrangement
was suitable and appropriate and not a fraud on Grandfather. Here, Smith's letter of non-
representation fell well short of a notice clarifying Smith's limited interests and dispelling the
implied advice, which would constitute a violation of Rule 4.3.

With Granddaughter as a client, Smith soon might have a further Rule 1.2 problem. Once
Granddaughter begins to use the new power of attorney, any transaction she enters into with
Grandfather is presumptively invalid as the product of undue influence. Further, if the transaction benefits Granddaughter personally, the transaction is presumed fraudulent. Smith could then be assisting Granddaughter in such fraudulent conduct in violation of Rule 1.2(d). If Smith in good faith believed Granddaughter's initial conduct was proper but later discovers that Granddaughter is bent on fraud, Smith would be required to withdraw from the representation. There are red flags galore raised by Granddaughter's conduct; Granddaughter has already tried to convince Jones to help complete a gift to her which Grandfather proposed, and has tried to persuade Grandfather to change the estate plan arrangement from Granddaughter receiving a life estate in certain property to Granddaughter receiving the fee interest. After rendering the initial service to Granddaughter of drafting a new power of attorney, if Granddaughter asks Smith to do anything else, Smith would have a duty to make further inquiry into Granddaughter's objectives to avoid assisting a client with a fraud.

B. Grandfather as Smith's client

A power of attorney is "[a]n instrument authorizing another to act as one's agent." The agent is a fiduciary, with a relationship to the principal of trust and confidence analogous to that of a trustee, having a duty to act primarily for the principal's benefit with scrupulous good faith and candor, and having "the punctilio of an honor the most sensitive [as] the standard of behavior." Granddaughter came to Smith, purportedly at the request of Grandfather, to draft a new power of attorney. The person whose objective is carried out by the attorney-client representation would seem to be Grandfather rather than Granddaughter on two grounds: First, Granddaughter was asking for Smith's assistance in accomplishing what Grandfather had requested of her (in effect, Granddaughter in consulting Smith is acting as an informal agent, enlisting Smith's help in carrying out Grandfather's objective of having a new power of attorney). Second, the objective of the representation was the appointment of an agent whose duty will be to act for the exclusive benefit of a principal. Grandfather may be Smith's real client with the preparation of the power of attorney, Smith's characterization notwithstanding.

If Grandfather is Smith's client, Smith has violated R.P.C. Rule 1.2 requiring a lawyer to abide by a client's decisions regarding the objectives of the attorney-client representation. Smith in fact never found out Grandfather's objectives directly from Grandfather, but instead relied
on Granddaughter's representations as to Grandfather's objectives (and Granddaughter at
that time was not purporting to act as authorized attorney-in-fact under the old power
of attorney). Had the estate-planning document been a will, no prudent lawyer would have
permitted the will to be executed without confirming the testator's wishes where the initial
communication of those wishes was with someone other than the testator. Further, while a
trust may be executed by an agent on behalf of a settlor, no prudent lawyer would permit an
agent to specify the terms of a trust instrument and then to execute it as settlor's attorney-in-
fact without independently ascertaining the settlor's wishes. A power of attorney is executed
with less formality than a will but more formality than a trust, but still represents an agency
arrangement for the sole benefit of a principal. A lawyer who drafts a power of attorney for a
frail principal to execute may be doing so at the implied instance of the principal, so that the
client is the principal and not the attorney-in-fact.

The facts also suggest that if Grandfather is the client, Smith may have violated Rule 1.14 in
another way. The rule requires a lawyer to maintain a normal lawyer-client relationship with a
client whose ability to make considered decisions is impaired, but authorizes the lawyer to take
protective action where the client cannot adequately act in the client's own interest. The
Comments to Rule 1.14 direct a lawyer to see to the appointment of a legal representative
where there is not one and where it would serve the client's best interests. Further, the
Comments expressly mention that the lawyer should maintain communication. Here, if Smith
had exercised reasonable diligence to ascertain the physical and mental condition of
Grandfather, Smith would have known of a clear need for the appointment of a suitable
representative for Grandfather. There were mechanisms already in place for appropriate
representatives to be appointed, namely, secure the physician certification that Grandfather
could not handle his own affairs, which would trigger two things: first, the springing of the
existing power of attorney so that the named co-attorneys-in-fact could assist with
individually owned property, and second, the right of successor co-trustees to assume
management of trust property. There would also be a substantial question whether
Grandfather had the capacity to put in place any other mechanism for the appointment of a
representative, such as a new power of attorney with different terms. Rule 1.14 imposed upon
Smith an obligation to consider whether an impaired client had the capacity to enter into
various protective mechanisms such as a new power of attorney or a new revocable trust.
Under these circumstances, if Grandfather is Smith's client, Smith violated Rule 1.14 by
assuming without seeing or talking to Grandfather that Grandfather had the capacity to make a new power of attorney.21

C. Granddaughter and Grandfather as Smith’s joint clients

Joint representation of both Granddaughter and Grandfather would be another possibility with Smith’s preparation of a new power of attorney (and Granddaughter as attorney-in-fact has attempted to arrange Smith’s joint representation for all matters since by purportedly firing Jones and hiring Smith as Grandfather’s lawyer.) Under R.P.C. Rule 1.7, a lawyer shall not represent a client if the representation may be materially limited by the lawyer’s responsibilities to another client unless the lawyer believes the representation will not be adversely affected and the client consents after consultation. Representation of multiple clients in a single matter is possible, but only where the consent after consultation is given, and the consultation must include an explanation of the implications of common representation and the advantages and risks.

Here, Smith did not consult Grandfather at all on the preparation of the new power of attorney, and Smith did not obtain his consent. As discussed above, had Smith met Grandfather face-to-face, the issue of Grandfather’s capacity would have been apparent, so as to make the effectiveness of any consultation regarding joint representation suspect, and to make the validity of any consent to joint representation questionable. Certainly, Smith provided Grandfather no explanation of the implications of joint representation or the advantages and risks. If Granddaughter and Grandfather are Smith’s joint clients on the new power of attorney, Smith has violated Rule 1.7.22

Issue 2 – Is Grandfather a continuing client of Jones?

If Grandfather is a continuing client of Jones on estate-planning and incapacity-planning matters, then Smith violated R.P.C. Rule 4.2 by contacting Grandfather in seeking Grandfather’s signature on the new power of attorney. An estate plan or incapacity plan is typically an ongoing process, with changes necessary as the law changes or as the circumstances or wishes of a client change. Whether a lawyer’s representation of a client on such matters has terminated would depend on whether the client has expressly discharged the lawyer or upon the passage of considerable time where no legal services had been rendered. Where
Grandfather has not expressly discharged Jones, and only days or weeks (and not months or years) have passed since Jones's last legal services for Grandfather, Jones is still Grandfather's lawyer for estate planning and incapacity planning.

As discussed above, Smith knew or should have known that Grandfather had employed Jones as his lawyer on estate planning and incapacity planning in the near-past. If Smith had any question about whether Jones represented Grandfather, Smith had a duty to find out, either by asking Grandfather or Jones or both, and Smith failed to do so. Smith's contact with Grandfather thus violated R.P.C. Rule 4.2. Also as discussed above, if Grandfather were not a continuing client of Jones but a former client, Smith's tender of the new power of attorney to Grandfather for signature might constitute the impermissible giving of advice to an unrepresented person in violation of R.P.C. Rule 4.3.

Issue 3 – May Jones take any protective action?

R.P.C. Rule 1.14 provides that a lawyer may take protective action for a client where the client's ability to make adequately considered decisions is impaired. A lawyer should take the protective action that is least restrictive under the circumstances. Here, Jones has considerable reason to believe that the new power of attorney is invalid, in light of the physician's certification that Grandfather was incapacitated on a date prior to execution of the new power of attorney. Jones might well also have grounds to believe Grandfather is subject to Granddaughter's undue influence under the circumstances, knowing how Granddaughter has made attempts to influence Grandfather in the past. Jones is authorized by Rule 1.14 to take action to protect incapacitated client Grandfather under these circumstances, with the particular steps taken the only issue.

One step which Jones could take and has taken is to resist Granddaughter's demand as purported attorney-in-fact for Grandfather's file. This is the least restrictive protective action that Jones could take, and is clearly authorized by the rules under the circumstances, at least until it is established judicially that the power of attorney is valid. One further action which Jones might contemplate to protect Grandfather would be to bring a declaratory judgment action to determine the validity of the new power of attorney. If such an action is brought, Jones should request that a guardian ad litem be appointed for Grandfather in the action. Jones might also consider requesting injunctive relief pending a hearing on the merits if that
were felt to be in Grandfather's best interests.

**Issue 4 – Has Smith properly supervised the paralegal?**

Under R.P.C. Rule 5.3, a lawyer having supervisory authority over a nonlawyer shall make an effort to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. Smith here sent a paralegal who was a notary to obtain Grandfather's signature on the new power of attorney, but far more than notarizing a signature was done by the paralegal. The paralegal read Smith's letter to Grandfather. The paralegal further tendered the new power of attorney for Grandfather's signature and notarized the signature. The paralegal necessarily made a determination that Grandfather understood the notice of non-representation sent by Smith, that he knowingly and intelligently waived his right to consult counsel, that he had the capacity to execute the power of attorney, and that he was free from the undue influence of Granddaughter or anyone else. Assuming arguendo that Smith's client was Granddaughter, Smith had the "special obligation" under R.P.C. Rule 1.2 which a lawyer owes the beneficiary of a fiduciary-client. Under these circumstances this special obligation would require Smith to verify that this 88-year-old person in ill and declining health had capacity and was free from undue influence. Smith may not delegate this obligation to a paralegal. Accordingly, Smith violated R.P.C. Rule 5.3 by failing properly to supervise the paralegal sent to obtain Grandfather's signature.

**Conclusion**

The facts are highly suggestive that Granddaughter is seeking to alter all of her Grandfather's estate planning and incapacity planning to Granddaughter's own individual benefit now that Grandfather has grown too weak to resist her influence. Moreover, Granddaughter has found a lawyer to assist her in her enterprise and not look too closely at it. Even accepting Smith's position that Granddaughter was the client, Smith here violated Rule 1.2 by failing to make further inquiry into Granddaughter's real objectives and the Rule 1.2 "special obligation" owed a beneficiary. Smith further violated the Rule 4.2 prohibition against contacting a person represented by an attorney, and may have violated the Rule 5.3 obligation properly to supervise nonlawyers. With Granddaughter's very first transaction under the new power of attorney which benefits herself personally, Smith will violate Rule 1.2 for assisting a client in committing a fraud unless Smith withdraws from representing Granddaughter. If, however,
Grandfather is Smith's real client, then Smith has violated Rule 1.2 for failure to determine and follow a client's objectives, Rule 1.14 for failure to evaluate the capacity of a client and protect a client's interest, and Rule 5.3 for sending a paralegal to do what Smith was required to do. Jones, pursuant to Rule 1.14, is authorized to take the least restrictive steps to protect Grandfather's interests, certainly including resisting surrendering confidential client information to a purported attorney-in-fact acting under a questionable power of attorney, and perhaps also including seeking a judicial determination of the validity of the power of attorney and injunctive relief pending that determination.

1. The two lawyers who requested an ethics opinion each submitted detailed statements of the facts. Other than changes made to make the lawyers and the parties unidentifiable, the facts presented here are drawn from the lawyers' statements. No facts known to be in dispute are presented. The opinion is, however, based only upon the facts as set out. The Committee cannot investigate, nor can the Committee resolve disputes of fact. This opinion should not be read to suggest that some lawyers should be referred for discipline, but is published to educate the bar on potential ethical pitfalls and to stimulate discussion on ethics issues.


3. I.C. 30-5-4-5.


5. While there is a presumption that persons possess the capacity to act (Graham v. Plotner, 87 Ind.App. 462, 151 N.E. 735 (1926); Achey v. Stephens, 8 Ind. 411, 414-15 (1856)), the presumption here is overcome by Grandfather's appearance and physical and mental condition (which Smith's paralegal saw), even if Granddaughter failed to inform Smith that a week ago a physician had certified that Grandfather was unable to manage his own affairs. See also the discussion infra at footnote 27 regarding Smith's non-delegable duty to determine Grandfather's capacity.

6. For purposes of the instant R.P.C. 4.2 analysis, the author assumed that Granddaughter did not tell Smith either of two things: one, that she knew Grandfather's physician had rendered an opinion that Grandfather did not have capacity; and two, that Grandfather had recently and continuously used Jones as his attorney on estate-planning and incapacity-planning matters. (In effect, Granddaughter's knowledge is not imputed to Smith.) Had Granddaughter told Smith these things, Smith would clearly have violated Rule 4.2 by not contacting Jones prior to tendering the new power of attorney for Grandfather's execution.


9. Id.
10. "Whether a lawyer may submit papers to an unrepresented party for signature is a difficult question, apparently dependent upon whether the lawyer's actions are categorized as the rendition of legal advice, or mere communication. The distinction is difficult to discern in many cases. . . . Professor Wolfram suggests that the lawyer in the 'precarious' position of presenting documents to an unrepresented person might find it advisable to give written notice to the unrepresented party clarifying the lawyer's limited interests." (Center for Professional Responsibility, American Bar Association, *Annotated Model Rules of Professional Conduct, 4th ed.*, pp. 421-422).


12. Fraud is presumed in a transaction benefiting an attorney-in-fact. *Villanella v. Godbey*, 632 N.E.2d 786, 790 (Ind.App. 1994). Note, however, that where an attorney-in-fact acts with due care for the benefit of a principal, the presumption is overcome, so the attorney-in-fact is not liable for such acts even though the attorney-in-fact also benefits. (I.C. 30-5-9-2)

13. Note, however, that Granddaughter's arranging to be sole attorney-in-fact rather than co-attorney-in-fact probably does not confer a benefit to Granddaughter, so that fraud would not be presumed by that change alone. By analogy, I.C. 29-1-5-2 provides that if a person named in a will to receive an interest also witnesses the will, the gift is forfeited. The interest must be a beneficial interest, and the statute expressly provides that being named in the will as executor, trustee, guardian or counsel for any of those is not a beneficial interest. As with a will, being named a fiduciary probably does not confer a benefit, so fraud would not be presumed with the initial service Granddaughter requested of Smith, which was to make her sole attorney-in-fact instead of co-attorney-in-fact.


16. *Id.*


18. Weighing against that conclusion, though, is the possibility that Grandfather may not have had the capacity to engage Smith; the existence of a lawyer-client relationship depends upon an express and comprehensive authorization from the client, and under Rule 1.14 a lawyer representing a disabled client must evaluate the degree of incapacity and medical reports to determine whether the client can make informed decisions. Pa. Bar Assn. Comm. on Legal Ethics and Professional Responsibility, Op. 97-51 (1997). If Grandfather should be considered Smith's real client, Smith has violated Rule 1.14 by failing to evaluate Grandfather's ability to hire Smith in the first place. Note also that Smith may not delegate to a paralegal the duty to evaluate Grandfather's capacity or the responsibility to establish an attorney-client relationship; *see infra* at footnotes 24-27.

19. I.C. 30-4-2-1(a).

21. Again, note that Smith’s duty to determine Grandfather’s capacity was not delegable to a paralegal; see infra at footnote 27.

22. Best for both Granddaughter and Grandfather might have been for each to be represented by separate counsel. Smith could have avoided all of the issues regarding a due diligence obligation to ascertain Grandfather’s capacity if Jones had continued to represent Grandfather. Whenever a lawyer is asked by a family member (or a close friend or caregiver) to perform services purportedly at the instance of another, the lawyer might be well advised to see that the other is represented by counsel. If the other is not already represented, the lawyer might consider referring the other to a capable colleague not in the lawyer’s same firm, especially if there is any question of diminished capacity, so that the new counsel could fully investigate the issue and take whatever steps are necessary to protect the other. See In re Estate of Meyer, 747 N.E.2d 1159, 1168 (Ind.App. 2001) at footnote 7, where the Court of Appeals approved a lawyer’s referring a prospective client to separate counsel where the prospective client indicated he wanted to create a trust which would benefit the lawyer or the lawyer’s family.


25. If Grandfather is Smith’s client, note that R.P.C. Guideline 9.3(a) prohibits a lawyer’s delegating responsibility for establishing an attorney-client relationship to a paralegal, and note further that Guideline 9.3(c) prohibits delegating to a paralegal the responsibility for a legal opinion (such as whether a person has capacity or whether a proposed arrangement is suitable and not a fraud).

26. Note that the fact Granddaughter was not present during the execution of the power of attorney is not determinative on the issue of undue influence; such fact is only one in the entire set of circumstances, other facts being Grandfather’s health and its effect on body and mind, Grandfather’s dependence upon and subjection to Granddaughter’s influence, and Granddaughter’s opportunity to wield influence. O’Dell v. Youngblood, 422 N.E.2d 381, 383 (Ind.App. 1981).

27. Some paralegals, especially ones employed by elder-law attorneys, may have special training or experience in assessing capacity. There is no indication here that Smith’s paralegal had any such special training or experience. If the paralegal had, the proper procedure would not be for the paralegal to assess capacity and render an opinion, but to report to the lawyer the results of the assessment and let the lawyer render the non-delegable opinion. The facts as presented by the lawyers do not rule out the possibility that Smith’s paralegal had special training or experience and that the paralegal discussed the assessment of capacity with Smith, letting Smith make the determination of whether Grandfather had the capacity to execute the power of attorney. Finally, note that the paralegal’s observations of Grandfather’s physical and mental condition are and should be imputed to Smith, who has the responsibility to supervise the paralegal.

28. Without knowing whether the paralegal had special training or experience and whether Smith and not the paralegal rendered the opinion that Grandfather had capacity to execute the power of attorney, it is not possible to conclude that Smith violated Rule 5.3. It may even be, however, that Smith deliberately sent the paralegal in order to distance himself from the document execution, so that he would not be called as a witness if any litigation ensued and would be able to represent a litigating party. That kind of sharp practice calculated to steal a millionaire client from another lawyer would certainly seem to violate a lawyer’s obligation to deal honestly with others. (R.P.C. Preamble)