

# Trusts & Estates

The newsletter of the Illinois State Bar Association's Section on Trusts & Estates

## In the August issue...

BY JENNIFER L. BUNKER

**In this month's newsletter**, I thank authors that have contributed to the Trusts & Estates Newsletter during the 2015-2016 year. Additionally, Rick Law discusses issues to consider when determining a client's mental capacity.

Thank you to each and every person that has helped make this newsletter a success by providing informative, substantive, and practical articles. Members of the Trusts & Estates Section

may comment on the articles in the newsletter by way of the online discussion board on the ISBA Web site at <<http://www.isba.org/sections/trustsestates/newsletter>> and as always, suggestions for improvement of the newsletter are welcome. If any readers have articles that they would like to be considered for publication, please contact me at [jenniferbunker@outlook.com](mailto:jenniferbunker@outlook.com). ■

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## Thank you to our authors

BY JENNIFER L. BUNKER

**As Editor of the Trusts & Estates Newsletter**, I would like to thank the below named individuals that donated their time to contribute one or more articles to the Trusts & Estates Newsletter during the 2015-2016 year. The Trusts & Estates Section Council is truly appreciative of not only the time spent in drafting these articles, but also of the quality of the writing, the timeliness of the content, and the usefulness in every day practice of the information contained therein. Archived newsletters can be obtained at the following website address: <http://www.isba.org/sections/trustsestates/newsletter>. Additionally, if you are interested in drafting an article for the newsletter and would like more information,

please do not hesitate to contact me at [jenniferbunker@outlook.com](mailto:jenniferbunker@outlook.com).

### June 2015

1. Chair's column – Mary Lee Faupel
2. Present gift or future interest? The enforceability of gifting to a Crummey Trust with a religious arbitration panel requirement - Sean D. Brady and law clerk Bryan Wellner
3. Flinn Report summary – Joseph P. O'Keefe
4. Gun trusts – Darrell Dies

### July 2015

1. Message from the Chair – Tracy S. Dalton

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## Thank you to our authors

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- Save the date! – William R. Kuehn
- Thank you to our authors – Jennifer L. Bunker

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- Message from the Chair – Tracy S. Dalton
- The new and improved UFADAA
- Illinois blocks inheritance rights and social security benefits of posthumously conceived children – David Shayne
- Flinn Report summary – Joseph P. O'Keefe
- Legislative update – Justin Karubas

### September 2015

- Message from the Chair – Tracy S. Dalton
- Literary estates for the not-so-rich and famous: Making sure the author is not forgotten (and not unrewarded) – Part I – Sarah M. Linsley
- Ethics corner: Estate planning attorneys should not ignore their own mortality – Michael J. Drabant
- Become more efficient by using a probate checklist – Colleen L. Sahlas
- Flinn Report summary – Joseph P. O'Keefe

### October 2015

- How do you trust? – Amanda B. Puplava and Robert W. Kaufman
- The *Howell* decision and the future of estate planning for disabled clients – Sarah LeRose

### November 2015

- Message from the Chair – Tracy S. Dalton
- Estate tax return changes – Gary R. Gehlbach
- Flinn Report summary – Joseph P. O'Keefe
- Who would win – Foreclosure statute vs. Probate Act – Nathan B. Hinch

### December 2015

- Legislative Committee report – Justin Karubas
- Caselaw update – Raymond W. Prather
- Flinn Report summary – Joseph P. O'Keefe
- Save the date! – William R. Kuehn

### January 2016

- Proposed legislation: Illinois Trust Code – Susan T. Bart
- Flinn Report summary – Joseph P. O'Keefe
- 2016 estate tax summary – Jeffrey R. Gottlieb

### February 2016

- 2015 year in review – Paul A. Meints
- Flinn Report summary – Joseph P. O'Keefe
- Heckerling 2016 reviewed – Timothy S. Midura
- Giving power to your Powers of Attorney – Alan R. Press

### March 2016

- A baker's dozen considerations before probating small or insolvent decedents' estates – Colleen L. Sahlas
- The guardians role in maintaining and initiating dissolution proceedings – Sarah LeRose and Marisa Cipolla
- Drafting a deed in trust without destroying tenancy by the entirety – Frank Greenfield

### April 2016

- Stepped-up basis for credit shelter trusts using PEG powers under Illinois law – Robert J. Kolasa
- Trustee's fees: What is "reasonable" compensation? – James M. Lestikow

### May 2016

- Restorative justice: A perspective from the bench – Hon. Sophia H. Hall
- A perspective on guardianships and visitation of wards – Daniel G. Deneen
- Flinn Report summary – Joseph P. O'Keefe ■

## Trusts & Estates

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# Unmasking client pseudo-mental capacity

BY RICK L. LAW

“A mask is what we wear to hide  
from ourselves.”

—Khang Kijaar Nuyen

Today, in many jurisdictions, lawyers have a duty to make a legal assessment of an older adult's mental capacity. It is the lawyer's duty to determine whether or not a client or prospective client has sufficient capacity to engage in contracts; make donations or gifts; or create testamentary documents. This article was written to benefit the attorney reader by creating awareness of the following:

1. The need to ask open-ended interview questions to probe for lack of realistic client insight and appreciation of consequences;
2. Client *confabulation*—a masking behavior that observationally appears to be true mental capacity;
3. Common attorney paradigms that may block the discovery and appreciation of a client's behaviors as evidence of possible dementia.

What follows is an interchange between estate planning elder law attorney Rick Law and multiple board certified forensic psychiatrist Dr. Nishad Nadkarni.<sup>1</sup>

## Evidence of dementia: Forgetfulness/short term memory loss is only one manifestation

**Lawyer:** We once represented a gentleman and his wife who were both well into their 80s. At the time of the client engagement, it was obvious to everyone that the wife did not have sufficient mental capacity to make her own decisions. On the other hand, the husband seemed to both mentally and physically capable. He always wore suits—his pattern all of his adult life. He had been a business owner and was known to have a high level of intelligence and to be very much in command of numbers. We were engaged as his estate planners and to assist with her long-term

care issues.

Several months passed, and then I received an agitated call from their adult daughter. She was beside herself because her father was making a lot of what she referred to as “foolish decisions” with his money. He had always been a very frugal man. Nonetheless, the week before he called an ambulance service to transport his disabled wife to her favorite beauty salon. The cost of that transport was approximately \$800 round-trip. In his younger days, he would never have considered spending his money on such an extravagance. The daughter asked that I meet with her father (our client).

The client came in to see me. He had complete command of all of the facts about his personal financial net worth. He and I reviewed every line item of his portfolio. He was able to explain everything about his finances. I discussed with him the cost of the use of the ambulance to transport his wife to her hair salon. He promised me that he would not do that again. He agreed that he did not have sufficient assets to spend that kind of money. When he left my office, I was certain he had a high level of mental capacity. Nevertheless, the next time the hairdressing issue came up, he called an ambulance.

What should I understand as an attorney working with a client in a situation like that?

**Psychiatrist:** The overriding point I want to make to you is this—even when people are beginning to get some sort of a dementia, their default is to continue to be strong in the areas in which they were strong and before they began to have dementia. In your fact pattern you gave an example of a businessman who had been financially prudent and knew how to handle numbers. You misjudged his command of numbers as evidence of his ability to comprehend the consequences of what those numbers mean. Your client

no longer understood the difference in consequences between spending \$8, \$80, or \$800. His *judgment*<sup>2</sup> (which is actually a formal mental status term) was obviously very poor. His *impulse control* (another mental status term) was very poor. His *insight*<sup>3</sup> (yet another mental status term) was very poor. Insight, judgment, impulse control... In other words, without the dementia, he would've thought it absurd for somebody to call an ambulance at any cost to transport someone to a hairdresser. Now that client showed clear change in impulse, judgment, and insight.

I recently saw a woman as a client with a very similar, but unfortunately much deeper-in-the-soup situation. She was being taken advantage of by scammers and the FBI had been brought in on the case. This woman could tell me everything about where her money was, what accounts they were in, and where she was getting her income. The problem was that she had complete lack of insight, judgment, and impulse control when it came to these scammers. In fact, she told me that the reason that the scammers had not been successful in achieving the results of their promise was because she hadn't paid them enough money yet.

People were calling her claiming to be attorneys from South America who, for a fee, would be able to take care of her tax problems on a timeshare that she owned in Mexico. Her name got passed around from one scammer to another and she started getting dozens of people calling her saying, “Wire \$10,000 here; wire \$20,000 there.” She ends up getting scammed out of funds in the seven figures. When asked about it, she showed tremendous deficiencies in insight, judgment and impulse control. The diagnosis is a presumed type of dementia that manifests itself in the loss of impulse control. It is called a frontotemporal dementia—and it shows itself in somebody doing something very out of character compared to 20 years earlier.

**Lawyer:** If I understand you correctly, what we should do with clients making illogical decisions is ask them why they are doing those things.

**Psychiatrist:** The general underlying principle is to ask. Ask them, “Did it make sense for you to call an ambulance to transport your wife to the beauty shop?” Confront the aberrant behavior and ask, “What do you think about that?” If the person admits that it was a mistake, then without making the person feel defensive, ask them to explain what was going through their mind at the time they made that decision. This will give you great insight into their level of processing ability. Once details start to come out it will be clear to you whether or not there is a bona fide doubt as to the person’s mental processing capacity.

**Lawyer:** From what you have shared, I should’ve been more suspicious about my client’s behavior, because it was aberrant compared to his character when he was younger, and he was someone I had known for a long time. Most people who walk into our office are not like that. In most cases we would need to ask open-ended questions and to dig deeper by talking to family members, with a goal of discerning whether a prospective client is acting in a way that does not conform with his or her character earlier in life. Behaviors that go to the depth of the change in character should give an attorney sufficient doubt to make a referral to a mental health professional for further evaluation.

### **Confabulation: A plausible but imagined memory that fills in gaps in what is remembered**

**Lawyer:** As a psychiatrist, what do you want attorneys to know when they have a senior citizen client coming in? Most attorneys want to fulfill their duty to make a legal assessment of the mental capacity of a prospective client under Rule 1.14(a) and its progeny.<sup>4</sup>

**Psychiatrist:** One of the incapacity-masking behaviors that seems to be

invisible to most attorneys is called *confabulation*. Confabulation is a pattern; it’s not a conscious deception. People who confabulate manufacture details that sound plausible to them, to make up for gaps in memory.

You could ask a person what they did last night. They could say, “Well we had some drinks at the bar for St. Patrick’s Day and then we went to another party somewhere and I remember it was a really loud party. There were lots of people there.” Or you could ask, “What did you have for breakfast this morning, Martha?” She might answer you, “I had oatmeal, with sliced bananas, orange juice, and two pieces of crisp bacon.” In both of those examples all the details sound plausible, but the confabulation means that the details are not true. The individual has no true recollection of those events, but their mind fills in the blanks with likely and plausible details. It’s very important that an attorney know about confabulation. It is not conscious, but it’s a way to sound plausible when the person themselves is unaware of the fact they have a gap in memory.

**Lawyer:** If a person is sitting in front of me and they are smoothly answering the questions I’m asking, it is very difficult for me to imagine how I’m going to observe evidence that they have incapacity.

**Psychiatrist:** People will tell you what meets social expectations and what they expect you want to hear. Confabulation is the cause of innumerable lawsuits. People will go to see their attorney and give them details about personal circumstances that have absolutely no basis in fact. Without reliable collateral information, you, the attorney, would not know that. When you hear about a person’s activities of daily living and independence, it’s important for you to dig for collateral information to back up what someone who is confabulating is telling you.

The only way that you would know that there are problems is by doing some formal testing, some mini mental health status exam testing, which would not be appropriate for your role as an attorney. You will need to get to the same point by

*digging for facts*. I also highly recommend that you reconsider your attorney bias that everyone is walking around fully capable of expressing their free will. If you become more suspicious about the certainty and truthfulness of what your prospective client is telling you, you will be a better judge of when to have reasonable doubt about a person’s state of mental capacity.

Somebody who is confabulating may be in denial, or may have poor insight, judgment, and impulse control as we spoke about earlier.

There is another thing that happens when people have deficiencies that they want to hide, and that is defensiveness. If you propose to somebody who is being very superficial with you and saying that everything is fine—“Would you mind, since you live with your daughter, for me to talk to your daughter about how you’re functioning at home before we start doing this estate plan?”—and if they become extremely defensive, that suggests that there might be something wrong. That is a red flag being waived in front of you. You have somebody who is defensive in terms of your establishing collateral information. The combination of superficiality and defensiveness almost always tells you that that person is confabulating and that there is something deeper going on.

Superficiality is another thing I want to define for the record for you. People with confabulation will tend to answer questions in a fast, superficial manner—in a way that almost darts around the subject, without a detailed answer. For example, if you asked somebody, “What is the date today?” And they say to you, “That’s silly! Everybody knows what date it is today.” You should say, “Well, humor me.” They’ll say, “Come on, just look it up. I don’t need to tell you the date.” That’s an example of confabulation right there. If you keep pressing the interview with that person and they keep trying to wiggle away from the answer, it may be because they don’t know the answer. “Tell me specifically what you did last night.” They respond, “Like I told you, we went to a party.” You respond, “Can you tell me exactly where the party was?” They may answer “It doesn’t matter!” You



would then say, “Was it here in the city of Chicago?” They might respond, “What does it matter? It was a good party.” That is confabulation.

When a person refuses to be pinned down on a specific answer it might be because when they search their memory banks, they can’t find the specific information. That pattern of response plus defensiveness when you ask for collateral information should send up a big red flag! It should lead you to have the type of doubt that would suggest that prospective client should be referred to an appropriate mental health expert.

**Lawyer:** What I’ve learned from this is that we attorneys typically do not press far enough in our interview process.

**Psychiatrist:** Let me share a few more things on the record. I want to give you an example of denial. You say, “Mrs. X, when was the last time you saw a doctor?” The client answer is, “I’ve never seen a doctor in my life. There is nothing wrong with me.” That is denial.

Here’s an example of a confabulatory response. “Mrs. X, can you tell me what you did in the last six months? I understand from your daughter that you were traveling somewhere?” She answers, “It’s a long story about the overseas travel. It would just take too much time to get into it and it’s not really that important.”

Here’s an example of superficial details. “Mrs. X, can you tell me where you live?” She answers, “Well, I live, you know, in the area around here.”

Here’s an example of a defensive posture that you should be looking out for. You ask Ms. X for more specific details about certain aspects of the interview—let’s say more questions about her bank accounts—and she responds to you, “I don’t think that you need to know this. I’m not sure why you are asking me about it.”

Another defensive and vague response might be to the question, “Can you tell me what your date of birth is?” She responds, “1930” instead of “September 15, 1930.” If you hear those kinds of vague answers or vacillating answers or other superficial answers, it should be treated as a red

flag and an indicator that a professional consultation should be considered.

## Paradigm: A mental analysis shortcut to determine the usefulness of information

**Lawyer:** All professionals have different paradigms which limit our openness to new information. As a trial-experienced psychiatrist you have observed several hundred cases involving mental capacity issues. As you have watched lawyers in action in these cases, do you believe that we lawyers and judges have difficulty recognizing diminished capacity?

**Psychiatrist:** In my experience, 50% of the time lawyers and judges are unwilling to see a person’s mental incapacity for what it really is. From what I know and surmise about your legal training, you are taught to presume that everybody is in a state of full mental competency. With that deeply entrenched belief, it becomes very difficult for you to break out of your bias.

I am a forensic psychiatrist. My training in mental health is very different. When someone comes into my office, the assumption is that they are there because something is wrong. I am trained to look for mental status deficiency or abnormality. After I find it, I am to name it. I was trained to be more skeptical than attorneys. As a lawyer, you advocate the presumption that people are competent to exercise their free will and you give them the benefit of the doubt. You dismiss the evidence of abnormal behaviors that are that are more apparent to a psychiatrist.

**Lawyer:** Based on what you have just said, does that make you biased to find something wrong with everyone, just so you can be right?

**Psychiatrist:** When diagnosing dementia and cognitive processing ability impairments, there are clusters of behaviors which are observable. We can discern patterns of decline. Psychiatrists don’t look to find trouble in all of our clients. I think that the trouble finds us and we are asked to identify the problem, not make up a problem.

People with Alzheimer’s disease tend to follow a certain pattern of decline. People with frontotemporal disorders follow a certain pattern. People who have vascular types of neurocognitive impairment or dementia tend to follow a certain pattern. There are very clear signs and symptoms that we are able to see in cluster and we see them over and over again. The only sure way to find out if somebody actually has dementia, especially diseases like Alzheimer’s, is a postmortem analysis of brain tissue.

**Lawyer:** If I understand you correctly, you are recommending to me as an attorney that I need to be more open to giving more credibility to professional evidence that a person has a cluster of behaviors that indicate that they have diminished capacity. I need to be willing to doubt my own presumption that everyone is walking around with full mental capacity.

**Psychiatrist:** Yes, I would like you to be more doubtful. One of the best responses would be to dig deeper for more evidence. You should be talking to a person’s family. You should be looking for changes in behavior from that person’s known prior character. You should be asking open-ended questions to see how a person responds. If after digging deeper, you find that you have an honest doubt about a person’s capacity, then you should make a referral to a mental health professional. It is not your job to use clinical mental health tools to determine client’s capacity.

Under Illinois Rules of Professional Conduct 1.14(a), the lawyer has a duty to do a thorough legal analysis of client capacity.<sup>5</sup> The first step is to observe and interpret signs of diminished capacity. Dig deeply in client interviews, and slow down to check out a client’s facts before drafting a complaint.<sup>6</sup> Seek out professional mental health practitioners to help you, whenever you have a reasonable doubt as to a client’s mental capacity.<sup>7</sup>

<sup>5</sup> Rick L. Law is the founder and managing partner of Law ElderLaw LLP ([www.lawelderlaw.com](http://www.lawelderlaw.com)) and concentrates his practice in elder law estate planning, asset protection, disability concerns, and nursing home Medicaid.

1. Dr. Nishad "Nick" Nadkarni, MD, is a psychiatrist practicing in the Chicago area. He is board-certified in forensic and general psychiatry. Dr. Nadkarni has extensive experience in both criminal and civil forensic consultation as well as in clinical assessment and treatment of patients.

2. *Judgment*, *Campbell's Psychiatric Dictionary* (9th ed. 2009) (citing E. Bleuler, *Textbook of Psychiatry* (1930)) ("If we speak in psychiatry

and jurisprudence, we mean the ability to form judgments, that is, the capacity to draw correct conclusions from the material acquired by experience.")

3. *Insight*, *Campbell's Psychiatric Dictionary* (9th ed. 2009) ("The patient's knowledge that his symptoms are abnormalities. For example, when a patient who fears crowds realizes that the fear is only within his own mind and unfounded in reality, he is said to have insight. Insight is further

defined from the standpoint of knowledge of the factors operating to produce the symptoms, such as a patient who understands the explanation for the development of his symptoms.")

4. Ill. Rules of Prof'l Conduct R. 1.14(a) cmt. 1 (2010).

5. *Supra*, note 3.

6. Ill. Rules of Prof'l Conduct R. 1.14(b) cmt. 6 (2010).

7. *Id.*

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### September

#### Thursday, 09/01/16- Webinar—

Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

#### Thursday, 09/08/16- Webinar—

Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

#### Thursday, 09/08/16- Webcast—

Monetizing Intellectual Property. Presented by IP. 12:30 p.m. – 2:15 p.m.

#### Friday, 09-09-2016- Webcast—

Telemedicine: Diagnosing the Legal Problems. Presented by Health Care. 9:00 a.m. – 11:00 a.m.

#### Wednesday, 09/14/16- Webcast—Hot

Topic: Union Dues/Fair Share—Friedrichs v. California Teachers Association. Presented by Labor and Employment. 10:00 a.m. – 12:00 p.m.

#### Wednesday, 09-14-16—

**Webinar**—2016 Military Law Overview. Presented by Military Affairs. 12:00 p.m. – 1:15 p.m. (maybe later).

#### Thursday, 09/15/16- CRO—Family

Law Table Clinic Series (Series 1). Presented by Family Law. 8:30 am – 3:10 pm. Vid: NONE THESE WILL NOT BE RECORDED OR ARCHIVED.

#### Friday, 09-16-06- CRO and Live

**Webcast**—The Fear Factor: How Good Lawyers Get Into (and avoid) Bad Ethical Trouble. Master Series Presented by the ISBA—WILL NOT BE RECORDED OR ARCHIVED. 9:00 a.m. – 12:15 p.m.

#### Wednesday, 09-

#### 21-16—Webcast—

Restorative Practice in Illinois: Practical and Creative Alternatives to Resolve Civil and Criminal Matters. Presented by Human Rights. Part 1- 10:00 a.m. – 12:00 p.m. Part 2- 1:00 p.m. – 3:00 p.m.

#### Thursday, 09-22-

#### 16- Webcast—Family

Law Changes and Mediation Practice. Presented by Women and the Law. 11:00 a.m. – 12:00 p.m.

#### Thursday,

#### 09/22/16- CRO and

**Webcast**—Recent Developments in E-Discovery in Litigation. Presented by Antitrust. 1:00- 5:15 pm.

#### Thursday, 09/22/16- Webinar—

Introduction to Boolean (Keyword) Searches for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm. ■

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