When Plaintiff's Bar and Defense Bar Collide: Top Issues in Legal Malpractice

Woodland Hills Tax & Estate Planning Council

Joel Osman — Parker Shaffie LLP (Plaintiff's Perspective)

Claudia Stone — Nemecek & Cole (Defense Perspective)

Nancy Reinhardt — (Facilitator)

Roadmap

- Who Is the Client?

- Client Capacity in Estate Planning Malpractice

- Collectability

- AI Issues in Legal Malpractice

- Audience: lawyers, CPAs, financial planners, trust bankers, insurance professionals

Who Is the Client? — The Challenge

- Multiple interested persons: testators, settlors, trustees, beneficiaries, conservators, advisors

- Family members often present at meetings and assisting with information flow

- Role clarity at intake reduces downstream disputes about duties owed

Who Is the Client? — Joel (Plaintiff) / Claudia (Defense)

Plaintiff (Joel)	Defense (Claudia)
Careful record of who sought and received advice	Clear engagement letters; repeated reminders of client identity
Intake triage: engagement terms, communications with non-clients, tasks beyond named client	Expressly state no advice given to non-clients; suggest independent counsel
Ambiguity in role definition expands duty arguments	Separate communication tracks for non-clients; document limits

Who Is the Client? — Practical Takeaways

- Confirm in writing: who is/is not the client, scope, information-sharing protocols

- Revisit and re-confirm client identity at key decision points

- Clarity benefits defense; ambiguity benefits plaintiffs

Client Capacity — Why It Matters

- *Joel — Plaintiff's Perspective*
- Core malpractice risk in estate planning
- Elder clients may have fluctuating or diminished capacity
- Decisions during fragile periods are later scrutinized
- Capacity type varies by legal act
- Documentation at time of execution is pivotal

California Presumptions & Functional Approach

- Presumption of capacity to make decisions — Probate Code § 810(a)

- Disorder alone does not negate capacity — Probate Code § 810(b)

- Incapacity requires evidence of specific mental-function deficit correlated to the act — Probate Code §§ 810(c), 811

- Adults with disabilities presumed competent absent contrary legal determination — Welf. & Inst. Code § 21000(a)

Plaintiff's Litigation Strategy

- *Joel — Plaintiff's Perspective*

- Medical records, caregiver/family testimony, contemporaneous observations

- Retain medical and legal experts linking deficits to specific act

- Frame standard of care: did attorney evaluate and document capacity given known red flags?

- Show missed opportunities to pause, investigate, or adopt protective steps

Capacity — Defense Strategy

- *Claudia — Defense Perspective*
- Leverage rebuttable presumption of capacity (Probate Code §§ 810–811)
- Show what lawyer observed, asked, and recorded contemporaneously
- Diagnosis alone is not dispositive — focus on functional ability
- Document fiduciary consultations, medical context, sensory accommodations
- Demonstrate proportionate protective actions respecting client autonomy

Ethical Obligations When Capacity Is at Issue

- Maintain normal attorney-client relationship to extent possible
- Take protective action consistent with client's best interests
- Narrowly tailored disclosures to fiduciaries; preserve confidences
- If agent acts against principal's interests → seek court guidance
- Agent may disobey principal only with court approval — Probate Code § 4234(b)

The Herren Case — Overview

- *Herren v. George, 109 Cal.App.5th 410 (2025)*

- Court of Appeal affirmed elder abuse restraining order against attorney

- Elder Abuse Act permits protective orders without prior capacity adjudication

- Substantial evidence of undue influence by retained attorney

- Capacity adjudication not a prerequisite to restraining relief

Herren — What Happened

- George S. — trust created 1991, restated 2022; daughter Susannah named successor attorney-in-fact

- George diagnosed with severe dementia; declared incapacitated 2023

- Attorney Jamie Herren obtained $100,000 retainer on first meeting

- Same day: demand letter sent to co-trustees and prior law firm

- Susannah filed elder abuse restraining order petition five days later

Herren — Practical Guidance (Part 1)

- Scrutinize for exploitation; independently assess capacity when red flags exist

- Avoid secret or isolated meetings with vulnerable elders

- Include a trusted third party as appropriate

- Communicate transparently with fiduciaries

- Verify status and scope of powers of attorney, trusteeships, conservatorships

Herren — Practical Guidance (Part 2)

- Obtain and review trust and medical incapacity documents when authorized

- Document observations, steps taken, and voluntary nature of engagement

- Align actions with statutory presumptions and functional evidence standards

- Attorneys cannot ignore red flags — constructive knowledge standard applies

Herren — Statutory Framework Reminders

Statute	Key Point
Welf. & Inst. Code § 15600 et seq.	Elder Abuse Act — protective orders
Probate Code §§ 810–811	Presumptions and functional analysis
Probate Code § 4234(b)	Agent disobedience requires court approval
Welf. & Inst. Code § 21000(a)	Presumption of competence for adults with disabilities

Collectability — Why It Matters

- *Joel — Plaintiff's Perspective*
- Merits without recovery = pyrrhic win
- Evaluate collectability before investing in complex litigation
- Many estate planning attorneys are solo or small-firm practitioners
- Collectability drives case-acceptance decisions

Collectability — Intake Framework

- *Joel — Plaintiff's Perspective*

- **Insurance**: identify coverage and limits early; confirm entity coverage

- **Public records**: real property, liens, UCC filings, judgments, bankruptcies

- **Practice profile**: firm affiliation, partnership interests, career stage, visible assets

- **Candid risk assessment**: discuss judgment-proof scenarios with clients; re-evaluate at milestones

- **Alternative avenues**: other liable parties — firms, professionals; preserve tolling

Collectability — Defense Note

- *Claudia — Defense Perspective*
- Adequate insurance protects personal assets
- Early tender to carriers enables defense counsel and resolution discussions
- Insurance + prompt carrier engagement = strongest position

AI Issues — Setting the Stage

- *Joel — Plaintiff's Perspective*

- Courts, rules bodies, and State Bar: education → enforcement

- Verification and oversight are non-delegable duties

- Rapidly evolving expectations for all practitioners

- Estate planning uniquely affected: errors may surface years later

AI & Client Confidences

Plaintiff (Joel)	Defense (Claudia)
Did lawyer use system lacking adequate confidentiality?	Show diligence: enterprise tools, no-train terms
Failure to de-identify data?	Privacy reviews, de-identification protocols
Failure to communicate AI risk to client?	Firm policies; proportionality to data sensitivity

State Bar Guidance on AI & Confidentiality

- Review, validate, and correct all AI outputs
- Avoid inputting confidential data without adequate safeguards
- Supervise AI use consistent with competence and diligence duties
- *Source: State Bar of California, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law (Nov. 16, 2023)*

Risks of Open-Ended AI Systems

- *Joel — Plaintiff's Perspective*

- Consumer-grade models may retain prompts

- Data may be reused for model training

- Lack legal-grade security infrastructure

- Assume visibility risk for identifiable client data

- Absent strong contractual and technical protections → do not input sensitive information

Competence & AI

- *Both Presenters*
- Lawyers must understand benefits and risks of relevant technology
- Keep abreast of changes in law and practice — Cal. Rules Prof. Conduct, rule 1.1
- Reasonable understanding of AI tool limitations and failure modes
- Human legal judgment remains non-delegable
- Overreliance on AI is inconsistent with competence
- *See Noland v. Land of the Free, L.P.*, 114 Cal.App.5th 426 (2025)

The Duty to Verify AI Output

- *Both Presenters*
- Personally read and verify all authorities
- Ensure factual and legal accuracy before filing
- Failure to verify has resulted in sanctions
- *Noland v. Land of the Free, L.P.*, 114 Cal.App.5th 426 (2025) — monetary penalties, State Bar referrals

California Sanctions Landscape

- *Noland v. Land of the Free, L.P.*, 114 Cal.App.5th 426 (2025)
- *People v. Alvarez*, 114 Cal.App.5th 1115 (2025)
- *Shayan v. Shakib*, 116 Cal.App.5th 619 (2025)
- Common thread: fabricated or misrepresented legal authorities
- Courts emphasize verification as counsel's personal duty

Federal & National Context

- Fed. R. Civ. P. 11 — filings must have evidentiary support after reasonable inquiry

- Unverified AI attributions risk Rule 11 violations

- 9th Cir. FRAP 32 Committee Note (Dec. 1, 2025):
  - Signature attests to counsel's review and responsibility for accuracy
  - Applies regardless of drafting method

California Rules of Professional Conduct — AI Application

Rule	AI Application
Rule 1.1 (Competence)	Understand technology risks and benefits
Rule 1.4 (Communication)	Keep clients informed about significant means affecting representation
Rule 1.6 (Confidentiality)	Ensure adequate AI security; limit disclosures

California Rules of Court & Judicial Standards

- **CRC rule 10.430** (eff. Sept. 1, 2025) — courts permitting AI must adopt generative AI policies

- **CRC Standard 10.80** (eff. Sept. 1, 2025) — judicial officers verify AI accuracy; consider disclosure for public-facing content

- **Local example**: San Mateo Superior Court AI policy — verification, human oversight, compliance with Code Civ. Proc. § 128.7

Emerging Legislation — SB 574

- California Senate passed SB 574 (Jan. 30, 2026)

- Would add Bus. & Prof. Code § 6068.01

- Codifies verification, confidentiality, and bias requirements for attorney AI use

- Currently pending in the Assembly

- *For situational awareness — not yet law*

AI in Estate Planning Specifically

- *Joel — Plaintiff's Perspective*

- Benefits: drafting efficiencies, issue spotting

- Risks: missing client-specific goals, jurisdictional nuances, execution formalities, family dynamics

- Document human review, instruction tailoring, and final legal judgment

- Essential for defending the work years later when plans are implemented

Building Defensible AI Workflows

- *Both Presenters*
- Adopt written firm AI policies
- Select enterprise tools with legal-grade confidentiality
- De-identify client inputs before use
- Log verification steps
- Memorialize attorney judgment over AI-assisted drafts
- Check local, statewide, and federal rules before filing
- Consider required disclosures

Key Takeaways

- **Client identity**: define clearly; document limits on who is advised
- **Capacity**: functional, evidence-driven; align with statutory presumptions; document ethical decision-making
- **Collectability**: evaluate early; revisit at milestones
- **AI**: confidentiality, competence, verification are non-negotiable; align with State Bar guidance, CRC standards, and case law

Next Steps for Practitioners

- Update engagement letters and capacity protocols
- Implement AI policies aligned with official guidance and court rules
- Conduct tabletop exercises for high-risk capacity and AI scenarios
- Monitor SB 574 and evolving local court AI policies

Questions & Discussion

- **Joel Osman** — Parker Shaffie LLP

- **Claudia Stone** — Nemecek & Cole

- Thank you to the Woodland Hills Tax & Estate Planning Council