

The Ghosts of Clients Past – The Dangers of Financial Elder Abuse Claims Against Estate Planners

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I. Introduction

In states with Financial Elder Abuse statutes, legal malpractice claims by seniors invoking those statutes are common. These laws are generally understood to address the conversion of property of elderly or dependent adults based on undue influence or duress. In fact, liability can usually be established based on a showing of any wrongful taking of the elder's property.^[1]

Estate planners are particularly vulnerable to such claims for two reasons:

1. First, competence challenges by successors and beneficiaries are generally made after the client is deceased or incompetent.^[2] Thus, liability depends on a fact-driven forensic evaluation of the client file and dueling narratives about the client's capacity.
2. Second, lawyers are ethically required to conduct capacity evaluations under a pro-client standard of care, under which the client is given every benefit of the doubt.^[3] Yet elder abuse statutes typically apply an inconsistent constructive "should have known" standard of liability.^[4]

This hindsight-driven constructive knowledge standard is problematic. Thus, the ease with which such claims can be pled in an ordinary malpractice case in some jurisdictions makes them difficult candidates for dismissal.^[5] That, in turn, enhances potential liability exposure, which includes fee-shifting damages and even punitive damages, though under a higher clear and convincing evidence standard.^[6]

Further, every engagement requires trust that the estate planner will faithfully carry out the client's intent. The reputational stigma of an allegation in open court of elder abuse, as opposed to mere attorney error, is inherently greater.

This newsletter surveys the risk characteristics of elder abuse claims and areas where proactive steps can be taken to avoid such claims.

II. Malpractice Versus Financial Elder Abuse Exposure

In some jurisdictions, professional malpractice alone cannot satisfy the statutory requirements of elder abuse. For instance, in Florida, an attorney may be liable if they participate in a transaction with the intent to deprive the elderly person of their property.^[7]

However, intent is not expressly required in jurisdictions such as California and Oregon. Liability attaches to cases where a reasonable person knew or “should have known” that taking the property from an elder was wrongful.^[8] In contrast, errors or omissions falling below the standard of care of a reasonable professional support malpractice liability irrespective of knowledge or intent.^[9]

Ambiguity in these statutory standards has led to disparate results about whether, as in Florida, *prima facie* evidence of intent to defraud, as opposed to mere attorney negligence, supports liability. The few reported decisions are ultimately fact-driven but also influenced by policy considerations. An important consideration has been whether the claimant was a current or former client. In the case of non-client claims, a factor is whether the non-client elder understood that the attorney was not representing their interests.

Thus, in *Wood v. Jamison*, the attorney assisted a client who defrauded the plaintiff into using family trust assets to invest in a speculative venture.^[10] After the death of her son and the confinement of her husband to an Alzheimer’s facility, the client falsely persuaded the trustor that he was her nephew. The client retained Jamison to document the loans the trustor agreed to make to fund the investment. However, during the process, Jamison met directly with the trustor and provided her advice on the loans. Jamison also received compensation he knew was derived from the loans.^[11]

Knowing that the trustor was unrepresented and relied on Jamison to consider the suitability of this imprudent investment, the Court found Jamison could be jointly liable with his client for financial elder abuse.^[12] Given the abusive level of fraud and Jamison’s failure to disclose his conflicts and recommend independent counsel, there was sufficient evidence to support liability for assisting the client.^[13]

However, in a later decision, a California court ruled that, where the scope of the representation is clear, the statute does not provide non-clients standing to sue a third party’s attorney. In *Strawn v. Morris, Polich & Purdy, LLP*, an insurance company was sued for bad faith and financial elder abuse for denying fire insurance coverage based on a determination that the insured had committed arson.^[14]

The attorneys who were retained in connection with the investigation of coverage were accused of aiding the insurer in retaining funds that rightfully belonged to the insured.^[15] The court held that extending elder abuse liability to attorneys acting only in a representative capacity would contradict long-standing public policy.^[16] Neither the statute nor its legislative history could support such an interpretation. Practical problems with

allowing such claims included the observation that the attorney cannot effectively defend such non-client claims without violating the attorney-client privilege.^[17]

California has extended similar protection to estate planners sued by beneficiaries based on the same principles. Trust and will beneficiaries who assert they received a lesser share based on a modification of the estate plan have no standing to sue because the client lacked the capacity to make the change.^[18] Thus, in *Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray, PC*,^[19] the court held that allowing beneficiaries to sue an attorney for purportedly failing to conduct an adequate testamentary capacity evaluation would inject conflicts of interest into estate planning engagements. A lawyer's obligation to protect all interests in the estate would likewise compromise the undivided duty of loyalty owed to the client.^[20]

For that reason, California has declined to adopt Model Rule 1.14, which provides that when a practitioner has reasonable grounds to question the client's capacity, they consult with interested third parties, potentially breaching the attorney-client privilege and the duty of loyalty.^[21]

By comparison, state probate statutes confer standing on a trustee or personal representative to bring successor claims on behalf of the client.^[22] Successors are entitled to obtain the client's file when investigating estate affairs.^[23] Thus, successors can bring ordinary malpractice claims against estate planners for claims the client could have brought.^[24]

The Oregon case of *Hunsiger v. Graham*^[25] considered the specific question of whether successor claims of attorney malpractice in assisting a late-in-life testamentary change could also support liability for elder abuse.^[26] In *Hunsiger*, the decedent's son and personal representative brought an action contesting her capacity when she modified her will in 2005. At the time, the son was the sole beneficiary of the estate. The change divested the son of virtually all of his interest, which was instead gifted to Lisa Graham, the plaintiff's daughter and the decedent's granddaughter.

Graham was sued for allegedly exercising undue influence over the decedent to hire an attorney to change the trust. The attorney was sued for malpractice on the grounds that, had he conducted adequate diligence, the plaintiff and treaters at the convalescent facility where his mother resided would have attested to the fact that the mother was seriously impaired.^[27] Instead, the attorney determined he would rely exclusively on his one-on-one meetings to discuss the desired changes from which he excluded both the son and the granddaughter. As a result, the attorney never learned of alleged hallucinations that allegedly undermined the attorney's finding of testamentary capacity.^[28]

The court affirmed the trial court's ruling on summary judgment that the alleged breach of the standard of care did not satisfy the requirement of constructive knowledge under the elder abuse statute. Expert testimony and other evidence as to what more thorough due diligence would have revealed were not competent to rebut the evidence that the attorney had no actual knowledge of facts that would have put him on notice of the alleged lack of testamentary capacity.^[29] The court held that the elder abuse statute was not intended to apply to an "accidental" failure to prevent financial abuse of a vulnerable person.^[30]

Hunsiger illustrates why liability risks in estate planning have changed over time. The potential constituents of the survivor's marital estate and the decedent's estate on the death of the second spouse are fewer in the case of the traditional nuclear family. However, Hunsiger's decision to sue his daughter is belied by the fact that Hunsiger also had three sons by a second marriage after the original estate plan was drafted.

An essential factor in evaluating testamentary capacity is whether the client is able to identify the "natural objects of their bounty."^[31] That test is more challenging to apply in an era where multiple marriages lead to multi-generational and potentially conflicting constituencies. That, in turn, increases the risk that the estate planner will be drawn into estate contests among these constituencies for their perceived fair shares.

Hunsiger never reached the question of how the attorney should have responded had he known of signs of impairment witnessed by Hunsiger and healthcare professionals. The ABA and the American Psychological Association have published voluminous guidelines on best practices in testamentary and other capacity evaluations jointly and separately.^[32] In close cases, the estate planner and the forensic psychologist, though separately engaged, may jointly venture to evaluate the client's capacity.

Critically, testamentary capacity factors must inform both engagements. Thus, a fully competent client may perform poorly on adult intelligence and memory scale tests, which are timed and scored based on peer processing speeds. Therefore, undue reliance on standardized capacity tests is discouraged.^[33] Without carefully developing a rapport focused on the client's understanding of his assets and, for example, his rationale for a late-in-life change, a fully competent client may be unfairly deprived of the legal right to change the disposition of his property.^[34]

Finally, potential conflicts may also arise in the case of a joint engagement by spouses to prepare a family trust. Thus, in *Jackson v. Calone*, the lawyer defendant could not escape liability on summary judgment from a financial elder abuse claim by one of two estate planning clients.^[35] In that case, a modification of revocable trust, combined with a marital property transmutation agreement, had the net effect of irrevocably compromising the wife's lifetime rights in joint and separate property after the couple separated.^[36]

The court ruled that, given the allegation that the attorney laid the groundwork for subsequent one-sided control and impairment by the husband of trust assets, it could not dismiss as a matter of law the claim that the attorney acted with intent to defraud the wife out of her existing rights before the trust modification.^[37]

It would be impractical and cost-prohibitive for spouses to retain separate counsel for all trust engagements save those that result in absolute parity in conferring lifetime and testamentary benefits. As noted, beneficiaries whose rights arise from separate marriages may be adversely impacted despite best efforts to share the wealth with all members of the resulting extended families. However, the estate in *Jackson* was large, and the change in rights was material.

Spouses usually have a unity of interest in planning their estate. Still, undue influence within a marriage can result in permanent injustice once documented in an estate plan. Whether a failure to identify such conflicts should support liability for elder abuse, as in other cases, is a fact-dependent question. However, any engagement that

results in a materially one-sided plan creates liability risk to the attorney and should, therefore, raise a red flag as to whether to proceed with the joint engagement.

III. Conclusion

The law regarding the circumstances under which an estate planner may be sued for financial elder abuse remains unsettled. However, the existing precedent is instructive on two points.

1. First, there is a heightened risk of liability when conflicts are not adequately identified and waived or avoided altogether.
2. Second, late-in-life changes are risky without adequate safeguards that build a record of adequate due diligence on testamentary capacity. Thus, as is true with most professional liability risks, the client file is the practitioner's best defense. Though testamentary capacity can be satisfied when the client suffers numerous disabilities, avoiding risk to successors is best achieved by documenting the process of evaluating the client under the appropriate standards.

[1] *Hunsiger v. Graham*, 288 Ore. App. 169, 177 (2017); *Wood v. Jamison*, 176 Cal. App. 4th 156, 164 (2008).

[2] See, e.g., *Applestein v. Kleinhendler*, 2024 U.S. Dist. LEXIS 134609 at p. * 2-3 (E.D.N.Y. July 30, 2024).

[3] *Hunsiger* 288 Ore. App. at 187; *Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray, PC*, 109 Cal.App.4th 1287, 1290 (2003).

[4] *Hunsiger* 288 Ore. App. at 190.

[5] *Jackson v. Calone*, 2019 U.S. Dist. LEXIS 169388 at pp. *37-38 (E.D. Cal. Sept. 30, 2019).

[6] *Strawn v. Morris, Polich & Purdy, LLP*, 30 Cal. App. 5th 1087, 1103 (2019).

[7] Fla. Stat. § 415.825.103(1)(a); *Applestein*, 2024 U.S. Dist. LEXIS 134609 at p. *13.

[8] *Hunsiger*, 288 Ore. App. at 180, citing ORS §§ 120.100(5) and 124.110; *Wood v. Jamison*, 167 Cal. App. 4th 156, 164 (2008) citing, Cal Wel & Inst Code § 15610.30.

[9] See, *Hunsiger*, 288 Ore. App. at 183-84.

[10] 176 Cal. App. 4th at 158-59.

[11] *Id.*

[12] *Id.* at 164-65.

[13] *Id.*

[14] 30 Cal. App. 5th 1087, 1092 (2019).

[15] *Id.* at 1093.

[16] *Id.* at 1101-03.

[17] *Id.* at 1101, N. 5.

[18] *Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray, PC*, 109 Cal.App.4th 1287, 1298 (2003).

[19] 109 Cal.App.4th 1287, 1298-30 (2003).

[20] *Id.*

[21] COPRAC Formal Opinion 2021-207, pp. 10-11.

[22] E.g., *Moeller v. Superior Court*, 16 Cal. 4th 1124, 1129 (1997) (Successor trustees stand in the shoes of predecessor trustees and succeed to attorney-client communications).

[23] *Id.*

[24] E.g., *Wood*, 167 Cal. App. 4th at 158; *Granquist v. Sandberg*, 219 Cal. App. 3d 181, 185 (1990).

[25] 288 Ore. App. 169, 177 (2017).

[26] *Id.* at 171-72.

[27] *Id.*

[28] *Id.* at 174-75.

[29] *Id.* at 185-86.

[30] *Id.* at 184-85.

[31] ABA Commn. on L. & Aging & Am. Psychological Assn., Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (ABA/ APA 2005) pp. 5-9, 13-21 (collecting cases).

[32] *Id.* APA Guidelines for Psychological Assessment and Evaluation, Guideline 7 (APA 2020).

[33] Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, p. 15 (Discussing the importance of an autobiographical interview to test the client's knowledge of his assets, their value, his potential beneficiaries, and the rationale for the disposition he seeks).

[34] *Id.*

[35] 2019 U.S. Dist. LEXIS 169388 at pp. *37-39.

[36] *Id.* at pp. at pp. *3-4.

[37] *Id.* at pp. at pp. *38-39.

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