

ELDER EXPLOITATION

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State Bar of Texas
ADVANCED GUARDIANSHIP LAW COURSE
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CHAPTER 3



Brenda Hull Thompson

Judge

Brenda Hull Thompson is the judge of The Probate Court of Dallas County, Texas. She was elected in 2010 after more than twenty years of service in Texas to the community in civil practice and mediation. Her civil practice focused on estate administration, guardianship administration, and family law. In addition, she has been an adjunct professor at Texas Wesleyan School of Law. Before moving to Texas, she was a senior staff attorney at the office of the General Counsel for the Federal Trade Commission in Washington, D.C. She has made numerous presentations to local bar association sections and community groups and she has received numerous awards for her pro bono and public service activities pertaining to elderly and disabled persons, low-income persons, and children.

Judge Thompson received her J.D. degree from Georgetown University Law School, Washington, D.C., her M.A. degree from Boston University, and her B.S. degree from the University of Maryland. She is a member of the Dallas Bar Association and the Texas Bar Foundation, and she is licensed to practice law in Texas state courts, the U.S. District Court for the Northern District of Texas, the Supreme Court of Pennsylvania (inactive) and the District of Columbia Court of Appeals (inactive). Judge Thompson is serving on the Executive Committee of the National College of Probate Judges. She is the Presiding Judge of the Dallas County Probate Courts and has been a co-author on the O'Connor 2012-2013 Probate Code Plus, the 2013-14 Estates Code Plus and the 2014-2015 Estates Code Plus.



Mark R. Caldwell

Shareholder

Mark R. Caldwell was born on June 29, 1979 at Beaufort Naval Hospital in Beaufort, South Carolina where his father flew F-4 Phantoms at the nearby Marine Corps air station (although his mother had the more difficult job of raising three children). After having lived on the East Coast, West Coast and in Hawaii, he attended Eastfield Community College in Mesquite, Texas before transferring to Southern Methodist University, where he earned a full academic scholarship. One year later, he attended the London School of Economics as a General Course Student. Mark earned his law degree from New England School of Law in Boston, Massachusetts in 2005. He entered private practice as a litigator in a boutique probate and trust firm, representing executors, guardians, and beneficiaries in complex estate and trust litigation. He has also represented fiduciaries in all phases of estate, trust, and guardianship administration. Mark enjoys the investigatory aspects of estate and trust litigation, including reviewing and analyzing medical, financial, and suspicious property records and transactions. Mark is committed to developing and maintaining strong, personal relationships with his clients. He endeavors to offer smart, pragmatic and cost-effective legal advice. Mark believes that the strongest winning position is one that is simple, direct, and understandable and he realizes that estate and guardianship litigation often involves substantial damage to family relationships. While he strives to advocate strong, aggressive positions for clients, Mark also strives to resolve disputes in an ethical and reasonable manner that, if desired, does not preclude the opportunity for reconciliation.

Mark is married and has three children. He enjoys living an active life-style, traveling and spending time with his family.

Representative Experience

- Recovered significant settlement in case involving fraud on the community and breach of fiduciary duty through the use of a power of attorney.
- Obtained favorable jury verdict in a guardianship case involving an elderly ward.
- Successfully defeated claim that will was executed without testamentary capacity on summary judgment.
- Obtained temporary injunctions and temporary guardianships in cases involving the abuse of a power of attorney.
- Obtained partial summary judgment against Trustee for breach of fiduciary duty.
- Represents guardians, executors, and administrators in all phases of guardianship and estate administration.
- Routinely serves as attorney ad-litem and guardian ad-litem in guardianship cases.
- Routinely serves as temporary guardian and guardian in guardianship cases and as temporary administrator and administrator in decedents' estates.

Public Speaking & Publications

- Co-authored, Properly Performing Annual Accounts in Guardianships and Management Trusts Where One or Both Spouses are Incompetent, Real Estate, Probate, & Trust Law Reporter, Volume 52, No. 4 (2014).
- Served as Moderator for the Guardianship and Ad Litem Attorney Certification Course, sponsored by the Dallas

Bar Association Probate, Trusts & Estate Section, Dallas County Probate Courts and the Dallas Volunteer Attorney Program to train lawyers in the representation of guardians of indigent wards, and the role and responsibilities of the Attorney Ad Litem (2014).

- Winning the Battle and the War; A Remedies—Centered Approach to Litigation Involving Durable Powers of Attorney; 64 Bay. L. Rev. 435 (Spring 2012).
- Author/Speaker: “An Introduction to Guardianships” – Texas Department of Assistive & Rehabilitative Services (DARS), Dallas, Texas (Fall 2010; Spring 2011).
- Co-authored and presented article, “Proof of Facts and Common Evidentiary Problems Encountered in Contested Probate Proceedings,” at the Seventh Probate Litigation Seminar, sponsored by the Tarrant County Probate Bar Association (September 2010).
- Author, A Good Deed Repaid: Awarding Attorney’s Fees in Contested Guardianship Proceedings; 51 S. Tex. L. Rev. 439 (Winter 2009).

Community and Bar Association Involvement

- Board of Directors and Vice President, City of Sachse Economic Development Corporation (2010-2014)
- Member, Charter Review Commission, City of Sachse (2012-2013)
- Dallas Bar Association; Probate and Trust Section Member; Trial Skills Section Member
- Dallas Association of Young Lawyers; Elder Law Section Member
- Board of Directors, St. Thomas More Society
- Dallas Bar Mentor Program; Participated as Mentee; Mentor, Edward V. Smith III
- Organized and leads an ongoing monthly probate study group featuring prominent guest speakers and court staff

Certifications, Awards and Recognition

- Board Certified Estate Planning and Probate Law - Texas Board of Legal Specialization
- Named Rising Star by the Texas Super Lawyers (2014, 2015)

Education

- General Course, The London School of Economics, London, England (2001-2002)
- B.A., *magna cum laude*, Southern Methodist University, Dallas, Texas (2002)
- J.D., New England Law | Boston, Boston, Massachusetts (2005)



Amy Croft

Dallas County Assistant District Attorney

Amy Croft has been an Assistant District Attorney with the Dallas County District Attorney's Office since 2006. She is currently the deputy chief of the Elder Abuse Unit, which was established in May 2014 as part of the Elder Financial Safety Center, a public safety project made possible by the W.W. Caruth, Jr. Foundation at the Communities Foundation of Texas. She has been handling cases of elder abuse and financial exploitation since 2009.

Amy was selected to participate in the National District Attorneys Association's Prosecuting Elder Abuse Cases in May 2011 and she is a certified Elder Abuse Instructor by the Federal Law Enforcement Training Center through the U.S. Department of Homeland Security since August 2009. Before joining the Dallas County DA's Office, Amy worked as an associate in the bankruptcy section of the Dallas office of Haynes and Boone, L.L.P. Amy received her J.D. from Southern Methodist University Dedman School of Law in 2003 and graduated *magna cum laude* and Phi Beta Kappa with a B.A. in Political Science from Texas Christian University in 2000.

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ELDER EXPLOITATION

I. INTRODUCTION

According to one 2011 study, the annual financial loss by victims of elder financial abuse was estimated to be at least \$2.9 billion dollars, a 12% increase from the \$2.6 billion estimated in 2008.¹ Financial exploitation of the elderly is perhaps one of the fastest growing problems in society today. This problem may only grow worse by the fact that, statistically, the pool of elderly victims will only increase. Between 2012 and 2050, the United States will experience considerable growth in its older population.² According to the U.S. Census, in 2050, the population aged 65 and over is projected to be 83.7 million, almost double its estimated population of 43.1 million in 2012.³

While the sheer number of potential elder exploitation victims will increase substantially in the future, many potential victims face special challenges that only exacerbate their susceptibility to elder exploitation.

The number of Americans with Alzheimer's disease and other dementias will escalate rapidly in coming years as the baby boom generation ages. By 2050, the number of people age 65 and older with Alzheimer's disease may nearly triple, from 5 million to as many as 16 million, barring the development of medical breakthroughs to prevent, slow or stop the disease.⁴

The phrase “financial exploitation of the elderly” conjures up thoughts of dilapidated and disreputable nursing homes, elaborate reverse mortgage scams, telemarketing fraud, or phony “You’ve already won _____” sweepstakes perpetrated by strangers; the unfortunate reality is that many elderly people are exploited at the hands of those that they trust the most – their family and/or their caregivers. Exploitation or abuse by family members and/or caregivers in a domestic setting can be the most difficult to detect and quite frankly, the most difficult to accept. The difficulty in detection is due, in large part, to the fact that it comes in such subtle forms. For example, family members or caregivers may skim unattended cash, use credit cards to make innocuous purchases for

gas and food, take blank checks out of checkbooks, and/or steal jewelry, electronics, and personal information. Once their conduct is discovered, these perpetrators offer the most convenient justifications for their behavior, such as, “They wanted me to have it” or “I deserve something for having to do everything for them.”

Other signs of elder exploitation can be more conspicuous and can include: (1) Sudden changes in bank accounts or banking practice; (2) Unexplained withdrawals of significant sums of money by a person accompanying the victim; (3) Adding additional names on a bank signature card; (4) Unapproved withdrawal of funds using an ATM card; (5) Sudden changes in a will or other financial documents, sometimes ambiguously described as “asset protection”; (6) Unexplained missing funds or valuables; (7) Providing substandard care; (8) Having a significant amount of unpaid bills despite having enough money; (9) Forged signature for financial transactions or for the titles to property; (10) Sudden appearance of previously uninvolved relatives claiming their rights to a person’s affairs and possessions; (11) Unexplained sudden transfer of assets; and/or (12) Providing unnecessary services.⁵

Fortunately, an attorney has numerous weapons at his or her disposal to fight elder exploitation and to seek remedies for the exploited individual. The battle to protect the elderly can, and often does, occur along many fronts. In many cases, the battle spills into more than one theater at a time. This article highlights the key statutes and procedures used to fight elder exploitation in Texas. The statutes and procedures are organized and discussed in the context of the three main environments in which elder exploitation most commonly appears: (1) the criminal arena; (2) the administrative arena, i.e. Adult Protective Services; and (3) the guardianship arena.

The role of the Elder Financial Safety Center in educating the public and providing the tools and resources necessary to prevent, protect and prosecute elder exploitation is also discussed. Finally, this article discusses the boundaries of an attorney’s ethical obligation to report elder exploitation to criminal authorities while litigating contested civil proceedings.

II. THE CRIMINAL ARENA

Prosecution of cases involving the financial abuse and exploitation of elderly victims is an important component in the fight against elder exploitation. A successful prosecution can bring justice to the victim of this type of crime by holding the perpetrator

¹ The Metlife Study of Elder Financial Abuse (June 2011), available online at: <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf>.

² See An Aging Nation; The Older Population in the United States, Jennifer M. Ortman, Victoria A. Velkoff, and Howard Hogan, (May 2014), pg. 1; available online at: <http://www.census.gov/prod/2014pubs/p25-1140.pdf>.

³ *Id.*

⁴ See http://www.alz.org/alzheimers_disease_facts_and_figures.asp#quickFacts.

⁵ See http://www.dfps.state.tx.us/everyonesbusiness/PDFs/Financial-Exploitation_Eng.pdf.

accountable for his or her actions as well as deter others from engaging in this type of behavior.

A. Key Statutes

1. Tex. Penal Code § 32.45–Misapplication of Fiduciary Property

In Texas, criminal charges may be levied against persons acting in a fiduciary capacity. The Texas Penal Code defines the term “fiduciary” broadly to include a trustee, guardian, administrator, executor, conservator, and receiver, an attorney in fact or agent appointed under a durable power of attorney, and any other person acting in a fiduciary capacity, including an officer, manager, employee, or agent carrying on fiduciary functions on behalf of the fiduciary.⁶

A person commits a criminal offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.⁷ The term “misapply” has a special meaning under the Texas Penal Code and means to deal with property contrary to: (A) an agreement under which the fiduciary holds the property; or (B) a law prescribing the custody or disposition of the property.⁸

Texas Penal Code Section 32.45 provides a stair step liability scheme depending on the amount of the property misapplied, ranging from a Class C misdemeanor all the way to a first-degree felony when the value of the property misapplied is \$200,000 or more. Perhaps as a demonstration of the State’s resolve to curb abuse of our senior citizens, an offense under the section can be “bumped up” to the next higher punishment tier if the offense is committed against an elderly individual.⁹

Texas Penal Code Section 32.45 and its stair step liability scheme can become particularly important in civil cases, as in certain situations, conduct that violates Section 32.45 can serve as the basis to remove the statutory limitations on punitive damages. Chapter 41 of the Civil Practice & Remedies Code, which applies to any action in which a claimant seeks damages relating to a cause of action (e.g. breach of fiduciary duty), establishes the maximum amount of punitive damages that may be awarded. Generally, exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of economic damages; plus

(B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or

(2) \$200,000.¹⁰

But, these limitations do not apply to a cause of action against a defendant from whom a plaintiff seeks to recover exemplary damages based on knowing or intentional conduct described as a felony in Texas Penal Code Section 32.45 (i.e. when the value of the property misapplied is \$1,500 or more).¹¹ Our legislature sends a strong message when this conduct can lift punitive caps alongside other detestable acts, including capital murder, aggravated sexual assault, and injury to a child.

2. Tex. Penal Code § 32.53 – Exploitation of Elderly Individual

The statute provides that a person commits an offense if the person intentionally, knowingly, or recklessly causes the exploitation of a child, elderly individual, or disabled individual.¹² “Exploitation” means the illegal or improper use of a child, elderly individual, or disabled individual or the resources of a child, elderly individual, or disabled individual for monetary or personal benefit, profit, or gain.¹³

Enacted as of September 1, 2011, the exploitation statute only applies to offenses committed after that date. This statute is very broad in that it criminalizes the illegal or improper use of the individual *or* their resources. Unlike most of the other offenses contained in Chapter 32, it does not follow the fraud value ladder, and is always a third degree felony, no matter what dollar amount of property is involved. It may not be necessary for a victim to testify in a case prosecuted under this statute, especially if the evidence shows that the victim was incapacitated and/or unable to know that the defendant was illegally or improperly using their resources.

3. The Theft Statutes

Texas Penal Code Section 31 and its component subsections are referred to herein as the “Theft Statutes”. Texas Penal Code Section 31.03(a) provides that a person commits an offense if he unlawfully appropriates property with the intent to deprive the owner.¹⁴ The statute further states that appropriation is unlawful if it is without the owner’s effective consent.¹⁵ Most elder exploitation cases prosecuted

⁶ TEX. PENAL CODE §32.45(a)(1)(A)-(D).

⁷ TEX. PENAL CODE §32.45(b).

⁸ TEX. PENAL CODE §32.45(a)(2)(A).

⁹ TEX. PENAL CODE §32.45(d).

¹⁰ TEX. CIV. PRAC. & REM. CODE §41.008.

¹¹ TEX. CIV. PRAC. & REM. CODE §41.008(c).

¹² TEX. PENAL CODE ANN. §32.53(b).

¹³ TEX. PENAL CODE ANN. §32.53(a)(2).

¹⁴ TEX. PENAL CODE ANN. §31.03(a).

¹⁵ TEX. PENAL CODE ANN. §31.03(b)(1).

under the theft statutes come down to whether or not the victim had given effective consent to the perpetrator in the transaction or transactions in question.

There are some instances in which the victim in the transaction may have given his or her consent, but under the law, that consent is not effective. Section 31.01(3) lists several instances when consent is not effective. This paper focuses on the prosecution of theft offenses under Texas Penal Code Section 31.03— theft by deception as defined in Texas Penal Code 31.01(1)(A-E) and theft from an individual with diminished capacity as defined in Texas Penal Code Section 31.03(3)(E). Under Section 31.01(3)(A), consent is not effective if it is “induced by deception or coerced.”

Theft by Deception. The Penal Code provides several different definitions of “deception.”¹⁶ Under Section 31.01(1)(A), “deception” means creating or confirming by word or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true.¹⁷

The deception definitions also include scenarios in which the perpetrator fails to correct false information that the victim relies upon in exchange for her consent. Under Section 31.01(1)(B), “deception” means failing to correct a false impression of law or fact that is likely to affect the judgment of another in the transaction that the actor previously created or confirmed by words or conduct that the actor does not now believe to be true.¹⁸

Under Section 31.01(1)(E), deception includes promising performance that is likely to affect the judgment of another in the transaction and that of the actor does not intend to perform or knows will not be performed, except that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.¹⁹

In any case prosecuted as a theft by deception, it is very important that the victim will be able to testify at trial. Because the key to the offense is the deception, the victim must be able to clearly articulate exactly what the deception was and that it did indeed affect the judgment of the victim in the transaction.

Theft by Diminished Capacity. Section 31.01(3)(E) addresses situations in which consent is given by a person with diminished capacity, making the consent ineffective. Under the law, consent is not effective if “it is given by a person who by reason of

advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property.”²⁰ The “diminished capacity” state of the victim must exist at the time of the offense and must be the reason that the consent was given.

Most often, the victim is not able to testify at trial because he or she still has diminished capacity and therefore, is not a competent witness. Since the victim, due to her diminished state, provides no assistance in terms of testimony or information to the prosecution, it is possible to prosecute this type of offense even if the victim has passed away prior to trial. The two main elements that the prosecution must prove in a case like this are: (1) that the victim had diminished capacity at the time of the offense; and (2) that the perpetrator knew it.

B. Procedure

1. Levels of offenses and punishment ranges

The offenses used to prosecute financial abuse and exploitation of the elderly are found within Chapters 31 and 32 of the Texas Penal Code, which contain the theft and the fraud statutes.²¹ For theft and fraud related offenses, the level of offense is dependent upon the dollar amount involved in the crime. The level of offense determines the degree of punishment that will apply to that offense.

The “fraud value ladder” is consistent across all theft and fraud offenses. SEE APPENDIX A. The theft and fraud offenses in the Penal Code can range from a Class C Misdemeanor (lowest level of criminal offense) to First Degree Felony (highest level of criminal offense) dependent upon the dollar amount of the fraud. The degree of offense then determines the range of offense then determines the range of punishment that a defendant can receive as punishment for a crime. SEE APPENDIX B.

2. The Elderly Enhancement

The Penal Code defines “an elderly individual” as a person who is 65 years of age or older.²² The legislature has recognized that elderly individuals are often more vulnerable to victimization of financial crimes, and that the consequences can have a far more devastating effect on the elderly victim than on a younger victim. We see this illustrated in the “elderly enhancement” that exists within the theft and most of the fraud offenses found within Chapters 31 and 32 of the Penal Code. The elderly enhancement provides that if the victim of the crime is elderly, the level of offense is enhanced by one degree, subjecting the defendant to the next higher level punishment range.

¹⁶ TEX. PENAL CODE ANN. §§31.01(1)(A)-(E).

¹⁷ TEX. PENAL CODE ANN. §31.01(1)(A).

¹⁸ TEX. PENAL CODE ANN. §31.01(1)(B).

¹⁹ TEX. PENAL CODE ANN. §31.01(1)(E).

²⁰ TEX. PENAL CODE ANN. §31.01(3)(E).

²¹ TEX. PENAL CODE ANN. §§31 AND 32.

²² TEX. PENAL CODE ANN. §22.04(C)(2).

For example, what would otherwise constitute a third degree felony will be enhanced to a second degree felony theft if the State proves that the victim was 65 years of age or older at the time the offense was committed.²³

III. THE ADMINISTRATIVE ARENA

Essentially, Chapter 48 of the Texas Human Resources Code establishes the state's authority to protect elderly and disabled persons from abuse, neglect, and exploitation. The Texas Department of Family and Protective Services (DFPS) is charged with the statutory authority to investigate the abuse, neglect, or exploitation of elderly or disabled persons and to provide protective services to such people.²⁴ Adult Protective Services (APS) is a part of DFPS.

A. Adult Protective Services (APS)

In addition to investigating reports of abuse, neglect (including self-neglect), and exploitation of adults who are elderly or have disabilities, APS conducts in-home investigations and provides or arranges for services, investigates allegations at facilities, and educates the public about prevention of elder abuse.²⁵

B. Key Statutes

1. Abuse

Under Chapter 48 of the Texas Human Resources Code the term "Abuse" means:

- (A) the negligent or willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person by the person's caretaker, family member, or other individual who has an ongoing relationship with the person; or
- (B) sexual abuse of an elderly or disabled person, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Section 21.08, Penal Code (indecent exposure) or Chapter 22, Penal Code (assaultive offenses), committed by the person's caretaker, family member, or other individual who has an ongoing relationship with the person. Tex. Hum. Res. Code Ann. § 48.002(a)(2).

2. Exploitation

Under Chapter 48 of the Texas Human Resources Code the term "Exploitation" means:

- (3) the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an elderly or disabled person that involves using, or attempting to use, the resources of the elderly or disabled person, including the person's social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the elderly or disabled person. Tex. Hum. Res. Code Ann. § 48.002(a)(3).

3. Neglect

Chapter 48 of the Texas Human Resources Code defines "Neglect" to mean:

- The failure to provide for one's self the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain or the failure of a caretaker to provide such goods or services.²⁶

4. Immunity

To encourage reporting, the Texas Human Resources Code provides statutory immunity to any person who files a report with DFPS from civil and criminal liability arising from the report.²⁷ Furthermore, the identity of a person who files a report is treated as confidential during the investigation and there are special rules governing its release.²⁸

C. Procedure

APS, through its In-Home program, is responsible for investigating abuse, neglect and financial exploitation and providing services to persons who are aged 65 or older, or if between the age of 18-65 with mental, physical, or developmental disabilities that substantially impair the ability to live independently or provide for their own self-care or protection, and reside in the community (e.g., private homes, unlicensed adult foster homes, unlicensed board and care homes, etc.).²⁹

In fact, Texas Human Resources Code Section 48.002(c) also gives APS the authority to

²³TEX. PENAL CODE ANN. §31.03(F)(3)(A).

²⁴TEX. HUM. RES. CODE §48.001.

See the Texas Department of Family and Protective Services' Website available online at: https://www.dfps.state.tx.us/adult_protection/.

²⁶TEX. HUM. RES. CODE ANN. §48.002(a)(4).

²⁷ Hayden Colby, *How Texas Can Better Protect Seniors from Financial Abuse and Mismanagement Associated with Alzheimer's Disease*, 13 SCHOLAR 483, 500 (2010).

²⁸*Id.* TEX. HUM. RES. CODE ANN. §48.051.

²⁹ See http://www.dfps.state.tx.us/Adult_Protection/About_Adult_Protective_Services/in_home.asp.

further define abuse, neglect, and exploitation for purposes of conducting an investigation.³⁰ Title 40 Texas Administrative Code §705 offers further definitions of these terms.

Once a case is reported, APS caseworkers investigate the reported abuse, neglect, or financial exploitation to determine if the alleged victim has a substantial impairment, if the reported situation exists, and to what extent it adversely affects the alleged victim.³¹ Reports of abuse, neglect, or financial exploitation sometimes do not contain sufficient information for APS to determine an adult's level of impairment from a disability; therefore, APS assesses the alleged victim's level of impairment to determine whether he or she meets APS eligibility criteria.³²

The caseworker must initiate an investigation of all reports within 24 hours of receipt of the report by the department.³³ The initiation of the investigation allows the caseworker to gain further knowledge of the situation and determine whether immediate intervention is required. The caseworker is authorized to interview the elderly or disabled person, and if appropriate, with persons thought to have knowledge of the circumstances. If the elderly or disabled person refuses to be interviewed or cannot be interviewed because of a physical or mental impairment, the department shall continue the investigation by interviewing other persons thought to have knowledge relevant to the investigation.³⁴

Unfortunately, if the report is of suspected elder exploitation from within the family, the investigation will hinge almost entirely on the cooperation of the senior.³⁵ In many cases, seniors may be hesitant to

reveal exploitation or abuse by family members.³⁶ This is often attributable to a fear of retaliation, a desire to "keep the peace" in the family or embarrassment. Exploitation often cannot be verified and acted upon as a result. If the case manager has reason to believe exploitation is occurring, APS must notify the appropriate law enforcement authority and provide a copy of the investigation report.³⁷

In addition to involving a law enforcement agency, a caseworker also has a wide array of tools to help prevent further financial exploitation, including taking control of a bank account and administering a sufficient allowance to the exploited senior for basic provisioning per his or her needs.³⁸ If family members continue to misappropriate money, the caseworker may also administer a type of debit card to prevent the transfer of cash from the senior to the predator(s).³⁹ If these measures prove fruitless, the caseworker may go so far as to physically shop for the senior, and if necessary, to protect him or her from further exploitation.⁴⁰

The caseworker can petition the court for an emergency order authorizing protective services if the caseworker determines that the senior is suffering from abuse, neglect, or exploitation presenting a threat to life or physical safety, and that senior lacks the capacity to consent to receive protective services.⁴¹ A senior lacks capacity to consent to receive protective services if, because of mental or physical impairment, the senior is incapable of understanding the services offered and agreeing or rejecting them.⁴²

These cases frequently transform into proceedings similar to a guardianship, or one that may eventually result in the imposition of a temporary or permanent guardianship. The relief often sought by APS can include orders of the court authorizing: (1) immediate removal from a residence to an appropriate medical facility to alleviate immediate threats to life and/or safety; (2) suitable temporary placement following discharge from a hospital; and (3) assistance by law enforcement and/or medical personnel to carry out a court's orders.

If the caseworker has reason to believe the senior is an incapacitated person, and that the senior is in a state of abuse, neglect, or exploitation, the caseworker can refer the senior to the Department of Aging and

³⁰ TEX. HUM. RES. CODE §48.002(c) ("Except as provided by Subsection (b), the executive commissioner by rule may adopt definitions of "abuse," "neglect," and "exploitation," as an alternative to the definitions of those terms under Subsection (a), for purposes of conducting an investigation under this chapter or Chapter 142, Health and Safety Code.")

³¹ See http://www.dfps.state.tx.us/Adult_Protection/About_Adult_Protective_Services/in_home.asp.

³² *Id.*

³³ *Id.* See also TEX. HUM. RES. CODE §48.151(a) ("Not later than 24 hours after the department receives a report of an allegation of abuse, neglect, or exploitation under Section 48.051, the department shall initiate a prompt and thorough investigation as needed to evaluate the accuracy of the report and to assess the need for protective services, unless the department determines that the report: (1) is frivolous or patently without a factual basis; or (2) does not concern abuse, neglect, or exploitation . . .").

³⁴ TEX. HUM. RES. CODE §48.152.

³⁵ Hayden Colby, *How Texas Can Better Protect Seniors from Financial Abuse and Mismanagement Associated with Alzheimer's Disease*, 13 SCHOLAR 483, 500-01 (2010).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Hayden Colby, *How Texas Can Better Protect Seniors from Financial Abuse and Mismanagement Associated with Alzheimer's Disease*, 13 SCHOLAR 483, 501 (2010).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ TEX. HUM. RES. CODE §48.208.

⁴² *Id.*

Disability Services for guardianship services.⁴³ However, if there is a less restrictive alternative to a guardianship, the caseworker must pursue this alternative, rather than refer the senior for guardianship services.⁴⁴

The caseworker then completes a comprehensive assessment of the alleged victim's situation. The purpose of the assessment is to determine the alleged victim's eligibility, situation and needs. The assessment process also enables the caseworker to identify and address root causes of abuse, neglect, or financial exploitation.

When reports are validated on cases in the community and protective services are appropriate, APS caseworkers provide or arrange for services to alleviate or prevent further maltreatment. Services may be provided directly by caseworkers, through arrangements with other community resources or purchased by APS on a short-term, emergency basis.

Types of services provided include, but are not limited to, the following:

- Financial assistance for rent and utility restoration;
- Social services;
- Health services;
- Referrals to the Texas Department of Aging and Disability Services (DADS) for guardianship services; and/or
- Referrals to other state or community services.

Instances of abuse or neglect may be reported by calling the abuse hotline at 1-800-252-5400.

D. The Texas Department of Aging and Disability Services (DADS)

The Texas Department of Aging and Disability Services (DADS) is one of five state agencies⁴⁵ that make up the broader Texas health and human services system.⁴⁶ These agencies—including DADS—operate under the oversight of the Health and Human Services Commission.⁴⁷

DADS has numerous powers and duties, but they are generally responsible for administering human services programs for the aging and disabled, including:

- (1) administering and coordinating programs to provide community-based care and support services to promote independent living for

populations that would otherwise be institutionalized;

- (2) providing institutional care services, including services through convalescent and nursing homes and related institutions under Chapter 242, Health and Safety Code;
- (3) providing and coordinating programs and services for persons with disabilities, including programs for the treatment, rehabilitation, or benefit of persons with developmental disabilities or mental retardation; and
- (4) operating state facilities for the housing, treatment, rehabilitation, or benefit of persons with disabilities, including state schools for persons with mental retardation.⁴⁸

In addition to these administrative duties, DADS also plays an important role as the “eyes and ears” on the ground, as they: advocate for residents of nursing facilities through the office of the state long-term care ombudsman; foster the state and community infrastructure and capacity to serve older residents of this state; ensure the availability of a comprehensive resource for state government and the public on trends related to and services and programs for an aging population; perform all licensing and enforcement activities and functions related to long-term care facilities, including licensing and enforcement activities related to convalescent and nursing homes and related institutions under Chapter 242, Health and Safety Code; perform all licensing and enforcement activities related to assisted living facilities under Chapter 247, Health and Safety Code; perform all licensing and enforcement activities related to intermediate care facilities for persons with mental retardation under Chapter 252, Health and Safety Code; and perform all licensing and enforcement activities and functions related to home and community support services agencies under Chapter 142, Health and Safety Code.⁴⁹

DADS also serves as guardian of the person or estate, or both, for an incapacitated individual in certain circumstances as authorized by the Texas Estates Code.⁵⁰

Finally, DADS maintains the “employee misconduct registry,”⁵¹ which contains information about persons who work at certain elder care facilities or for an individual employer; who are individuals who provide personal care services, active treatment, or any other personal services to a consumer or to an

⁴³ TEX. HUM. RES. CODE §48.209.

⁴⁴ *Id.*

⁴⁵ TEX. HUM. RES. CODE §161.002.

⁴⁶ See <http://www.dads.state.tx.us/services/faqs-fact/fag/index.html>

⁴⁷ *Id.*

⁴⁸ TEX. HUM. RES. CODE §161.071.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ TEX. HEALTH & SAFETY CODE § 253.007.

individual using the consumer-directed service option, and who are not licensed by an agency of the state to perform the services the employee performs for the individual using the consumer-directed service option or at the facility or is a nurse aide employed by a facility.⁵² This reporting and record keeping function plays a significant role in identifying and “flagging” certain individuals who might present significant exploitation risks.

The state office headquarters is located in the John H. Winters Human Services Complex, 701 W. 51st St., Austin, Texas 78751. The mailing address is P.O. Box 149030, Austin, Texas 78714-9030. The main phone number is 512-438-3011.

IV. THE GUARDIANSHIP ARENA

It is common for elder exploitation to be uncovered in contested guardianship proceedings. Such exploitation is usually apparent in the facts supporting a temporary guardianship application or a request for injunctive relief. Even when elder exploitation is not discovered in the early stages, it almost certainly comes out during the discovery stages of a contested guardianship proceeding, especially where two or more applicants allege the other is disqualified from serving as guardian.

A. Key Statutes

Be careful to identify and distinguish the differences between a lack of standing to apply for or contest a guardianship and disqualification to serve as guardian. One is a question of law (standing), while the other is a question of fact (disqualification).⁵³ Any person who does not have an adverse interest to the proposed ward may file for, or contest, an application to create, modify or terminate a guardianship.⁵⁴ This adverse interest, and thus a person’s standing to participate in a guardianship proceeding, may be challenged by filing a *motion in limine*. The burden rests upon the challenged person to prove his or her standing.⁵⁵

Also note that the Texas Estates Code supplies no definition of the phrase “adverse interest” in connection with Section 1055.001. In *Betts v. Brown*, the court applied the rationale often used in determining issues of standing in a decedent’s estate when it concluded that an “adverse interest” is one that

does not promote the well-being of the ward.⁵⁶ A debt owed by a party to the proposed ward may or may not divest them of standing, but even if it does not, the issue will almost always reappear in the context of a challenge to that person’s qualification to serve as guardian.⁵⁷

The laundry list of grounds that would disqualify someone from serving as guardian that were formerly listed in Texas Probate Code Section 681 can now be found in separate sections in the Texas Estates Code, starting from Section 1104.351 and ending at Section 1104.358.

1. Incapacity or Inexperience

Texas Estates Code Section 1104.351 defines “inexperience” very broadly and in fact, does not really limit the disqualification to “inexperience” alone. The Section states that a person may not be appointed guardian if the person is “a person who, because of inexperience, lack of education, or *other good reason*, is incapable of properly and prudently managing and controlling the person or estate of the ward.”⁵⁸ There are almost an infinite number of *good* reasons why someone would be incapable of properly and prudently managing the estate of a ward. For example, a pattern or practice of manipulative or exploitive behavior, even if it’s only subtle, can serve as the basis to argue someone should be disqualified.

2. Unsuitability

A person may not be appointed guardian if the person, institution, or corporation is found by the court to be unsuitable.⁵⁹ For instance, a ward’s husband was considered unsuitable, and was thus disqualified from serving as permanent guardian, because he withheld payments for the ward’s nursing home bills while he was her temporary guardian.⁶⁰

3. Notoriously Bad Conduct

“Notoriously bad conduct” allegations – perhaps one of the broadest grounds for opposing someone from being appointed as guardian – can contain numerous acts of elder exploitation. A person may not

⁵⁶ *Betts v. Brown*, No. 14-99-00619-CV, 2001 WL 40337, at *3 (Tex. App. – Houston [14th Dist.] Jan. 18, 2001 (not designated for publication).

⁵⁷ See *In re Miller*, 299 S.W.3d 179 (Tex. App. – Dallas 2009) (court found standing despite indebtedness to the proposed ward), but compare to *In re Olivares*, No. 07-07-0275-CV, 2008 WL 5206169, *2 (Tex. App. – Amarillo Dec. 12, 2008 (not designated for publication) (court found no standing because of indebtedness to the proposed ward).

⁵⁸ TEX. ESTATES CODE §1104.351(2) (emphasis added).

⁵⁹ TEX. ESTATES CODE §1104.352.

⁶⁰ *Trimble v. Texas Dept. of Protective & Regulatory Service*, 981 S.W.2d 211 (Tex.App. – Houston [14th Dist.] 1998).

⁵² TEX. HEALTH & SAFETY CODE ANN. § 253.001.

⁵³ *Betts v. Brown*, No. 14-99-00619-CV, 2001 WL 40337, at *3 (Tex. App. – Houston [14th Dist.] Jan. 18, 2001 (not designated for publication).

⁵⁴ TEX. ESTATES CODE §1055.001.

⁵⁵ *In re Miller*, 299 S.W.3d 179 (Tex. App. – Dallas 2009).

be appointed guardian if the person's conduct is notoriously bad.⁶¹ It is presumed to be not in the best interests of a ward or incapacitated person to appoint as guardian of the ward or incapacitated person a person who has been finally convicted of:

- (1) any sexual offense, including sexual assault, aggravated sexual assault, and prohibited sexual conduct;
- (2) aggravated assault;
- (3) injury to a child, elderly individual, or disabled individual;
- (4) abandoning or endangering a child;
- (5) terroristic threat; or
- (6) continuous violence against the family of the ward or incapacitated person.

4. Conflict of Interest

A person may not be appointed guardian if the person: (1) is a party or is a person whose parent is a party to a lawsuit concerning or affecting the welfare of the proposed ward; (2) is indebted to the proposed ward, unless the person pays the debt before appointment; or (3) asserts a claim adverse to the proposed ward or the proposed ward's property.⁶²

Texas Estates Code Section 1104.353 contains a savings clause for the first and second grounds. The fact that a person is a party (or their parent is a party) to lawsuit concerning or affecting the welfare of the proposed ward will not serve to disqualify the person if the court: (A) determines that the lawsuit claim of the person who has applied to be appointed guardian is not in conflict with the lawsuit claim of the proposed ward; or (B) appoints a guardian ad litem to represent the interests of the proposed ward throughout the litigation of the ward's lawsuit claim. Similarly, the fact that a person is indebted to the proposed ward will not disqualify the person if the person pays the debt before being appointed as guardian.⁶³

The fact that a person has an interest in the ward's property does not necessarily mean there is an actual conflict of interest. A daughter's interest in living in her mother's home and using a joint bank account alone was inadequate to disqualify her as guardian.⁶⁴

5. Disqualified by Declaration

A person may not be appointed guardian if the person is disqualified in a declaration under Texas Estates Code Section 1104.202(b).⁶⁵ The fact that a proposed ward has affirmatively disqualified someone

from serving as their guardian can sometimes reflect the fact that the disqualified person had previously exploited, or attempted to exploit, the proposed ward, or – and this can be more disturbing – that the declaration was executed at the insistence and perhaps undue influence of someone who is exploiting the proposed ward and wishes to insulate their conduct from concerned and good intentioned family members. However, courts might be reluctant to honor the disqualification in a declaration if that disqualification was made when the ward was already incapacitated.⁶⁶

Note that the declaration(s) and designation(s) permitted under Texas Estates Code Section 1104.202 may be made self-proven at any point during the declarant's lifetime.⁶⁷ Once self-proven, the declaration and/or designation is *prima facie* evidence of the declarant's competency.⁶⁸ Discovery in a guardianship frequently focuses upon estate planning documents executed at or around a time of suspected incapacity and/or exploitation. The testimony of estate planning lawyers, attesting witnesses and even notary publics can be critical to determining the validity of declaratory documents that, if misused, might operate to insulate exploitative conduct.

6. Subject to Protective Order for Family Violence

A person found to have committed family violence who is subject to a protective order issued under Chapter 85, Texas Family Code, may not be appointed guardian of a proposed ward or ward who is protected by the protective order.⁶⁹ Texas Estates Code Section 1104.358 became effective January 1, 2014 and reflected the disharmony and conflict found in the growing number of guardianship disputes that involved a divorce or family law component. Family violence is a term of art and is defined in the Texas Family Code broadly to include:

- (1) an act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;
- (2) abuse, as that term is defined by Sections 261.001(1)(C), (E), and (G), by a member of

⁶¹ TEX. ESTATES CODE §1104.353.

⁶² TEX. ESTATES CODE §1104.354.

⁶³ *Id.*

⁶⁴ *Hill v. Jones*, 773 S.W.2d 55, 57 (Tex.App. Houston [14th Dist.] 1989).

⁶⁵ TEX. ESTATES CODE §1104.355.

⁶⁶ See *In re Guardianship of Parker*, 275 S.W.3d 623, 632 (Tex.App. Amarillo [7th Dist.] 2008).

⁶⁷ TEX. ESTATES CODE §§1104.202 – 1104.206.

⁶⁸ TEX. ESTATES CODE §1104.209.

⁶⁹ TEX. ESTATES CODE §1104.358.

- a family or household toward a child of the family or household; or
- (3) dating violence, as that term is defined by Section 71.0021.⁷⁰

B. Access to Criminal History Records

The Texas Estates Code provides a procedure whereby the criminal histories of proposed guardians (even proposed temporary guardians) are to be obtained, reviewed, and taken into consideration when determining who to appoint as guardian. This can, however, have only a limited effect on identifying elderly predators, as many types of elder exploitation do not, and will not, show up on the criminal radar.

1. General Rule

With a few exceptions, the clerk of the county having venue of the proceeding for the appointment of a guardian has a duty to obtain criminal history record information that is maintained by the Department of Public Safety (DPS) or the Federal Bureau of Investigation (FBI) identification division relating to the following persons:

- (1) a private professional guardian;
- (2) each person who represents or plans to represent the interests of a ward as a guardian on behalf of the private professional guardian;
- (3) each person employed by a private professional guardian who will: (A) have personal contact with a ward or proposed ward; (B) exercise control over and manage a ward's estate; or (C) perform any duties with respect to the management of a ward's estate;
- (4) each person employed by or volunteering or contracting with a guardianship program to provide guardianship services to a ward of the program on the program's behalf; or
- (5) any other person proposed to serve as a guardian under this title, including a proposed temporary guardian and a proposed successor guardian, other than the ward's or proposed ward's family member or an attorney (the "General Rule")⁷¹

The clerk may charge a \$10 fee to recover the costs of obtaining criminal history record information referenced above.⁷²

2. Exceptions

The county clerk does not have a duty to obtain a criminal history record under three circumstances.

First, Texas Estates Code Section 1104.403 alleviates this duty if not later than the 10th day before the date of the hearing to appoint a guardian, a person submits to the clerk a copy of the person's criminal history record information required under Section 1104.402(a)(5) that the person obtains not earlier than the 30th day before the date of the hearing from: (1) the Department of Public Safety; or (2) the Federal Bureau of Investigation (the "Self-Reporting Exception").⁷³

Second, the clerk is not required to obtain criminal history record information for a person who holds a certificate issued under Section 155.102, Government Code (dealing with private professional guardians), or a provisional certificate issued under Section 155.103, Government Code, if the guardianship certification program of the Judicial Branch Certification Commission conducted a criminal history check on the person before issuing or renewing the certificate (the "Private Professional Guardian Exception")⁷⁴ Even then, however, the board shall provide to the clerk the criminal history record information that was obtained from the Department of Public Safety or the Federal Bureau of Investigation if the court requests it.⁷⁵

Third, the clerk is not required to obtain criminal history record information in cases where, under Texas Estates Code Section 1104.406, the Department of Aging and Disability Services (DADs) has an independent duty to obtain the criminal records. This may occur, for example, where an individual is or will be providing guardianship services for a ward of DADs or a ward referred by DADs.⁷⁶

3. Confidentiality

Criminal history record information obtained or provided under Texas Estates Code Section 1104.402 (the General Rule), 1104.403 (the Self-Reporting Exception), or 1104.404 (the Private Professional Guardian Exception) is privileged and confidential and is for the exclusive use of the court. The criminal history record information may not be released or otherwise disclosed to any person or agency except on court order or consent of the person being investigated.⁷⁷ The county clerk may destroy the criminal history record information after the information is used for the purposes authorized by this subchapter.⁷⁸

⁷³ TEX. ESTATES CODE §1104.403.

⁷⁴ TEX. ESTATES CODE §1104.404.

⁷⁵ *Id.*

⁷⁶ TEX. ESTATES CODE §1104.406(a).

⁷⁷ TEX. ESTATES CODE §1104.405.

⁷⁸ *Id.*

⁷⁰ TEX. FAM. CODE §71.004.

⁷¹ TEX. ESTATES CODE §1104.402.

⁷² TEX. ESTATES CODE §1104.402.

4. Use of Criminal History Records by the Court

The court shall use the information obtained under this subchapter only in determining whether to:

- (1) appoint, remove, or continue the appointment of a private professional guardian, a guardianship program, or the department; or
- (2) appoint any other person proposed to serve as a guardian under this title, including a proposed temporary guardian and a proposed successor guardian, other than the ward's or proposed ward's family member or an attorney.⁷⁹

C. Procedure

1. Court-Initiated Procedure to Appoint a Guardian

If a court has probable cause to believe that a person is incapacitated and does not have a guardian, the court can appoint a guardian ad litem or a court investigator to investigate the person's conditions and circumstances to determine whether the person is indeed incapacitated, and whether a guardianship is necessary.⁸⁰

A written letter or certificate from a physician who has examined the person, or an information letter about the person submitted by an interested person can establish the probable cause required for court-initiated procedure.⁸¹ An information letter must describe the nature and degree of the person's alleged incapacity, and state whether the person is in imminent danger of serious impairment to the person's physical health, safety, or estate.⁸² Additionally, if the interested person submitting the information letter is also a family member of the alleged incapacitated person, the information letter must be signed and sworn to before a notary public by the interested person, and must include a written declaration signed by the interested person under penalty of perjury that the information is true and to the best of the person's knowledge.⁸³ These requirements ensure that a potential guardianship is not in and of itself a form of elder exploitation; disgruntled family members cannot threaten to initiate a guardianship for a senior based on sheer spite, lest they commit perjury.

After the court-appointed guardian ad litem or court investigator completes an investigation, he or she must file an application for the appointment of a guardian of the person and/or estate, if he or she believes that the person is incapacitated and that a guardianship is necessary.⁸⁴

⁷⁹ TEX. ESTATES CODE §1104.409.

⁸⁰ TEX. ESTATES CODE §1102.001.

⁸¹ TEX. ESTATES CODE §1102.002.

⁸² TEX. ESTATES CODE §1102.003(a)(9-10).

⁸³ *Id.*

⁸⁴ TEX. ESTATES CODE §1102.004.

2. Initiation of Proceeding for Appointment of Guardian

Any person without an adverse interest may file an application for guardianship when a proposed ward becomes incapacitated and the need for guardianship arises.⁸⁵

The application for appointment of a guardian must state the nature and degree of the alleged incapacity, which is accomplished by including a written letter or certificate from a physician.⁸⁶ A court may not grant an application to create a guardianship unless the applicant presents this letter or certificate to the court.⁸⁷ The letter or certificate must be dated no earlier than 120 days before the application is filed, and it must be based on an examination performed no earlier than 120 days before the application is filed, assuring that the medical evidence of incapacity is recent.⁸⁸

Service and notice requirements associated with the application for guardianship also act as procedural safeguards against elder exploitation. When an application for guardianship is filed, the court clerk must issue a citation stating that the application was filed, the name of the proposed ward, the name of the applicant, and the name of the proposed guardian, if different than the applicant.⁸⁹ This citation must be posted, and it must cite all persons interested in the welfare of the proposed ward to appear at the time and place stated in the notice if those persons wish to contest the application.⁹⁰

A proposed ward must be personally served with citation to appear and answer an application for guardianship.⁹¹ The proposed ward's parents and spouse are also entitled to personal service.⁹² Additionally, the applicant for guardianship must mail a copy of the application and a notice containing information required in the citation to

- (1) each adult child of the proposed ward;
- (2) each adult sibling of the proposed ward;
- (3) the administrator of a nursing home facility or similar facility in which the proposed ward resides;
- (4) the operator of a residential facility in which the proposed ward resides;
- (5) a person whom the applicant knows to hold a power of attorney signed by the proposed ward;

⁸⁵ TEX. ESTATES CODE §1055.001.

⁸⁶ TEX. ESTATES CODE §1101.001(b)(4).

⁸⁷ TEX. ESTATES CODE §1101.103.

⁸⁸ *Id.*

⁸⁹ TEX. ESTATES CODE §1051.102.

⁹⁰ *Id.*

⁹¹ TEX. ESTATES CODE §1051.103.

⁹² *Id.*

- (6) a person designated to serve as guardian of the proposed ward by a written declaration, if the applicant knows of the existence of the declaration;
- (7) a person designated to serve as guardian of the proposed ward in the probated will of the last surviving parent, if the declarant is deceased and the applicant knows of the existence of the declaration;
- (8) a person designated to serve as guardian of the proposed ward by a written declaration of the proposed ward's last surviving parent, if the declarant is deceased and the applicant knows of the existence of the declaration; and
- (9) each person named as another relative within the third degree by consanguinity in the application if the proposed ward's spouse and each of the proposed ward's parents, adult siblings, and adult children are deceased or there is no spouse, parent, adult sibling, or adult child.⁹³

3. Investigation

On the filing of an application for guardianship, a statutory probate court must appoint a court investigator to investigate the circumstances of the proposed guardianship and determine whether a less restrictive alternative to guardianship is appropriate.⁹⁴ The court also may appoint a court visitor to evaluate the proposed ward on the court's own motion or on the request of any interested person, including the proposed ward.⁹⁵

The court must appoint an attorney ad litem to represent the legal interests of the proposed ward, and advocate on their behalf.⁹⁶ The attorney ad litem is provided copies of all of the current records in the guardianship case, and may have access to all of the proposed ward's relevant medical, psychological, and intellectual testing records.⁹⁷ Within a reasonable amount of time before the hearing on the application for guardianship, the attorney ad litem must interview the proposed ward and discuss the law and facts of the case, the proposed ward's legal options regarding the disposition of the case, and the grounds on which the guardianship is sought.⁹⁸ The appointment of an attorney ad litem provides a senior who is facing elder exploitation the confidential opportunity to bring to light any abuse.

⁹³ TEX. ESTATES CODE §1051.104.

⁹⁴ TEX. ESTATES CODE §1054.151.

⁹⁵ TEX. ESTATES CODE §1054.103.

⁹⁶ TEX. ESTATES CODE §1054.001.

⁹⁷ TEX. ESTATES CODE §1054.003.

⁹⁸ TEX. ESTATES CODE §1054.004.

4. Hearing

A court must have a hearing on an application for the appointment of a guardian: consideration by submission of a motion or application is prohibited.⁹⁹ A proposed ward is entitled to a jury trial on request.¹⁰⁰

At the hearing for appointment of a guardian, the court will inquire as to whether the proposed ward can feed, clothe, and shelter himself or herself, care for himself or herself, and manage his or her property or financial affairs.¹⁰¹ The court will inquire into the qualifications, abilities, and capabilities of the person seeking to be appointed guardian.¹⁰² Importantly, a proposed ward must be present at the hearing unless the court determines that a personal appearance is not necessary.¹⁰³

If the court finds that the proposed ward is totally without capacity to care for himself or herself and manage his or her property, the court may appoint a guardian of the proposed ward's person and/or estate.¹⁰⁴

5. Guardian of the Estate Must Act with Court Permission

The Texas Estates Code imposes a myriad of duties on a guardian of the estate, and a guardian must obey these legal obligations or face removal. The numerous requirements ensure that a ward does not face exploitation within the guardianship, as the guardian must account to the court for every action.

Not later than the 30th day after the guardian's date of qualification, a guardian must file with the county clerk an inventory of all of the ward's property that has come into the guardian's possession or about which the guardian has knowledge.¹⁰⁵ This inventory must set out an appraisal of the fair market value of each item in the inventory on the date the guardian was appointed.¹⁰⁶ If the judge does not approve the inventory, the judge must enter an order stating so, and requiring the filing of another inventory.¹⁰⁷ On the written complaint of any interested person that something has not been included in the inventory, the guardian will be cited to appear and show cause why he or she should not be required to file another inventory.¹⁰⁸

A guardian is required to exercise the judgment and care under the circumstances then prevailing that a

⁹⁹ TEX. ESTATES CODE §1055.051.

¹⁰⁰ TEX. ESTATES CODE §1101.052.

¹⁰¹ TEX. ESTATES CODE §1101.051.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ TEX. ESTATES CODE §1101.151.

¹⁰⁵ TEX. ESTATES CODE §1154.051.

¹⁰⁶ *Id.*

¹⁰⁷ TEX. ESTATES CODE §1154.054.

¹⁰⁸ TEX. ESTATES CODE §1154.102.

person of ordinary prudence, discretion, and intelligence exercises in the management of the person's own affairs.¹⁰⁹ A guardian cannot sell property of the ward, or lease it for more than one year, without first obtaining court permission.¹¹⁰ An interested person can file an opposition to the sale, or apply to sell other property of the estate.¹¹¹ If the property is indeed sold, the guardian must file a report on the sale of the property, and the court must hold a hearing to determine the adequacy of the report.¹¹²

6. Annual Reviews

As a "checks and balances" feature, guardianship authority expires annually if it is not renewed. Each year, the guardian of the estate, and/or the guardian of the person, must provide to the court certain information about the guardianship. The guardian of the estate must file an annual account that details any changes to the ward's estate that have occurred during the previous year of the guardianship.¹¹³ Similarly, a guardian of the person must file an annual report that describes the status of the ward, including his or her residence, doctor's visits, and living arrangements.¹¹⁴

Additionally, every year the court must review the guardianship to determine whether the guardianship should be continued, modified, or terminated.¹¹⁵ In making this determination, courts may review any report prepared by a court investigator, guardian ad litem, or court visitor.¹¹⁶ The court may also conduct a hearing or review an annual account or annual report.¹¹⁷

The requirement that the court annually review the guardianship, combined with the annual account and annual report prepared by the guardian(s), establishes a high degree of accountability and preemptively halts elder exploitation.

The restrictions placed on a guardian's ability to invest the ward's estate and the court's related supervisory power serve as another level of protection for the ward during the pendency of a guardianship. These investment provisions are found in Texas Estate Code Sections 116.001 through 116.205. The guardian of the estate has a duty to invest the ward's estate that meets a certain conservative standard set forth in Texas Estates Code Section 1161.003 within 180 days after the guardian qualifies, or alternatively, make application to invest the funds in another manner the

court approves.¹¹⁸ The court has the ability, on its own motion, to cite the guardian to appear and show cause why the estate is not invested or not properly invested.¹¹⁹

7. Modification and Closing of Guardianships

Once a guardianship is established, the ward is not necessarily trapped in the guardianship. Rather, there are ample opportunities for the ward, or any person interested in the ward's welfare, to ask the court to modify or close the guardianship. Courts seek the opportunity to maintain a narrowly-tailored guardianship and embrace circumstances that might permit a guardianship's conclusion by way of restoration of a ward's capacity. As stated above, every year the court must review the guardianship to determine whether the guardianship should be continued, modified, or terminated.¹²⁰

A guardianship lasts until the ward is no longer incapacitated, or passes away. When the ward or any interested person seeks by written application to terminate or modify the guardianship, then if the court finds by a preponderance of the evidence that the ward is no longer partially or fully incapacitated, the court may close the guardianship.¹²¹ If the court finds by a preponderance of the evidence that the current nature and degree of the ward's incapacity warrants a modification of the guardianship, the court may modify the guardianship accordingly.¹²²

Moreover, at any time, the ward may request an order for closing or modifying the guardianship by writing an informal letter to the court.¹²³ Anyone who knowingly interferes with the transmission of the request will be guilty of contempt of court.¹²⁴ Once the court receives the letter, it must appoint the court investigator or a guardian ad litem to investigate the circumstances described in the letter, and determine whether the ward is no longer incapacitated or whether the guardianship should be modified.¹²⁵ If the guardianship should be closed or modified, the court investigator or guardian ad litem must file an application to do so on the ward's behalf.¹²⁶

V. COURT INVESTIGATORS

Court investigators are those persons appointed by the judge of a statutory probate court under Texas Government Code Section 25.0025 to essentially be

¹⁰⁹ TEX. ESTATES CODE §1161.002.

¹¹⁰ TEX. ESTATES CODE §1158.001.

¹¹¹ TEX. ESTATES CODE §1158.254.

¹¹² TEX. ESTATES CODE §1158.551, §1158.552.

¹¹³ TEX. ESTATES CODE §1163.002, §1163.001.

¹¹⁴ TEX. ESTATES CODE §1163.101.

¹¹⁵ TEX. ESTATES CODE §1201.052.

¹¹⁶ TEX. ESTATES CODE §1201.053.

¹¹⁷ *Id.*

¹¹⁸ TEX. ESTATES CODE §1161.051.

¹¹⁹ TEX. ESTATES CODE §1161.007.

¹²⁰ TEX. ESTATES CODE §1201.052.

¹²¹ TEX. ESTATES CODE §1202.153.

¹²² *Id.*

¹²³ TEX. ESTATES CODE §1202.054.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

the “eyes and ears” of the Court. (Texas Government Code Section 25.0025 directs the judge of a statutory probate court to appoint at least one court investigator—although the commissioners court can authorize additional investigators).¹²⁷ In their role, they are often on the front lines of spotting elder exploitation.

A. General Duties

A court investigator has several key duties. First, when a guardianship application is filed, a court investigator is appointed to investigate the circumstances alleged in the application to determine whether a less restrictive alternative to guardianship is appropriate.¹²⁸

Second, a court investigator is required to perform the following “general duties”: (1) supervise a court visitor program (discussed below) and, in that capacity, serve as the chief court visitor; (2) investigate a complaint received from any person about a guardianship and report to the judge, if necessary; and (3) perform other duties as assigned by the judge or required by this title.¹²⁹

Except where a guardianship is created only because the appointment of a guardian for a person is necessary for the person to receive funds from a governmental source, each statutory probate court is required to operate a court visitor program to assess the conditions of wards and proposed wards.¹³⁰ At any time before a guardian is appointed for a proposed ward or during the pendency of a guardianship of the person or estate, a court may appoint a court visitor to evaluate the ward or proposed ward and provide a written report on: (1) the request of any interested person, including the ward or proposed ward; or (2) the court's own motion.¹³¹ Within 14 days after the court visitor performs an evaluation of the ward or proposed ward, the court visitor is required to file a sworn report containing certain specific information.¹³²

B. Report

A court investigator is required to file with the court a report containing the court investigator's findings and conclusions after conducting an investigation under Texas Estates Code Section 1054.151 (general investigation of guardianship and consideration of least restrictive alternatives) or Section 1054.152 (the general duties).¹³³ In a contested case, the court investigator must provide copies of the report of the court investigator's findings

and conclusions to the attorneys for the parties before the earlier of: (1) the seventh day after the date the court investigator completes the report; or (2) the 10th day before the date the trial is scheduled to begin.¹³⁴ Disclosure to a jury of the contents of a court investigator's report is subject to the Texas Rules of Evidence.¹³⁵

C. Mandatory Duties to Report or Investigate Abuse or Neglect

It is important to note that the Texas Estates Code essentially tells us that third persons cannot rely on court investigators to report elder exploitation (*See* Texas Estates Code §1054.154, stating that nothing in the court investigator provisions supersedes any duty or obligation of another to report or investigate abuse or neglect under any statute of this state).

VI. ELDER FINANCIAL SAFETY CENTER

Typically, the issue of elder financial safety or financial insecurity in a political subdivision is assigned to or handled by independent entities such as law enforcement, courts, public and private social services agencies and the like. As outlined above, elder financial safety is a national concern being discussed and addressed at all levels of government and in most communities. Whether elder financial insecurity stems from inadequate resources, insufficient education, lack of access to services, isolation, predatory persons and entities in the community or diminished physical or mental capacity, it seldom improves without strategic intervention.

In poignant testimony to the U. S. Senate Special Committee on Aging in March of 2011, legendary actor Mickey Rooney said that he “suffered silently” for years from elder financial abuse. The tragic story of Brooke Astor, the New York philanthropist, and her son Anthony Marshall, who was convicted and served prison time for elder financial abuse/theft as well as the multitude of stories less famous person who are victimized by family members, caregivers, and other people in the community are painful evidence of the need for specific and coordinated action.

A case of elder financial exploitation in Dallas County, Texas garnered significant local and national media attention in June 2011. The case, known as *4949 Swiss Avenue*, involved 88 year old socialite Mary Ellen Bendtsen and theft of her entire estate by strangers. This case focused attention on serious gaps in protections afforded to a vulnerable segment of the Dallas County community.

The Dallas County Elder Financial Safety Center (“EFSC”) is a novel approach that meshes the interrelated missions and interests of both public and

¹²⁷ TEX. GOV'T CODE §25.0025.

¹²⁸ TEX. ESTATES CODE §1054.151.

¹²⁹ TEX. ESTATES CODE §1054.152.

¹³⁰ TEX. ESTATES CODE §§1054.101, 1054.102.

¹³¹ TEX. ESTATES CODE §1054.103.

¹³² TEX. ESTATES CODE §1054.104.

¹³³ TEX. ESTATES CODE §1054.153.

¹³⁴ *Id.*

¹³⁵ *Id.*

private entities into a collaborative attack on the issue that threatens the elderly in Dallas County, Texas. It is a collaborative attack on the issue that threatens the elderly in Dallas County, Texas. It is a centralized intake portal for making reports of elder financial safety concerns, for referral of information regarding elder financial abuse, exploitation or fraud to the appropriate point of contact to investigate the information and for obtaining resources to deal with safety concerns. The principal collaborators of the EFSC are the Senior Citizens of Greater Dallas d/b/a The Senior Source (“The Senior Source”), The Dallas County Probate Courts (“The Courts”) and the Dallas County District Attorney’s Office (“The DA’s Office”).

In the planning stages of EFSC, the collaborators defined their respective roles and relationships in memoranda of understanding and established anticipated outcomes within their respective organizations. In addition, the collaborators determined that a shared and customized client database and staff coordination could eliminate duplicative services, augment the impact of services, increase response time, and provide economies of scale advantages. In sum, the interface between the governmental sector, i.e. the Courts and the D.A.’s office, and the private sector, i.e., The Senior Source, offered the opportunity to enhance the timely delivery of services by each organization.

Utilizing a very generous grant of \$3.9 million over 5 years from the W. W. Caruth, Jr. Foundation-Communities Foundation of Texas, the EFSC has dedicated staff positions in each collaborating entity, equipment and training materials, funding for education programming and community outreach, and assessment tools. EFSC does not supplant the responsibilities of any collaborating entity and it increases access to appropriate services for the elderly. Its staff cultivates helpful relationships with any and all agencies engaged in ensuring financial security, including agencies such as Consumer Credit Counseling Service of Greater Dallas.

The Senior Source is a multifaceted private social services agency that has served the elderly in Dallas for more than 50 years. It has been at the forefront of the issue of elder financial safety. In the context of the EFSC, it provides prevention services from inadequate financial resources and from exploitation. Services include, but are not limited to, employment services, financial counseling, benefits counseling, money management, budgeting, insurance counseling and income tax services. In addition, the staff can provide debt management counseling and cautionary counseling regarding scams, fraudulent schemes and best practices for financial security. The Senior Source utilizes cooperative relationships with other private

agencies and public entities to augment its available services to the elderly.

The DA’s office created the Elder Abuse Unit in connection with the EFSC, to handle cases involving the financial abuse and exploitation of elderly victims. The Elder Abuse Unit investigates and prosecutes cases received through referrals from the EFSC, as well as directly from law enforcement and various state agencies. Through, EFSC, the prosecutors within the Elder Abuse Unit at the DA’s office will also provide training for law enforcement in how to better recognize and investigate these types of crimes.

The Probate Courts of Dallas County and the Court Investigators Office deal with all application for guardianship of the person and/or estate and provide ongoing monitoring and assessment of existing guardianships pursuant to the statutes discussed above.

To access the EFSC, an individual may call (214) 525-6130 or (214) 823-5700 or email efsc@theseniorsource.org. Also, information may be obtained from the Dallas County government website on the Probate Courts webpages at www.dallascounty.org.

VII. ETHICALLY DEALING WITH OR REPORTING CRIMINAL BEHAVIOR

A. Myths about Criminal Reporting

Unfortunately, sometimes a lawyer’s own client is the person committing elder exploitation. The Texas Disciplinary Rules of Professional Conduct prohibit lawyers from assisting or counseling a client in conduct that the lawyer believes is fraudulent or criminal. However, a lawyer can and should still take affirmative action by attempting to dissuade the client from committing criminal actions, and to persuade the client to correct actions already taken.

In regards to the conduct of third persons, in many civil cases, the conduct of an opposing party or even a non-party can rise to the level of criminal conduct involving the neglect, abuse, or exploitation of the elderly. Many attorneys improperly believe they can never report criminal behavior during the pendency of a civil matter. In fact, in many situations, an attorney may have a mandatory legal obligation to report certain kinds of criminal conduct to the authorities. Generally speaking, if reporting the criminal conduct is appropriate for purposes other than merely attempting to gain an advantage in a civil dispute, then a lawyer should consider alerting the authorities.

Protecting the client is a lawyer’s primary duty. Therefore, if a lawyer suspects that the client has become incapacitated and is being exploited, the lawyer must take action to protect the client from such exploitation. The lawyer may pursue the appointment of a guardian for the client by contacting persons designated in the client’s estate planning documents,

writing an information letter to the court, or by contacting the client's family members.

B. The Texas Disciplinary Rules of Professional Conduct

1. Duties When the Client is the Person Committing Exploitation

Elder exploitation is a serious matter, and it does not become less serious simply because an attorney's client is the one committing the exploitation. Perhaps the best starting point to understanding an attorney's role with respect to a client whom the attorney suspects or has reason to believe is committing elder exploitation is to recognize that a lawyer shall not assist or counsel a client in conduct that the lawyer believes is criminal or fraudulent.¹⁴⁰

In the normal course of representing a client, a lawyer will regularly counsel the client about the likely consequences that may result from the client's conduct. The mere fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent, does not, of itself, make a lawyer a party to the course of action.¹⁴¹

When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.¹⁴² When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.¹⁴³

In other words, the first step for the lawyer concerning criminal conduct that the client appears reasonably likely to commit is to dissuade the client, while the first step for the lawyer regarding criminal conduct that has already been committed by the client is to attempt to persuade the client to take corrective action.

A lawyer may, but is not required to, disclose confidential information under Tex. Disciplinary Rules of Prof'l Conduct R. 1.05(c):

(4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law (read: Tex. Hum. Res. Code § 48.051 dealing with elder exploitation)

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

In situations where disclosure is discretionary, the lawyer must weigh preventing harm on one hand, and preserving confidential information on the other:

When the threatened injury is grave, the lawyer's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information. As stated in sub-paragraph (c)(7), the lawyer has professional discretion, based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act.¹⁴⁴

In exercising discretion under Tex. Disciplinary Rules of Prof'l Conduct R. 1.05(c), the lawyer should consider a variety of factors, including:

The magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs (c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure

¹⁴⁰ TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.02(c).

¹⁴¹ TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.02, cmt. 7.

¹⁴² TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.02(d).

¹⁴³ TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.02(e).

¹⁴⁴ TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05, cmt. 13.

and no civil liability is intended to arise from the failure to make such disclosure.¹⁴⁵

In certain situations, however, disclosure is mandatory. When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.¹⁴⁶

2. Duties When a Third Person is the One who is Committing Exploitation

Texas Disciplinary Rule of Professional Conduct 4.04 states in relevant part that a lawyer shall not present, participate in presenting, or threaten to present criminal or disciplinary charges solely to gain an advantage in a civil matter.¹⁴⁷ Such conduct is prohibited since “using or threatening to use the criminal process solely to coerce a party in a private matter improperly suggests that the criminal process can be manipulated by private interests for personal gain.”¹⁴⁸ It is important to note, however, that Rule 4.04 does not serve as an absolute bar against an attorney reporting criminal conduct of third persons to the authorities. For example, an attorney is allowed to give any notice required by law or applicable rules of practice or procedure as prerequisite to instituting criminal charges (unless the underlying criminal charges were made without probable cause).¹⁴⁹

3. Duties When the Client is the One Being Exploited

Texas Disciplinary Rule of Professional Conduct 1.02(g) mandates that a lawyer who reasonably believes that the client lacks capacity shall take action to appoint a legal guardian for the client, if such action is necessary to protect the client.

To initiate action to appoint a legal guardian for the client, a lawyer may contact individuals named in the client’s estate planning documents that appoint persons to make medical and financial decisions. If the client does not have these estate planning documents, or if they do not designate any individuals, the lawyer can send to court an information letter regarding the potential incapacity. Such a letter must comply with

¹⁴⁵ TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.05, cmt. 14.

¹⁴⁶ TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.05(e).

¹⁴⁷ TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 4.04(b)(1).

¹⁴⁸ TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 4.04, cmt. 2.

¹⁴⁹ *Id.*

Texas Estates Code Section 1102.002.¹⁵⁰ Upon receipt of this letter, the court will appoint a court investigator or guardian ad litem to investigate the client’s circumstances and determine whether a guardianship is necessary. Alternatively, the lawyer may file an application for guardianship of the client, requesting that the court appoint an independent third party selected by the court.

Lastly, if the lawyer knows family members of the client, the lawyer may contact them and discuss the concerns about the client’s possible incapacity.

C. **Mandatory Reporting–Tex. Hum. Res. Code § 48.051**

Generally, a person who has cause to believe that an elderly or disabled person is in a state of abuse, neglect, or exploitation, has a mandatory duty to report such activity immediately to the Department of Protective and Regulatory Services.¹⁵¹ The duty applies to everyone with knowledge of the possible abuse, neglect, or exploitation, including attorneys, without exception, even if such knowledge is obtained during the scope of the person’s employment or whose professional communications are generally confidential.¹⁵²

The report should can be made either orally or in writing and must include: (1) the name, age, and address of the elderly or disabled person; (2) the name and address of any person responsible for the elderly or disabled person’s care; (3) the nature and extent of the elderly or disabled person’s condition; (4) the basis of the reporter’s knowledge; and (5) any other relevant information.¹⁵³

D. **Criminal Penalties for Failing to Report or Making False Reports**

Knowingly failing to report elder abuse, neglect, or exploitation is a Class A misdemeanor.¹⁵⁴ A Class A misdemeanor is punishable by: (1) a fine not to exceed \$4,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement.¹⁵⁵ A person also commits a Class A misdemeanor if the person knowingly or intentionally reports information that the person knows is false or lacks factual foundation.¹⁵⁶

¹⁵⁰ TEX. ESTATES CODE §1102.002.

¹⁵¹ TEX. HUM. RES. CODE § 48.051.

¹⁵² TEX. HUM. RES. CODE ANN. § 48.051(B).

¹⁵³ TEX. HUM. RES. CODE ANN. § 48.051(d).

¹⁵⁴ TEX. HUM. RES. CODE ANN. § 48.052.

¹⁵⁵ TEX. PENAL CODE ANN. § 12.21.

¹⁵⁶ TEX. HUM. RES. CODE ANN. § 48.053.

APPENDIX A
Texas Penal Code Chapter 32
Fraud Value Ladder

<u>Money Involved</u>	<u>Degree of Offense</u>
Under \$50	Class C Misdemeanor
\$50-\$499	Class B Misdemeanor
\$500-\$1499	Class A Misdemeanor
\$1500-\$19,999	State Jail Felony
\$20,000-\$99,999	Third Degree Felony
\$100,000-\$199,000	Second Degree Felony
\$200,000 or greater	First Degree Felony

APPENDIX B
Texas Penal Code
Punishment Ranges

<u>Degree</u>	<u>Punishment</u>
Class C Misdemeanor	<ul style="list-style-type: none">• Fine not to exceed \$500
Class B Misdemeanor	<ul style="list-style-type: none">• Fine not to exceed \$2,000• Confinement not to exceed 180 days in county jail• Up to 2 years of probation
Class A Misdemeanor	<ul style="list-style-type: none">• Fine not to exceed \$4,000• Confinement not to exceed 1 year in county jail• Up to 2 years of probation
State Jail Felony	<ul style="list-style-type: none">• Optional fine not to exceed \$10,000• Confinement for 180 days up to 2 years in state jail facility• Up to 5 years of probation
Third Degree Felony	<ul style="list-style-type: none">• Optional fine not to exceed \$10,000• Confinement for a term of 2 to 10 years in prison• Up to 10 years of probation
Second Degree Felony	<ul style="list-style-type: none">• Optional fine not to exceed \$10,000• Confinement for a term of 2 to 20 years in prison• Up to 10 years of probation
First Degree Felony	<ul style="list-style-type: none">• Optional fine not to exceed \$10,000• Confinement for a term of 5 to 99 years or life in prison• Up to 10 years probation