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**PROGRAM MATERIALS**  
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## **Building an Elder Law Case: How to Grapple with Abuse of the Elderly and Disabled**

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# Building an Elder Law Case: How to Grapple with Abuse of the Elderly and Disabled CELESQ 31274 November 16, 2021



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Here are links for some of her recent articles:

### **CO-AUTHOR:**

**With Daniel Pollack, PROFESSOR, WURZWEILER SCHOOL OF SOCIAL WORK, YESHIVA UNIVERSITY:**

[\(PDF\) How Much Weight Does a Social Worker's Opinion Carry in Court? \(researchgate.net\)](#)

[\(PDF\) Vaccinating Children in State Care: What Happens to the Rights of Biological Parents to Consent? \(researchgate.net\)](#)

[\(PDF\) The Lesson of Rule 11 Sanctions: Practice Professionally \(researchgate.net\)\(PDF\)](#)

[Dealing With Doomsday Justice System Colleagues and Officials \(researchgate.net\)](#)

[\(PDF\) Afraid to immunize? Judges may view your reluctance sternly \(researchgate.net\)\(PDF\) 'I'm right!' 'No, I'm right.' New techniques for mediating high-conflict disputes \(researchgate.net\)](#)

[\(PDF\) Will the Real Expert Please Take the Stand? \(researchgate.net\)](#)

[\(PDF\) Where Does an "Outcry Witness" Fit in the Child Abuse Arena? \(researchgate.net\)](#)

[\(PDF\) Hindsight bias in the context of child protection services \(researchgate.net\)](#)

### **AUTHOR:**

[\(PDF\) Art Does This Seem Fishy to You Justice Barrett First SCOTUS Opinion - Texas Lawyer 20210305 \(researchgate.net\)](#)

“*My Yiddishe Mama: Paralegal Extraordinaire*,” Jewess Magazine, Fall, 2018. [My Yiddishe Mama: The Best Paralegal Ever - Jewess \(jewessmag.com\)](#)

“Are you a Pro or a Rookie,” DALLAS BAR ASSOCIATION Family Law Section Newsletter, April, 2014. <https://www.elisareiter.com/wp-content/uploads/sites/1400950/2020/09/2014-April-Newsletter-V4.pdf>

## Acknowledgments

*Elisa Reiter thanks **Michael Mirsky** CEO Celesq® for the opportunity to present today. Much appreciation for Judges Steven M. King, Brenda Hull Thompson and Nikki DeShazo for their many contributions to elder law, probate and guardianship issues. **These judges raise good questions** - -and that is exactly what needs to be done to build a case regarding abuse and/or exploitation of the elderly and/or of the disabled.*

*“The Torah speaks of four children: One is wise, one is wicked, one is simple and one does not know how to ask.” – The Haggadah*

*One day, Mrs. Schwartz and Mrs. Kissinger were chatting. Mrs. Schwartz lamented that her children frequently said “nothing” in response to her daily carpool question of “did you learn anything new today?”. Mrs. Schwartz asked Mrs. Kissinger for advice. “Ah,” said Mrs. Kissinger. I ask my daughter: **“Did you ask any good questions today”?***

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<p><b>Love Changes Everything</b></p>	<p><i>From the musical, Aspects of Love</i>  <b>Songwriters: Andrew Lloyd Webber, Don Black, Charles Hart</b></p>
<p>Love  Love changes everything:  Hands and faces  Earth and sky  Love  Love changes everything:  How you live and  How you die  Love  Can make the summer fly  Or a night  Seem like a lifetime.  Yes, Love  Love changes everything:  Now I tremble  At your name.  Nothing in the world will ever  Be the same.  Love  Love changes everything:  Days are longer  Words mean more.  Love  Love changes everything:  Pain is deeper  Than before.  Love  Will turn your world around  And that world  Will last for ever.</p>	<p>Yes, Love  Love changes everything  Brings you glory  Brings you shame.  Nothing in the  World will ever  Be the same.  Off  Into the world we go  Planning futures  Shaping years.  Love  Bursts in, and suddenly  All our wisdom  Disappears.  Love  Makes fools of everyone:  All the rules  We make are broken.  Yes, Love  Love changes everyone.  Live or perish  In its flame.  Love will never  Never let you  Be the same.</p>

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## TRIAL PREPARATION

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**Witness preparation is key.** Some folks may say that they simply have no time. That's a mistake. You should find time to work with the attorneys on the case to prepare and to prepare well. Those with more resources might even consider calling in a jury consultant to assist with the trial preparation. Cases are won at the office. There can never be too much preparation. No one can stick to a script. There will be give and take in the courtroom. A key element of preparation is not just familiarity with story line, witnesses and exhibits – it's about giving the lawyer the opportunity to let you, an APEX WITNESS, talk. We need to hear you speak. The lawyer needs to facilitate you practicing responses to questions anticipated at trial. Part of the reason for preparing with a consultant or by allowing your attorney to call in another attorney to assist is that lawyers glean so much from watching and listening – particularly if we can have that moment of omniscience of observing how you respond to someone else. We need to find ways to help humanize you in introducing you to a jury.

Let's take some examples from two recent high profile cases: Floyd and Spears.

In the George Floyd case. Key points included: did Chauvin break police protocol when he kept his knee on George Floyd's neck for 9.5 minutes? What role, if any, did the drugs found to be in Mr. Floyd's system play in Mr. Floyd's death? Ironically, what impact did the arrest have on witnesses who watched a man die before their very eyes?

Think about the bystander testimony. Most of the prosecution witnesses were tearful; the defense witness taciturn. Darnella Frazier, the young lady who videotaped the arrest was one of the witnesses who testified off camera. Her video sparked action in our country. The video of Mr. Floyd's death was the beginning of much needed conversation about implicit bias. Ms. Frazier was awarded a Pulitzer citation for that video – considered journalism's most prestigious honor – on June 11, 2021.

There are differences in "live" testimony and "video" testimony. We all rely on our bodies, our voices, our eyes and our hands to control our environment. If on video, we lose the opportunity to have impact in 3D. Think about Charles McMillan, who testified that he urged Mr. Floyd to just get up and get in the cruiser – but the hearsay, excited utterance that slipped in regarding Mr. Floyd's response that he couldn't. Mr. McMillan also testified, in tears, how he heard Mr. Floyd repeatedly call out "Mama" – which all of us heard, when the videotape(s) were played.

In terms of humanizing a witness, think about Mr. Floyd's lady friend, Courteney Ross, who had a dating relationship with George Floyd for three years prior to his death. She opened the door to the life and times of George Floyd, including their first kiss, their relationship, how they loved to explore Minneapolis, and how they each engaged in and battled drug use. By sharing back story, the sting of the admission of drug use was tempered.

Consider the testimony of acting police chief, Chief Medaria Arradona of the Minneapolis Police Department, who indicated that Chauvin broke with department policy by not reacting and removing his knee from Floyd's neck once George Floyd stopped resisting, and further, by not immediately providing medical aid to Mr. Floyd once Mr. Floyd became nonresponsive.

Don't just consider your recollection – WATCH DR. MARTIN TOBIN in action. Think about the tools noted above. Dr. Tobin used his body to connect with the jurors. He physically turned in the witness chair to FACE the jurors during critical points of his testimony. Dr. Tobin used his hands to illustrate on his own body how and why he, a well known pulmonologist and expert on breathing issues, concluded from a review of the evidence that Mr. Floyd died as a result of a lack of oxygen due to the Chauvin's relentless pressure on Floyd's neck. And eye contact? Dr. Tobin CONNECTED with the jury.

On a different front, consider the Britney Spears case. In Ms. Spears' case, in 2008 her father sought and was granted conservatorship (aka guardianship) over his daughter some years ago by an LA Superior Court. On June 24, 2021, in a hearing in which Ms. Spears submitted testimony in support of termination of the conservatorship, she raised complaints common in such circumstances: "All I want is to own my money, for this to end," she said. Yet Ms. Spears refused to undergo an assessment to determine whether there were indicia of the same mental health issues that caused the Court to impose a guardianship over her person and estate 13 years ago. As noted in an [NPR piece](#) on the Spears case:

Conservatorship means the court is taking away the civil liberties from one person and giving them to someone else," Zoe Brennan-Krohn, a staff attorney with the American Civil Liberties Union's Disability Rights Project, said in [a blog post](#) last year. "But it is the court weighing into the person's life and saying you, as a person with a disability, are no longer able to make decisions about yourself and livelihood — such as where you live, and how you support and feed yourself — and we are putting someone else in charge of making those decisions.

In many situations, this step is extreme and one that should be done as a 'last resort,' Brennan-Krohn said. "And once a court has put a person under a conservatorship, only a court can lift that conservatorship.



A check of LA Superior Court records on-line reflects a number of cases that appear to pertain to Ms. Spears, some preceding the conservatorship case:

1	<a href="#">SPEARS ACTING BY AND THROUGH JAMES B. SPEARS CONSERVATOR OF THE ESTATE OF BRITNEY J. SPEARS BRITNEY J.</a>	Petition to Compel/Confirm/Vacate Arbitration (Unlimited)	03/13/2020
2	<a href="#">SPEARS BRITNEY</a>	Intentional Bodily Injury/Property Damage/Wrongful Death (e.g., a	05/05/2014
3	<a href="#">SPEARS BRITNEY</a>	OTHER (Limited)	11/15/2011
4	<a href="#">SPEARS BRITNEY</a>	Contractual Fraud (Unlimited)	03/30/2011
5	<a href="#">SPEARS BRITNEY</a>	Other Employment Complaint Case (Unlimited)	10/01/2010
6	<a href="#">SPEARS BRITNEY</a>	Other Employment Complaint Case (Unlimited)	09/08/2010
7	<a href="#">SPEARS BRITNEY</a>	Other Employment Complaint (Unlimited)	09/08/2010
8	<a href="#">SPEARS BRITNEY</a>	Intentional Infliction of Emotional Distress (Unlimited)	05/18/2009
9	<a href="#">SPEARS BRITNEY</a>	Infliction of Emotional Distress (Unlimited)	05/18/2009
10	<a href="#">SPEARS BRITNEY</a>	Other Breach of Contract/Warranty (not fraud or negligence) (Unli	01/08/2009
11	<a href="#">SPEARS BRITNEY</a>	Dissolution w/ Minor Children	11/07/2006
12	<a href="#">SPEARS BRITNEY</a>	Motor Vehicle - Personal Injury/Property Damage/Wrongful Death (U	06/06/2006
13	<a href="#">SPEARS BRITNEY</a>	Motor Vehicle - PI/PD/WD (Unlimited)	06/06/2006

14	<a href="#">SPEARS BRITNEY</a>	Defamation (slander/libel) (Unlimited)	12/19/2005
15	<a href="#">SPEARS BRITNEY</a>	Defamation (Slander/Libel) (Unlimited)	12/19/2005
16	<a href="#">SPEARS BRITNEY</a>	Other Civil Petition (Unlimited)	10/04/2005
17	<a href="#">SPEARS BRITNEY</a>	Civil Harassment (Unlimited)	07/18/2003
18	<a href="#">SPEARS BRITNEY</a>	Civil Harassment (Unlimited)	12/09/2002
19	<a href="#">SPEARS BRITNEY J.</a>	Civil Harassment Prevention	05/07/2019
20	<a href="#">SPEARS BRITNEY JEAN</a>	Intentional PI/PD/WD (eg. assault) (Unlimited)	05/05/2014
21	<a href="#">SPEARS BRITNEY JEAN</a>	Intentional Bodily Injury/Property Damage/Wrongful Death (e.g., a	05/05/2014
22	<a href="#">SPEARS BRITNEY JEAN</a>	Motor Vehicle - PI/PD/WD (Unlimited)	05/29/2009
23	<a href="#">SPEARS BRITNEY JEAN</a>	Defamation (slander/libel) (Unlimited)	02/03/2009
24	<a href="#">SPEARS BRITNEY JEAN</a>	Other Writ /Judicial Review (Unlimited)	09/29/2008
25	<a href="#">SPEARS BRITNEY JEAN</a>	Trust	03/17/2008

[Spears](#) provided [dramatic testimony](#), in which she claimed many infractions over the course of the conservatorship, including: being overworked, not being given breaks from work, being forced to take lithium and having to have an IUD to prevent her from getting pregnant, all of which she indicated had been approved by her father and co-conservator, Jamie Spears. Yet the presiding judge initially denied Ms. Spears’ request to remove her father as a conservator “without prejudice”. The Spears’ case is one of many, however, that is spearheading (as it were) the need for reform in guardianship and conservatorship matters.

Ms. Spears is not the typical person we visualize when considering a case involving the elderly or disabled. Yet her frustrations are not uncommon. While love changes everything, those who have been abused, neglected or exploited do not always wish to cooperate with litigation that seeks to protect their rights.

How to develop a case involving the elderly or people with disabilities? Gather evidence. Map out the case. Many attorneys use a white board to list key points of their case. You should too. Realize that trials are often subject to time constraints. You will have to work with the attorneys on the case to cut the wheat from the chafe and decide what is of the utmost importance in your case.

At the risk of telling you things you know from watching too many episodes of *The Good Fight*, SVU, *Boston Legal* or *Perry Mason*, remember that pace differs depending on who is asking questions and what portion of the case you find yourself in. Direct exam is predicated on who, what, when, why, where and how questions that care open-ended. A good lawyer will help an APEX WITNESS prepare for trial – it's not just about asking you to state your name or to then inquire of you "what happened next". On cross exam attorneys may ask leading questions, or questions that call for "yes," "no," or "I don't know" as a response.

On direct exam, lawyers need you to help tell the story of the case. You are a human flow chart helping paint a picture for a judge or jury. But it usually takes more than one witness to make a case. While some lawyers like to be spontaneous, the best lawyers will review the evidence, and will script their questions prior to trial. In the era of modern technology, we will annotate our questions, so that as needed, questions are tied to pertinent documentation that can be introduced as evidence to support or blow apart a witness's testimony. On direct exam, while the attorney is in control of the pace and the questions, the witness is the star of the show. An adept attorney should almost disappear during direct exam, leaving the judge/jury to focus on the witness.

At the risk of being accused of leading the witness, or "counsel is testifying," a good lawyer will give the witness some cues or transitions when moving from topic to topic. "Directing your attention to," or "Let's talk about" are examples. How to organize? Themes of the case. Taking things in chronological order. History of the relationship. Distinguishing injuries from things that a victim would not have consented to.

On cross examination, lawyers will try to have something big as an opening salvo, and again, at the conclusion of their cross exam. The best will be able to pick up something that might have seemed tangential in trial preparation, but which a given witness's testimony mandates attention to. On cross, a good lawyer will try to, as experienced grey haired politically incorrect

attorneys might say, beat a baby seal with a club before the judge and jury's very eyes. On cross exam, attorneys want to find a way to show that there is something in the witness's background that should cause the judge or jury to view them as unreliable, or, simply a liar. The attorney on cross wants to catch the witness in an exaggeration or a lie – and will have the appropriate proof at hand with which to impeach the witness's prior testimony. Who is the key player on cross? The attorney, not the witness, provided that the attorney is performing a good cross exam.

Re-direct is the opportunity of the attorney who presented you as a direct witness to cover territory that may require rehabilitation. If you have taken the time to work with the attorney for whom you are testifying, a key element if you are a key witness, then you should be familiar with areas of importance that the attorney can help resurrect you and your testimony with.

Our credo: do not let the judge or jury get bored. Like the attorneys, as a witness, your best presentation is grounded in being professional, reasonable, refraining from arguing, being in control, and focusing on the truth.

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## DOES THE GUARDIANSHIP SYSTEM NEED TO BE IMPROVED?

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Syracuse University held its **The Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability May 10-14, 2021. The recommendations flowing from the Syracuse University Summit as to guardianship proceedings follows:**

For purposes of these recommendations:

**Guardianship** includes adult guardianship, conservatorship and any other corresponding terms used by a state or tribe. The term includes both guardianship of the person and guardianship of the property unless otherwise specified.

**State or states** includes the District of Columbia and all U.S. territories.

**Supported decision-making** means “a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life.” (Prof. Robert Dinerstein)

The National Guardianship Network intends to reach out to Indian tribes to discuss the recommendations and how the recommendations may be applicable to various tribes.

### **I. Rights-Based Guardianships - Enhancing Rights of Persons Subject to Guardianship**

Recommendation 1.1: The National Guardianship Network (NGN) should convene a task force with representatives that include NGN members; national disability and

aging organizations; persons currently at risk of or formerly subject to guardianship; and family and professional guardians to develop an enforceable bill of rights.

- The bill of rights will identify the rights of adults subject to guardianship for passage by state legislatures, inclusion in court rules and policies, and adopted in state guardianship regulatory, licensing, training, monitoring and reporting requirements, as applicable. Such bill of rights should be in plain language understandable by adults subject to guardianship.
- The task force will identify those inherent rights which cannot be restricted, those rights which can be restricted but cannot be delegated, and those rights which can be restricted but only with further due process protections which ensure the decision is consistent with the adult's preferences and values, regardless of a determination of legal decision-making status or appointment of a guardian.
- The task force will consider, but not be limited to, the following specific rights to ensure dignity, privacy, autonomy, and the opportunity to fully participate in all decisions which affect them: marriage, divorce, relationships and association, communication, due process and notice, voting, education, employment, health care (including reproductive health and end of life), place of residence, community integration, free practice of religion, and personal choices.

Recommendation 1.2: States and courts must ensure that all judicial proceedings which may impact any of an adult's rights to legal capacity provide meaningful due process, which includes:

- Right to a qualified and compensated lawyer, paid a reasonable fee through the use of public funds if the adult is unable to pay, and appointed by the court should the adult not have a lawyer of their own choosing.
- Reasonable notice provided in the adult's preferred language in an understandable and accessible format, served in a manner that ensures timely receipt.
- An impartial, valid, and reliable assessment by a compensated and qualified person conducting a capacity assessment who has knowledge and training about decision-making in the area(s) related to the proceedings, inclusive of the adult's preferred reasonable accommodations and method of communication.
- Protection of the adult's right to participate in the proceeding consistent with their preferences, including preferred communication accommodations, after the right to appear and the purpose of the proceeding have been explained to the adult through the means the adult understands.

Recommendation 1.3: States and courts must ensure full access to a full or partial restoration of rights as soon as possible after a right is legally restricted. The process to restore rights includes:

- A clearly defined statute, regulation, court rule or policy which sets forth the procedures and the evidentiary burden and timelines.
- Representation of the adult whose rights were legally restricted by a qualified and compensated lawyer, paid a reasonable fee through the use of public funds if the adult is unable to pay, and appointed by the court should the adult not have a lawyer of their own choosing.
- A process triggered by informal or formal means.
- Notice to the adult whose rights have been legally restricted of the opportunity to restore their rights, annually and upon a change in the applicable law, regulation, rule or policy.
- A meaningful periodic review by a court or other appropriate entity, inclusive of the perspective of the adult whose rights were restricted, of whether it is necessary to continue to restrict the adult's rights.

- A guardian trained on the rights restoration process and the guardian's obligations in regards to the restoration of rights, the training to occur initially upon appointment and upon a change in the applicable law, regulation, rule or policy.
  - Courts and lawyers trained on the rights restoration process.
  - A prohibition on guardian interference with the restoration of rights, and as appropriate guardian facilitation of the restoration of rights.
- Any party seeking to restore any right or rights of an adult whose rights have been legally restricted need only demonstrate the right to restoration by a preponderance of the evidence.

## **II. Supporting Decision-Making**

Recommendation 2.1: States, the federal government, and the National Guardianship Network organizations should provide education, training, and outreach programs about supported decision-making (see preface definition).

- Direct education, training and outreach to stakeholders including state courts, guardians, the education system, families, anyone at risk of or subject to guardianship, health care providers, and other third parties, including government officials, financial institutions, advocates and protective entities, lawyers, Working Interdisciplinary Networks of Guardianship Stakeholders, and the general public.
- Develop campaigns and training curricula around availability, feasibility, and utilization of supported decision-making.
- Include in education, training, and outreach experiences from and presented by decision-makers and supporters.
- Target education, training, and outreach to marginalized populations and individuals across the lifespan/spectrum of support for diversity of disabilities.

Recommendation 2.2: Governments and organizations should expand supported decision-making practice and principles through promotion and expansion of sustainable (funded) pilot projects targeting diverse populations.

- Focus pilot programs on diverse populations as defined by differing disability issues and conditions (including, but not limited to, intellectual and developmental, physical, psycho-social, mental health, substance use, traumatic brain injury, communication, dementia, and other cognitive impairments), linguistic and cultural and intersectional identities, and across the life span.
- Establish, replicate, and scale up promising or best practices for sustainable supported decision-making practices and models.
- Identify gaps where supported decision-making best practices are not evident or used (e.g., older adults at risk of guardianship, geographical, and other marginalized populations) as a basis for determining funding priorities.
- Fund pilot projects targeting older adults at risk of guardianship.

Recommendation 2.3: Statutes, court rules, policies, and processes in every state should require courts to consider supported decision-making as one of the alternatives to guardianship at appointment and periodically thereafter by requiring that:

- Petitioners for guardianship plead affirmatively that supported decision-making as one of the alternatives has been tried or why it is not feasible.
- Before guardianship can be imposed, the court find by clear and convincing evidence that supported decision-making is not feasible.
- Courts institute procedures for periodic review of the need to continue guardianship, which includes an affirmative determination that supported decision-making and other less restrictive alternatives are not feasible.

Recommendation 2.4: The Department of Justice and other federal and state agencies should recognize that supported decision-making can be a reasonable accommodation under the Americans with Disabilities Act of 1990, as amended, in

supporting an individual in making their own decisions and retaining their right to do so.

### **III. Limited Guardianship, Protective Arrangements and Diverting Pipelines**

Recommendation 3.1: States should adopt and implement the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (Uniform Act), including the provisions mandating representation by a lawyer of all adult respondents. State guardianship laws need to ensure better avenues, stronger protections, and greater independence for individuals being considered for guardianship, and persons seeking to terminate or modify guardianship orders.

- Key provisions of the Uniform Act include, among others: (1) prohibit guardianships where less restrictive alternatives would meet an adult's functional needs; (2) require specific court findings before certain critical rights (e.g., to marry, vote, choose visitors) are abridged; (3) require petitioners to state whether less restrictive alternatives have been tried and justify any failure to do so; (4) create mechanisms that adults subject to guardianship and others can use to trigger modification or termination of an order; (5) clarify that a lawyer for a respondent, or adults subject to guardianship, must represent the adult's wishes; and (6) enable protective orders (or single transaction orders) instead of guardianship, thus expanding alternatives to guardianship.
- States should align practice with the requirements of the Uniform Act.
- Standardized evaluations and forms should contain details in plain language that provide courts with sufficient information to fully understand the adult's abilities.
- In all guardianship proceedings, including termination or modification, state law should require the appointment of a qualified and compensated lawyer to represent the adult's expressed wishes, paid a reasonable fee through the use of public funds if the adult is unable to pay, and appointed by the court should the adult not have a lawyer of their own choosing.

Recommendation 3.2: States should eliminate plenary guardianship, allowing people to retain the maximum of rights, and if guardianship is imposed, require tailored guardianship orders in all cases.

- The person should retain the right to make certain choices such as association, free practice of religion, personal choice, marriage, and voting unless the court makes a specific finding that a restriction is essential.
- All jurisdictions should review existing plenary guardianship orders to determine if continuation is justified, with the presumption being that continuation is not warranted.

Recommendation 3.3: Every state should have a guardianship diversion program tasked with facilitating alternatives to guardianship, reducing the likelihood that guardianships will be granted where not necessary, and monitoring for the continued need for the guardianship. Such programs could be operated as a multi-disciplinary approach in collaboration with schools, adult protective services, healthcare, aging and disability service providers, the legal community, and other entities.

- Diversion should include education and facilitation about specific tools such as use of powers of attorney, health care consent statutes, and supported decision-making.
- The diversion program should design and implement ongoing training and public information about alternatives to guardianship.

Recommendation 3.4: States should provide accessible, practical and tailored training to individuals and entities known to be pipelines to plenary guardianship (e.g., lawyers, judges, schools, nursing homes, health care providers, evaluators, investigators, adult protective services) on (1) the impact of guardianship; (2) legal and ethical obligations to exhaust alternatives to guardianship before pursuing it; (3) alternatives to guardianship including supported decision-making, formal and informal services and supports, advance directives, voluntary fiduciaries, other legal and non-legal interventions; and (4) orders that are limited in scope and limited in time.

#### **IV. Rethinking Guardianship Monitoring and Addressing Abuse**

Recommendation 4.1: The state's highest court should require ongoing collection of timely guardianship data through the following steps:

- Establish a multidisciplinary user group to review and adopt data standards reflective and inclusive of the community's diversity, based upon the National Open Court Data Standards and the Conservatorship Accountability Project standards.
- Develop and implement technology that includes mechanisms to validate reports, flag potential problems, and track monitoring.
- Establish a multidisciplinary user group reflective and inclusive of the community's diversity to develop monitoring reports of the status and well-being of adults, and to manage cases effectively, develop and evaluate policy, conduct research, and budget.

Recommendation 4.2: States and courts should enhance the wellbeing and safety of all adults who have court-appointed guardians by implementing a post-appointment, person-centered monitoring system that includes the following elements:

- Uniform statewide forms available online and in hard copy, in multiple languages, with clear instructions and sample completed forms in plain language.
- Written care and financial management plans serving as baselines for subsequent reports, which can be filed electronically or in hard copy.
- In addition to regular review of guardian reports and accountings, periodic in-person visits, verification of financial reports, and status review of the appropriateness of the choice of guardian and implementation of less restrictive options to enhance autonomy.
- An independent statewide entity to investigate the guardian's conduct in appropriate cases.

Recommendation 4.3: The state's highest court and state legislature should establish, and identify or appropriate funding for, advocacy measures to safeguard the rights of adults subject to guardianship and to augment the court's review process, including:

- Annual judicial in-person review.
- Continuing representation by a qualified lawyer for the adult appointed at the outset of the case, preferably a legal services, public defender, or other public service lawyer to minimize expenses to the estate.
- A complaint process for response to guardianship conduct that is accessible, user-friendly, transparent and effective for all, including those with access and functional needs which is in compliance with Title V of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990, as amended.
- An advocacy program for adults subject to guardianship using trained volunteers to visit and advocate for the adult's rights and preferences throughout the case, similar to the Court-Appointed Special Advocate Program (CASA) for children, but which does not supplant the right to a lawyer.

Recommendation 4.4: The U.S. Department of Health and Human Services Administration for Community Living should take the lead, in partnership with relevant federal agencies, national aging and disability organizations, and Protection and Advocacy agencies, to promote state and local collaborations at the policy level concerned about adult abuse or guardianship (i.e., adult/elder abuse multi-disciplinary and multi-system networks and teams, Working Interdisciplinary Networks of Guardianship Stakeholders) to address abuse by guardians:

- Developing protocols for case reporting and management that include the collection and recording of reports made, identification of the lead system responsible, and facilitation of cross-referrals as necessary.
- Ensuring membership representation from adult protective services, law enforcement, the courts, and self-advocates or self-advocacy organizations.



- Educating professionals and the public about how to report abuse by guardians and how the problem is addressed by its multiple responsible systems.

#### **V. Addressing Fiduciary Responsibilities and Tensions**

Recommendation 5.1: States should regulate court-appointed professional guardians through licensure or certification, or both, with sufficient funding for an agency to implement and oversee licensure and certification and to vet, train, test and discipline these guardians, with flexibility in implementation, and with standards for education and training.

Recommendation 5.2: National Guardianship Network member organizations should address fiduciary conflicts by expanding, developing, and encouraging education for all stakeholders about:

- Person-centered planning and supported decision-making.
- Options for alternative dispute resolution.
- Less restrictive alternatives.
- Services delivered in the most integrated setting, in compliance with the Americans with Disabilities Act of 1990, as amended.
- Tools for resolving fiduciary conflict, including mediation, elder caring coordination, Protection and Advocacy agencies, appointment of a guardian ad litem, use of Achieving a Better Life Experience (ABLE) accounts and special needs trusts.

States and organizations should address fiduciary conflicts through revisions of the relevant uniform acts, and statutes and rules addressing the gap in subject matter jurisdiction when conflict issues arise.

Recommendation 5.3: State courts and other stakeholders should encourage training, education and support to enhance autonomy, and reduce reliance on approaches that restrict individual rights to:

- Provide information on less restrictive alternatives to guardianship to adults who use or may use these arrangements, including supported decision-making, as well as family members, lawyers, judges and other professionals.
- Establish options for assistance with completing and submitting guardianship reporting forms, such as volunteer lawyers, law school clinics, lawyer for the day, and booklets for lay people.
- Support, educate, and train family and friends about guardianship issues.
- Encourage more states to establish Working Interdisciplinary Networks of Guardianship Stakeholders groups.

Recommendation 5.4: The National Center for State Courts and National College of Probate Judges should support states to develop rules, forms and procedures to implement the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.

#### **VI. Guardianship Court Improvement Programs**

Recommendation 6.1: Congress should establish a Guardianship Court Improvement Program modelled on the successful Child Welfare Court Improvement Program, and provide funding directly to the highest court in each participating state in order to enhance the rights and well-being of adults subject to, or potentially subject to, guardianship by:

- Effectuating consistent and meaningful data collection.

- Improving oversight and accountability.
- Avoiding unnecessary or overbroad guardianship.
- Enhancing collaboration and education among courts, agencies, and organizations that have an impact on adults subject to, or potentially subject to, guardianship.

Recommendation 6.2: The Guardianship Court Improvement Program should include:

- Inter-agency and multi-disciplinary collaboration among guardianship stakeholders, building upon groups such as Working Interdisciplinary Networks of Guardianship Stakeholders.

- Funding authorized at a level similar to the \$30 million per year currently authorized for the Child Welfare Court Improvement Program and allocated on a formula basis.
- Wide latitude given to participating courts to set priorities and create implementation plans after an initial assessment and planning period.

Recommendation 6.3: The Guardianship Court Improvement Program legislation should include creation of a national, non-profit capacity-building and/or resource center with appropriate expertise to provide training, technical assistance, and collaborative learning opportunities to participating courts and to coordinate national efforts.

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## ABUSE, NEGLECT, EXPLOITATION

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**Texas has laws that criminalize elder abuse. Elder abuse includes the abuse, neglect and exploitation. We hope that caretakers act out of love.**

**Unfortunately, sometimes they do not.**

**How do we better define elder abuse?** Think of Texas Penal Code Section 22.04 as prohibiting the following of individuals aged 65 or older, or those who are 14 years old or younger, or those who have certain developmental or cognitive or physical disabilities. The statute prohibits Texans from engaging in the following types of activity as to such individuals:

- Involuntary seclusion
- Intimidation/Humiliation/Deprivation/Punishment/Threats
- Corporal punishment
- Sexual assault and/or coercion
- Disparaging or derogatory terms (verbal, written, gesticulated, whether or not the subject of the remarks could hear or comprehend the remarks)
- Threats of the foregoing

**What constitutes neglect?** A caretaker's failure to provide goods and/or services, including but not limited to medical services, necessary to an individual for that individual to avoid physical and/or emotional harm or pain.

**What constitutes exploitation?** When a caretaker misuses an elderly or disabled child's or individual's resources for the caretaker's own financial benefit. There is a distinction between acting as a proxy for a person, at the request of the individual, versus a family member, friend, or nursing home employee arbitrarily wresting control of the individual's resources without the individual's permission.

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## JURISDICTION AND STANDING

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Be it civil or criminal, each case must address *jurisdiction* (the right of the court to hear the matter brought before it) and *standing* (the right of the plaintiff to file suit, or the right of the DA or some other entity to prosecute a criminal case).

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## TECHNOLOGY AND CYBER-ATTACKS

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How to avoid issues? Caregivers should talk to loved ones about potential grifters. Creating a false profile on social media is fairly easy, and one way for a scam artist to prey on the vulnerable. Typical scenarios for social engineering include reaching out to someone older and/or with cognitive difficulty and pretending to be a long lost relative, and after building rapport, seeking immediate financial assistance. Other scams include *phishing* or *vishing*. Phishing starts with an email that appears to be from a trusted source, asking someone to do something like send money, or alleging that an update of records must be made immediately, including requests for vital statistics such as birthdate or social security number. Vishing is a variation, and starts with a phone call – have you received a call lately warning you that you are “in trouble with the IRS,” or that you MUST update your records with the Social Security Administration, asking you to simply “press 1 to be connected to an agent”?

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## TEXAS PENAL CODE SECTION 22.04

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Texas Penal Code Section 22.04 establishes the following as to *Injury to a Child, Elderly Individual, or Disabled Individual*:

(a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:

- (1) serious bodily injury;
- (2) serious mental deficiency, impairment, or injury; or
- (3) bodily injury.

(a-1) A person commits an offense if the person is an owner, operator, or employee of a group home, nursing facility, assisted living facility, boarding home facility, intermediate care facility for persons with an intellectual or developmental disability, or other institutional care facility and the person intentionally, knowingly, recklessly, or with criminal negligence by omission causes to a child, elderly individual, or disabled individual who is a resident of that group home or facility:

- (1) serious bodily injury;
- (2) serious mental deficiency, impairment, or injury; or
- (3) bodily injury.

(b) An omission that causes a condition described by Subsection (a)(1), (2), or (3) or (a-1)(1), (2), or (3) is conduct constituting an offense under this section if:

- (1) the actor has a legal or statutory duty to act; or
- (2) the actor has assumed care, custody, or control of a child, elderly individual, or disabled individual.

(c) In this section:

- (1) "Child" means a person 14 years of age or younger.
- (2) "Elderly individual" means a person 65 years of age or older.

(3) “Disabled individual” means a person:

(A) with one or more of the following:

- (i) autism spectrum disorder, as defined by Section 1355.001, Insurance Code ;
- (ii) developmental disability, as defined by Section 112.042, Human Resources Code ;
- (iii) intellectual disability, as defined by Section 591.003, Health and Safety Code ;
- (iv) severe emotional disturbance, as defined by Section 261.001, Family Code ;
- (v) traumatic brain injury, as defined by Section 92.001, Health and Safety Code ; or
- (vi) mental illness, as defined by Section 571.003, Health and Safety Code ; or

(B) who otherwise by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self.

(4) Repealed by Acts 2011, 82nd Leg., ch. 620 (S.B. 688), § 11.

(d) For purposes of an omission that causes a condition described by Subsection (a)(1), (2), or (3), the actor has assumed care, custody, or control if he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for a child, elderly individual, or disabled individual. For purposes of an omission that causes a condition described by Subsection (a-1)(1), (2), or (3), the actor acting during the actor's capacity as owner, operator, or employee of a group home or facility described by Subsection (a-1) is considered to have accepted responsibility for protection, food, shelter, and medical care for the child, elderly individual, or disabled individual who is a resident of the group home or facility.

(e) An offense under Subsection (a)(1) or (2) or (a-1)(1) or (2) is a felony of the first degree when the conduct is committed intentionally or knowingly. When the conduct is engaged in recklessly, the offense is a felony of the second degree.

(f) An offense under Subsection (a)(3) or (a-1)(3) is a felony of the third degree when the conduct is committed intentionally or knowingly, except that an offense under Subsection (a)(3) is a felony of the second degree when the conduct is committed intentionally or knowingly and the victim is a disabled individual residing in a center, as defined by Section 555.001, Health and Safety Code , or in a facility licensed under Chapter 252, Health and Safety Code, and the actor is an employee of the center or facility whose employment involved providing direct care for the victim. When the conduct is engaged in recklessly, the offense is a state jail felony.

(g) An offense under Subsection (a) is a state jail felony when the person acts with criminal negligence. An offense under Subsection (a-1) is a state jail felony when the person, with criminal negligence and by omission, causes a condition described by Subsection (a-1)(1), (2), or (3).

(h) A person who is subject to prosecution under both this section and another section of this code may be prosecuted under either or both sections. Section 3.04 does not apply to criminal episodes prosecuted under both this section and another section of this code. If a criminal episode is prosecuted under both this section and another section of this code and sentences are assessed for convictions under both sections, the sentences shall run concurrently.

(i) It is an affirmative defense to prosecution under Subsection (b)(2) that before the offense the actor:

(1) notified in person the child, elderly individual, or disabled individual that the actor would no longer provide any of the care described by Subsection (d), and notified in writing the parents or a person, other than the actor, acting in loco parentis to the child, elderly individual, or disabled individual that the actor would no longer provide any of the care described by Subsection (d); or

(2) notified in writing the Department of Family and Protective Services that the actor would no longer provide any of the care described by Subsection (d).

(j) Written notification under Subsection (i)(2) or (i)(3) is not effective unless it contains the name and address of the actor, the name and address of the child, elderly individual, or disabled individual, the type of care provided by the actor, and the date the care was discontinued.

(k) It is a defense to prosecution under this section that the act or omission consisted of:

(1) reasonable medical care occurring under the direction of or by a licensed physician; or

(2) emergency medical care administered in good faith and with reasonable care by a person not licensed in the healing arts.

(l) It is an affirmative defense to prosecution under this section:

(1) that the act or omission was based on treatment in accordance with the tenets and practices of a recognized religious method of healing with a generally accepted record of efficacy;

(2) for a person charged with an act of omission causing to a child, elderly individual, or disabled individual a condition described by Subsection (a)(1), (2), or (3) that:

(A) there is no evidence that, on the date prior to the offense charged, the defendant was aware of an incident of injury to the child, elderly individual, or disabled individual and failed to report the incident; and

(B) the person:

(i) was a victim of family violence, as that term is defined by Section 71.004, Family Code , committed by a person who is also charged with an offense against the child, elderly individual, or disabled individual under this section or any other section of this title;

(ii) did not cause a condition described by Subsection (a)(1), (2), or (3); and

(iii) did not reasonably believe at the time of the omission that an effort to prevent the person also charged with an offense against the child, elderly individual, or disabled individual from committing the offense would have an effect; or

(3) that:

(A) the actor was not more than three years older than the victim at the time of the offense; and

(B) the victim was a nondisabled or disabled child at the time of the offense.

(m) It is an affirmative defense to prosecution under Subsections (a)(1), (2), and (3) for injury to a disabled individual that the person did not know and could not reasonably have known that the individual was a disabled individual, as defined by Subsection (c), at the time of the offense.

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### Additional Resources

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#### Texas Finance Code Section 281.003: Notifying Third Parties of Suspected Financial Exploitation of Vulnerable Adults.

If a financial institution submits a report . . . the financial institution may at the time the financial institution submits the report . . .also notify a third party reasonably associated with the vulnerable adult of the suspected financial exploitation, unless the financial institution suspects the third party of financial exploitation of the vulnerable adult.

#### **Bank Reporting is also addressed by the Texas Finance Code Sections 281.001-006, to wit:**

Sec. 281.002. REPORTING SUSPECTED FINANCIAL  
EXPLOITATION OF VULNERABLE ADULTS. (a) If an employee of a

financial institution has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the financial institution has occurred, is occurring, or has been attempted, the employee shall notify the financial institution of the suspected financial exploitation.

(b) If a financial institution is notified of suspected financial exploitation under Subsection (a) or otherwise has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the financial institution has occurred, is occurring, or has been attempted, the financial institution shall assess the suspected financial exploitation and submit a report to the department in the same manner as and containing the same information required to be included in a report under Section [48.051](#), Human Resources Code.

Sec. 281.004. TEMPORARY HOLD ON TRANSACTIONS IN CERTAIN CASES OF SUSPECTED FINANCIAL EXPLOITATION OF VULNERABLE ADULTS. (a) Notwithstanding any other law, a financial institution:

(1) may place a hold on any transaction that involves an account of a vulnerable adult if the financial institution:

(A) submits a report of suspected financial exploitation of the vulnerable adult to the department under Section [281.002](#) (b); and

(B) has cause to believe the transaction is related to the suspected financial exploitation alleged in the report; and

(2) must place a hold on any transaction involving an account of a vulnerable adult if the hold is requested by the department or a law enforcement agency.

(b) Subject to Subsection (c), a hold placed on any transaction under Subsection (a) expires on the 10th business day after the date the hold is placed.



(c) The financial institution may extend a hold placed on any transaction under Subsection (a) for a period not to exceed 30 business days after the expiration of the period prescribed by Subsection (b) if requested by a state or federal agency or a law enforcement agency investigating the suspected financial exploitation. The financial institution may also petition a court to extend a hold placed on any transaction under Subsection (a) beyond the period prescribed by Subsection (b). A court may enter an order extending or shortening a hold or providing other relief.

(d) Each financial institution shall adopt internal policies, programs, plans, or procedures for placing a hold on a transaction involving an account of a vulnerable adult under this section.

**ADDITIONAL TEXAS CRIMINAL STATUTES:**

**Misapplication of Fiduciary Property, Texas Penal Code Section 32.45**

**Securing the Execution of a Documentary Deception, Texas Penal Code Section 32.46**

**Forgery, Texas Penal Code Section 32.21**

**Credit Card or Debit Card Abuse, Texas Penal Code Section 32.31**

**Theft by Deception, Texas Penal Code Section 31.03**

**Theft by Diminished Capacity, Texas Penal Code Section 31.03**

**Fraudulent Use or Possession of Identifying Information, Texas Penal Code Section 32.51**

**Exploitation of Elderly Individual, Texas Penal Code Section 32.53**

**FEDERAL CRIMINAL STATUTES:**

- **Wire Fraud 18 U.S.C. Section 1343**
- **Bank Fraud 18 U.S.C. Section 1344**
- **Mail Fraud 18 U.S.C. Section 1341**
- **Computer Fraud and Abuse Act Section 18 U.S.C. 1030**
- **Conspiracy 18 U.S.C. Section 371**
- **Access Device Fraud 18 U.S.C. Section 1029**
- **Passport Fraud 18 U.S.C. Section 1542**
- **Identity Theft 18 U.S.C. Section 1028/1028A**

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## SENTENCING IN CRIMINAL CASES: MAKE THE PUNISHMENT FIT THE CRIME

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In criminal cases involving abuse, neglect or exploitation of seniors or disabled adults, consider that the sentence imposed on the defendant should serve two purposes: *(1) protect others in the community from further abuse and (2) provide justice.*

Might there be sentence *enhancements* for perpetrating fraud on seniors or the disabled?

What can you convey, and how, through a victim impact statement, realizing that there are many ways to present those statements? Does the victim have the capacity to present in Court? Through a letter read by a third party? Does the victim have the technological acumen to present a statement via ZOOM?

What will the victim require as future treatment for injuries inflicted by the defendant? Is there a need for a statement from a treating physician? From an actuary who can speak to life expectancy?

Would a condition of probation be to exclude the perpetrator from contact with the victim? To allow only supervised contact with the victim if the victim desires contact? Prioritize victim safety.

Reflecting on proper sentencing, consider the Historical Clinical and Risk-20 (HCR-20). Source: Lorandos and Campbell, Benchbook in the Behavioral Sciences, Carolina Academic Press (2005).

**Historical factors:**

1. previous violence;
2. young age at time of first violent act;
3. relationship instability;
4. employment problems;
5. substance abuse problems;
6. major mental illness;
7. psychopathy;
8. early maladjustment;
9. personality disorder; and

10. prior supervision failure.

**Clinical items:**

1. Lack of insight;
2. Negative attitudes;
3. Active symptoms of mental illness;
4. Impulsivity; and
5. Unresponsive to treatment.

**Risk management items:**

1. Future plans lack feasibility;
2. Exposure to destabilizers;
3. Lack of personal support;
4. Noncompliance with remediation attempts; and
5. Stress.

**Restitution.** Is it possible to restore something lost or stolen to the victim? Can the defendant make the victim whole by returning stolen jewelry or other personal property? Will the court order restitution, mandate payment as a condition of probation, and monitor payment? As with a contempt case, might a court issue a suspended sentence or deferred adjudication, conditioned on payment to the victim, or payment to a trust fund established for the victim's benefit? A bank may become an unintended victim if the crime involved fraudulent use of credit cards. Will the conviction impress upon the public in some way that the defendant as an elder abuser? Might a condition of probation be to enjoin the defendant from working with, volunteering for, or being associated with older, disabled or otherwise vulnerable individuals?

**Statutory Wrongdoing and Its Consequences:** *Source:* Texas Penal Code.

Cite: Texas Politics - Crime and Punishment in Texas: Statutory Wrongdoing and Its Consequences (utexas.edu)

Offense	Maximum Punishment	Examples	Court with Original Jurisdiction
<b>Felonies</b>			
Capital felony	Execution	Capital murder	District court, with automatic appeal to Texas Court of Criminal Appeals
First degree felony	5-99 years or life; \$10,000 fine	Theft of property valued at \$200,000 or more; aggravated sexual assault	District court
Second-degree felony	2-20 years; \$10,000 fine	Theft of property valued at \$100,000 or more, but less than \$200,000; aggravated assault; reckless injury to a child	District court
Third-degree felony	2-10 years; \$10,000 fine	Theft of property valued at \$20,000 or more, but less than \$100,000; drive-by shooting with no injury	District court
State jail felony	180 days to 2 years; \$10,000 fine	Theft of property valued at \$1,500 or more, but less than \$20,000; credit card or debit card abuse	District court
<b>Misdemeanors</b>			
Class A misdemeanor	1 year; \$4,000 fine	Burglary; theft of property valued at \$500 or more, but less than \$1,500; theft of cable service; stalking without bodily injury	Constitutional county court or county court at law
Class B misdemeanor	180 days; \$2,000 fine	Theft of property valued at \$20 or more, but less than \$500; driving while intoxicated; possession of up to 4 ounces of marijuana; making terroristic threats	Constitutional county court or county court at law



Class C misdemeanor	\$500 fine	Theft of property valued at less than \$20; assault without bodily injury; producing or selling term papers or reports for use by others; attending a dog fight	Justice of the Peace Court
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## ELDER ABUSE CASES PRESENT CHALLENGES

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**Initiating a case.** To initiate a case, to overcome such challenges (fear of losing loved ones who have acted as caretakers, shame, lack of resources), police and other community outreach partners must team up in order to prosecute these crimes successfully.

**Why would an elder law case escape from the vigilant eye of first responders, other medical professionals, police officers, or social workers?**

- Insufficient training of community partners
- Insufficient resources to find expert witnesses, such as forensic accountants or physicians with experience caring for geriatric patients or patients with cognitive issues
- Insufficient understanding of elder abuse, neglect, and exploitation
- Community partners' misunderstanding about misuse of an elderly person's assets by persons who appear to have the legal authority to act on the elderly person's behalf
- Cognitive or physical impairment precluding the victim's ability to recognize or report abuse
- Cognitive or physical impairment precluding the victim's ability to assist in prosecution
- Mixed blessing of technology; elderly or incapacitated individuals may not be able to access needed evidence
- Love/concern for perpetrator of abuse
- Fear of retaliation by perpetrator

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## Important Links from the Texas OAG

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### [Report elder abuse](#)

If someone is in immediate danger, [call 9-1-1](#) or your local law enforcement agency.

**Senior abuse:** [Adult Protective Services](#) (800) 252-5400

### **Nursing home abuse:**

[Department on Aging \(DADS\)](#) (800) 458-9858

### **Medicaid funded facilities:**

[Attorney General's Medicaid Fraud Control Unit](#)(800) 252-801

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## WHAT KIND OF CASE DO YOU HAVE?

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### **Civil? Criminal? Both?**

In the most global terms possible, elder law cases can include criminal matters and/or civil matters. The burden of proof differs depending on what type of case is being tried. Generally, criminal cases must be proven “beyond a reasonable doubt”. Victory in civil cases is based on the idea of proving a case by a preponderance of the evidence, or by clear and convincing evidence, or even by a mere scintilla of evidence.

For instance, in [Hicks v. State](#), the Court of Criminal Appeals grappled with Hicks’ appeal of a conviction for violating Penal Code Section 22.04. James Corey Hicks was convicted of injury to a disabled individual by omission by the trial court; Hicks had punched a mentally retarded man, left him, returning later to call the sheriff to advise the sheriff of the victim’s location. A physician testified that the victim suffered a “subarachnoid hemorrhage arising from trauma to the head and aspiration pneumonia”. The victim was hospitalized for approximately one week. Hicks argued that the Texarkana Court of Criminal Appeals erred in upholding his conviction, on the basis that both the interim appellate Court and the trial court erred in looking beyond the parameters of the statute for a definition of “possession”. The [Court of Criminal Appeals](#) held that:

The Legislature has clearly provided the standard for establishing when an actor has assumed ‘care, custody, or control’ of a disabled individual under subsection (b)(2). This standard is clearly and unambiguously set out in subsection (d). Although ‘possession’ in Section 1.07(a)(39) is defined as "care, custody, or control," the court of appeals incorrectly

assumed that "care, custody, or control" under Section 22.04(b)(2) means 'possession.' **This is like saying, 'I am a mammal, a dog is a mammal; therefore, I am a dog.' This is the fallacy of the undistributed middle.** Because the language of Section 22.04(d) is clear, the court of appeals should have applied the plain language of subsection (d) and refrained from looking beyond the text of the statute in interpreting it. By looking outside subsection (d) to the definition of "possession," the court of appeals ignored established principles of statutory construction by modifying the standard provided in subsection (d).

Emphasis added.

Questions of how to construe the plain language of a statute is fodder for many cases. In [Boykin v. State](#), the Court of Criminal Appeals, sitting *en banc*, held:

If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then and only then, out of absolute necessity, is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such extratextual factors as executive or administrative interpretations of the statute or legislative history.

**How many may be impacted?** [Baby Boomers](#), born between 1946 and 1964, must be cognizant of the fact that the United States is surging with aging boomers. Each day, approximately 10,000 Baby Boomers turn 65 years of age. By 2030, all Baby Boomers will be at least 65 years old. [Elder abuse](#) research indicates that approximately 1 in 24 cases of elder abuse is reported to proper authorities. In 2020, [JAMA](#) published the US Preventative Services Task Force Recommendation for annual screening of all geriatric patients for abuse. The numbers in the Recommendation are staggering, to wit:

According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (Fifth Edition) (DSM-5), dementia (also known as major neurocognitive disorder) is defined by a significant decline in 1 or more cognitive domains that interferes with a person's independence in daily activities. The 6 cognitive domains identified in the DSM-5 are complex attention, executive function, learning and memory, language, perceptual motor function, and social cognition. Dementia affects an estimated 2.4 to 5.5 million persons in the United States, and its prevalence increases with age. Dementia affects an estimated 3.2% of persons aged 65 to 74 years, 9.9% of those aged 75 to 84 years, and 29.3% of those 85 years or older. Mild cognitive impairment (MCI) differs from dementia in that the impairment is not severe enough to interfere with independent daily functioning. Some persons with MCI may progress to dementia, while some do not. One systematic review found that 32% of persons with MCI develop dementia over 5 years. However, studies have also shown that between 10% and 40% of persons with MCI may return to normal cognition over approximately 4 to 5 years. The prevalence of MCI is difficult to estimate, in part because of differing diagnostic criteria, leading to a wide range of prevalence estimates (3%-42%) in adults 65 years or older. In this recommendation statement, "cognitive impairment" refers to both dementia and MCI.

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## WHAT IS THE ATTORNEY'S ROLE?

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In a criminal case, the prosecutor zealously advocates for justice. The prosecutor guarantees that the voices of the elderly, disabled, and/or others who are cognitively or physically impaired are heard. In doing so, the prosecutor must:

- Gather evidence and preserve testimony
- Assure restitution by having criminals make victims whole by returning or paying back what was taken
- Protect others in the community who might otherwise fall prey to the perpetrator by holding the accused accountable
- To the extent possible, assure the rehabilitation of the accused

In a civil case, the attorney's role is to:

- assist aging and/or disabled individuals to navigate through issues related to aging,
- including preparing for long-term care,
- and/or choosing retirement plans,
- and/or planning and settling estates,
- and/or assisting in the preparation of conversion cases, fraud cases,
- and/or prosecuting or defending against guardianship cases.

Like a prosecutor, the civil attorney is obliged to gather and preserve evidence.

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## UNDUE INFLUENCE

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Many elder law cases are premised on someone exercising undue influence on a family member or upon someone for whom they are a caretaker.

Elder law cases present unique challenges, including issues of capacity, consent and duress. Life expectancy may be an issue. While it might be easy for the average person to gather bank records, deeds and related evidence, an elderly or incapacitated person may find such tasks beyond their level of functioning. "[Capacity](#) to make one's own decisions is fundamental to the autonomy of the individual. Capacity is a functional assessment made by a clinician to determine if a patient is capable of making a specific decision. Competency is a global assessment and legal



determination made by a judge in court”. [Chapter 1 of the Texas Penal Code](#) defines “consent” as “**assent in fact, whether express or apparent**”. To consent is to have the capacity to agree to what is taking place. In terms of sexual activity, a person engages in sex consensually if a person is of age and has the ability to and does agree with the activity.

Undue influence is “more often exercised by subtle and devious, but no less effective, means, such as deceit and fraud.” [Holcomb v. Holcomb](#), 803 S.W.2d 411 (Tex. App. Dallas 1991). Undue influence may also be evidenced via threats, or fraud, or the exercise of a strong mind over a weak mind. [Furr v. Furr](#), 721 S.W.2d 565 (Tex. App. 1986). The influence exercised need not occur at the time of the execution of the instrument in question, if the impact of the influence continues up to the time of execution of the instrument. *Id.* However, there is nothing that is illegal per se about an individual begging another individual to include them in their estate. [Guthrie v. Suito](#), 934 S.W.2d 820 (Tex.App. Houston – 1<sup>st</sup> Dist – 1996). Undue influence can be defined as that amount of control held by one person over the mind of another person (dominion), that prevents the latter individual from exercising discretion, thereby destroying the latter’s free will or agency, compelling said individual to do something against their will due to fear, or from a desire to end rancor, or from some feeling that the individual is unable to resist. [Lowery v. Saunders](#), 666 S.W.2d 226 (Tex. App. San Antonio 1984).

In [Curry v. Curry](#), the Texas Supreme Court dealt with the issue of duress, or undue influence. The case revolved around whether a warranty deed should be canceled due to allegations of the grantor’s mental incapacity and grantor being subjected to undue influence. “On November 21, 1949, N. S. Curry, then 85 years of age, broke his leg and hip and was hospitalized at Teague, Texas, until June 9, 1950. It thus appears that the deed under attack was executed while the grantor was in the hospital, some two years before his death on November 30, 1951”. The deed being attacked was executed while Mr. Curry was hospitalized. Evidence presented substantiated the fact that N.S. Curry had sufficient mental capacity to execute the instrument. Despite arguments that Mr. Curry was frail, the Texas Supreme Court noted that:

There was no testimony whatever that the grantor was weak and frail, either physically or mentally, unless it may be said that an inference of frailty and weakness might be drawn from the grantor's age and crippled condition and any such inference of mental weakness or weakness of will is contrary to all of the testimony of all of the witnesses, both lay and medical. *We are unwilling to hold that proof that the grantor was 85 years of age and had a broken hip, without further proof that the years and his injury had had a debilitating effect, gave rise to a reasonable inference, contrary to all the direct testimony, that he was easily influenced, which inference, in turn, could be appropriated by the jury as evidence of probative force that his will was subverted and his deed was procured by undue influence.* The only evidence to which plaintiffs allude as indicating mental frailty is that which shows that during a period of two or three weeks while the grantor was in the hospital he was delirious, irrational, and confused as a result of a high fever from an attack of pneumonia or influenza. The grantor's physician, Dr. Cox, definitely fixed this period at a date subsequent to the date of the deed and the evidence mentioned can have no weight on the issue.

Emphasis added. The Texas Supreme Court also noted that another witness testified that the Grantee arrived at the hospital with papers in his pocket, advising the Mr. Curry that he had papers he wanted him to sign, to which Mr. Curry apparently responded: "*Hell no, I don't want to sign them, I would like to read them first.*" The Texas Supreme Court adds:

It has been held that one may request or even importune and entreat another to execute a favorable dispositive instrument, but unless the importunities and entreaties are shown to be so excessive as to subvert the will of the maker they will not taint the validity of the instrument with undue influence. Robinson v. Stuart, 73 Tex. 267, 11 S.W. 275, 276; Salinas v. Garcia, Tex. Civ.App., 135 S.W. 588, 591, writ refused; Thompson on Wills, 3rd Edition, § 143, p. 226; Page on Wills, Lifetime Edition, Vol. 1, § 185, p. 371; 57 Am.Jur., Wills, § 361, p. 264. . .

The trial court's charge recognized the right of plaintiffs to set aside the deed if it was procured or induced by fraud. "Undue influence" was defined as "any fraudulent or designing means employed upon and with the maker of an instrument by which, under the circumstances and conditions by which such maker was surrounded, he could not well resist and which controlled his volition and induced him to do that which he otherwise would not have done." Even though fraud is treated as a species of undue influence, the evidence will not support a legal conclusion of undue influence based thereon unless it will support a legal conclusion of fraud.

There is no direct testimony in the record establishing fraud and none from which an inference of fraud can arise. For representations to form a basis of fraud, they must be false. See authorities, supra; Janes v. Stratton, Tex.Civ.App., 203 S.W. 386, 388, no writ history; Jett v. Gulf Prod. Co., Tex.Civ.App., 290 S.W. 884, writ dismissed.

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## PROVING UNDUE INFLUENCE

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Undue influences is often proven by circumstantial evidence. Ulterior motives are afoot but are hidden. The perpetrator's ulterior motives must then be proven by circumstantial rather than by direct evidence. Truelove v. Truelove, 266 S.W.2d 491 (Tex.Civ.App.- Amarillo, 1953).

## 1.5 Direct and Circumstantial Evidence

### 1.5 DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

#### Comment

"It is the exclusive function of the jury to weigh the credibility of witnesses, resolve evidentiary conflicts and draw reasonable inferences from proven facts. . . . Circumstantial and testimonial evidence are indistinguishable insofar as the jury fact-finding function is concerned, and circumstantial evidence can be used to prove any fact." *United States v. Ramirez-Rodriguez*, 552 F.2d 883, 884 (9th Cir. 1977) (quoting *United States v. Nelson*, 419 F.2d 1237, 1239-41 (9th Cir. 1969)). See also *United States v. Kelly*, 527 F.2d 961, 965 (9th Cir. 1976); and *Payne v. Borg*, 982 F.2d 335, 339 (9th Cir. 1992) (citing *United States v. Stauffer*, 922 F.2d 508, 514 (9th Cir. 1990)).

The Committee believes that an instruction on circumstantial evidence generally eliminates the need to explain the same principle in terms of inferences, and that matters such as flight, resistance to arrest, etc., are generally better left to argument of counsel as examples of circumstantial evidence from which the jury may find another fact. See *United States v. Beltran-Garcia*, 179 F.3d 1200, 1206 (9th Cir. 1999) (in discussing jury instruction regarding inferring intent to possess for distribution from quantity of drugs, the Ninth Circuit stated that "[a]lthough the instructions in this case were not delivered in error, we do not hesitate to point out the 'dangers and inutility of permissive inference instructions.'" (citations omitted)), *cert. denied*, 528 U.S. 1097 (2000). See also *United States v. Rubio-Villareal*, 967 F.2d 294, 300 (9th Cir. 1992) (en banc) (disapproved instructing the jury that knowledge of the presence of drugs in a vehicle may be inferred from the defendant being the driver).

It may be helpful to include an illustrative example in the instruction:

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide an explanation for the water on the sidewalk. Therefore, before

you decide that a fact has been proven by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

*Approved 9/2019*

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## WHETHER CRIMINAL OR CIVIL, DO YOU HAVE AN APEX WITNESS OR AN IMPAIRED LITIGANT: COGNITIVE TESTS

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Sadly, many individuals who are abused, neglected or exploited present with disability or infirmity. They may suffer from dementia. They may suffer from a traumatic brain injury. Stroke or other maladies may impair their ability to communicate. **Many screening tests exist to measure cognitive impairment.** Screening tests for cognitive impairment include:

[Mini-Mental State Examination \(MMSE\);](#)

[Clock Drawing test \(CDT\);](#)

[Memory Impairment Screen \(MIS\)/MIS by Telephone \(MIS-T\);](#)

[Mental Status Questionnaire \(MSQ\);](#)

[Mini-Cog verbal fluency, 8-Item Informant Interview \(AD8\);](#)

[Functional Activities Questionnaire \(FAQ\);](#)

[7-Minute Screen \(7MS\);](#)

[Abbreviated Mental Test \(AMT\);](#)

[Montreal Cognitive Assessment \(MoCA\);](#)

[St. Louis University Mental Status Examination \(SLUMS\);](#)

[Telephone Instrument for Cognitive Status \(TICS\);](#) and

[Informant Questionnaire on Cognitive Decline in the Elderly \(IQCODE\).](#)

Consider President Trump. Can [cognitive testing](#) impact our daily lives? As recently as June 30, 2021, in a press conference with our own Gov. Abbott, Pres. Trump continued to discuss his cognitive test results. *Please see exhibits attached for some examples, in addition to the links [above](#).*

<b>ON-LINE RESOURCES</b>	
<b>Office on Violence Against Women</b>	<a href="#">(Office on Violence Against Women (OVW)   Department of Justice)</a>
<b>National District Attorneys Association</b>	<a href="#">National District Attorneys Association: The Voice of America's Prosecutors (ndaa.org)</a>
<b>National Association of Elder Law Attorneys</b>	<a href="#">National Academy of Elder Law Attorneys (naela.org)</a>
<b>National Center on Law &amp; Elder Rights</b>	<a href="#">NCLER - Home (acl.gov)</a>
<b>Elder Justice Initiative</b>	<a href="#">Elder Justice Initiative (EJI)   Department of Justice</a>
<b>Department of Homeland Security</b>	<a href="#">What is Elder Law?   Homeland Security (dhs.gov)</a>



*"Is this really necessary, Your Honor? I'm an expert."*

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## EXPERTS: Frye, Daubert and FRE 702

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Trial judges act as gatekeepers. Expert witnesses, at least in theory, purport to give testimony that will withstand scientific scrutiny – that is, the expert bases grounds their opinion on something reliable, verifiable, and subject to replication in similar circumstances. “. . .in order to qualify as ‘scientific knowledge’, an inference or assertion must be derived from scientific method. As James R. Flens opined “the responsible use of psychological tests in child custody evaluations requires an advanced understanding of both psychological issues of test selection and legal criteria regarding admissibility of expert testimony.” Proposed testimony must be supported by appropriate validation – i.e. ‘good grounds’, based on what is known.” Per the Daubert case, we have the following criterion (summarized in the Benchbook for Behavioral Sciences at page 8):

TRIAL COURT	<i>Is the gatekeeper who must make a preliminary assessment as to whether the reasoning and methodology proffered are scientifically valid</i>
TRIAL COURT	<i>Must ensure that proffered testimony is relevant and reliable with a focus solely on principles and methodology</i>
EVIDENTIARY ADMISSIBILITY	<i>Shall be based upon reliability determined by the degree of scientific validity</i>
SCIENTIFIC METHODOLOGY	<i>Means generating hypotheses and testing them to see if they can be falsified. Has the technique been “tested” is the key question</i>
SCIENTIFIC KNOWLEDGE	<i>Is that which is derived from the empiricism of the scientific method</i>
EXPERTS	<i>Must be grounded in the methods and procedures of science</i>
EXPERTS	<i>Must know and base their opinions reliably based on the datum of their discipline</i>

In General Electric v. Joiner, the Supreme Court made some clarifications to Daubert. In Joiner, the Supreme Court held that:

...conclusions and methodology are not entirely distinct from one another . . .A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered . . .That is what the District Court did here, and we hold that it did not abuse its discretion in doing so.

HIPAA rules will not preclude accessing Certificates of Medical Examination (CME) – but the conclusions therein, and the individuals who prepared the assessment, are subject to attack on cross examination, or by taking the “expert” witness on *voir dire* and by raising questions about reliability, validity and efficacy of the tests employed. When does someone cross the line

from being opinionated to being an expert? In [Frye v. United States](#), a case decided in the first quarter of the 20<sup>th</sup> century, the court held that:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to determine. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle for discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs.

Daubert updated the Frye holding.

From the [Frye](#) case, which dealt with the issue of the admissibility of lie detector test results:

A single assignment of error is presented for our consideration. In the course of the trial counsel for defendant offered an expert witness to testify to the result of a deception test made upon defendant. The test is described as the systolic blood pressure deception test. It is asserted that blood pressure is influenced by change in the emotions of the witness, and that the systolic blood pressure rises are brought about by nervous impulses sent to the sympathetic branch of the autonomic nervous system. Scientific experiments, it is claimed, have demonstrated that fear, rage, and pain always produce a rise of systolic blood pressure, and that conscious deception or falsehood, concealment of facts, or guilt of crime, accompanied by fear of detection when the person is under examination, raises the systolic blood pressure in a curve, which corresponds exactly to the struggle going on in the subject's mind, between fear and attempted control of that fear, as the examination Page 1014 touches the vital points in respect of which he is attempting to deceive the examiner. In other words, the theory seems to be that truth is spontaneous, and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure. The rise thus produced is easily detected and distinguished from the rise produced by mere fear of the examination itself. In the former instance, the pressure rises higher than in the latter, and is more pronounced as the examination proceeds, while in the latter case, if the subject is telling the truth, the pressure registers highest at the beginning of the examination, and gradually diminishes as the examination proceeds. Prior to the trial defendant was subjected to this deception test, and counsel offered the scientist who conducted the test as an expert to testify to the results obtained. The offer was objected to by counsel for the government, and the court sustained the objection. Counsel for defendant then offered to have the proffered witness conduct a test in the presence of the jury. This also was denied.

So, in theory, the use of a pneumatic cuff to track the rise or fall of blood pressure – after establishing a baseline – was being proffered as a scientific method that was reliable, verifiable, and capable of being reproduced by others in similar circumstances. The D.C. Circuit Court in Frye held that:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.

Frye v. U.S. (1923) – seminal case in admission of scientific evidence.

- **Overview:** Defendant Frye was convicted of 2<sup>nd</sup> degree murder and argued on appeal that the trial court erred by refusing to allow an expert witness to testify about the result of a systolic blood pressure deception test taken by said defendant. (*Now better known as a lie detector test*).
- **Holding:** The Court of Appeals of the District of Columbia affirmed the conviction.
- **Ruling:** the testimony about the systolic blood pressure deception test was properly excluded at trial because it had not gained the required standing and scientific recognition from psychological and physiological authorities.

Under the 2000 revisions to FRE Rule 702, an expert's opinion is admissible if:

1. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
2. the testimony is based on sufficient facts or data;
3. the testimony is the product of reliable principles and methods; and
4. the expert has reliably applied the principles and methods to the facts of the case.

More recently, the Advisory Committee of the Federal Rules of Evidence questioned whether Rule 702 should be amended again. The proposed changes (as of April, 2020) include:

1. Clarifying the trial court's gatekeeping function by imposing a burden of proof regarding expert testimony;
2. The burden of proof, left unaddressed by the 2000 amendments to FRE 702, would be a "preponderance of the evidence". Now, if a judge admits expert testimony that has not shown by a preponderance of the evidence that there is a reliable, valid basis for the opinion, and/or that scientific method has been appropriately applied, the judge essentially



defers that analysis to a jury. “[The Committee](#) has stressed that Rule 702’s requirements concern admissibility, *not* the weight of the evidence. The latter remains a jury function.”

The proposed revisions to Rule 702 would provide depth, in contrast to Federal Rule of Evidence 104(a), which provides that:

## **Rule 104 – Preliminary Questions**

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(a) **In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) **Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) **Conducting a Hearing So That the Jury Cannot Hear It.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

- (1) the hearing involves the admissibility of a confession;
- (2) a defendant in a criminal case is a witness and so requests; or
- (3) justice so requires.

(d) **Cross-Examining a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) **Evidence Relevant to Weight and Credibility.** This rule does not limit a party’s right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

### *History*

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat.1930; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

If the proposed revisions to Rule 702 are codified, the result would be establishing a burden of proof, to assure that a trial judge finds that all elements are satisfied by a preponderance of the evidence before admitting expert testimony. To help guide jurists, the Committee is considering including a Committee Note to emphasize the impact of the burden of proof.

There have been several meetings of the [Advisory Committee on Evidence Rules](#) since, the most recent of which was held April, 2021. The April 30, 2021 report consists of almost 500 pages. In pertinent part, setting out minutes from a November 30, 2020 Committee meeting (Pages 17-18 of 486):

The Committee has been considering an amendment to FRE 702 to expressly provide that the trial judge must find the requirements of the Rule satisfied by a preponderance of the evidence. The Reporter noted that one concern about such an amendment might be that FRE 104(a) already applies to FRE 702 under existing rules. Indeed, he noted that express preponderance language likely would have been rejected in 2000 when Rule 702 was amended to reflect the *Daubert* opinion because the preponderance standard was already baked into the existing Rule. Twenty years later -- when it is clear that federal judges are not uniformly finding and following the preponderance standard -- the justification for a clarifying amendment exists. He emphasized that the FRE 104(a) standard is not expressly stated in FRE 702. Litigants and judges need to look to a footnote in *Daubert* providing that FRE 104(a) governs Rule 702 determinations and then to FRE 104(a) (which does not actually explicitly set out a preponderance of the evidence standard) and then to the Supreme Court's decision in *Bourjaily* (which interprets Rule 104(a) as requiring a preponderance) to learn that such findings are to be made by the trial judge by a preponderance of the evidence. The Reporter explained that this circuitous route to the preponderance standard is a subtle one that has been missed by many courts and that an amendment to Rule 702 could improve decision making by expressly stating the applicable standard of proof. He further noted that the *Daubert* opinion included some language about "shaky" expert testimony being a question for the jury, further exacerbating confusion.

Additional observations from the November 30, 2020 [Committee meeting](#) (Page 21 of 486):

Ted Hunt, the Department's expert on forensic testimony, next argued that existing Rule 702 is being applied effectively by federal courts to police forensic testimony, and that no rule change should be made. He described tremendous change in the forensics community since 2009. In particular, he noted studies completed since the PCAST Report revealing false positive error rates of less than 1% in forensic disciplines such as fingerprint identification and ballistics. He noted that even these low rates of error failed to account for the fact that a second reviewing examiner required by protocols in forensic laboratories would catch even these few errors (though he did not mention whether those second reviewers knew the results of the original test). He emphasized that pattern comparison testimony is a skill-based, experience-based method and that courts are appropriately treating it as such. He acknowledged the difficulty in extrapolating error rates to all forensic examiners in all disciplines, making the identification of general error rates challenging. Still, he highlighted the Department's work in developing and publishing uniform language for 16 forensic disciplines. This language prohibits overstatement by experts and eliminates problematic legacy language (such as "zero error rate" or "infallible"). He emphasized that concessions of fallibility are now routinely made by forensic experts. He suggested that the federal caselaw may not have entirely caught up with this rapid progress, but that courts were starting to reference and utilize the uniform language appropriately. In sum, he opined that existing Rule 702 is working optimally with respect to forensic testimony and should not be amended.

Could a group of lawyers meet without voicing many opinions? Unlikely. Concern has been expressed that there should be [an overstatement amendment to Rule 702](#) (Page 21 of 486):

Next, the Federal Defender voiced her strong support for an overstatement amendment to Rule 702. She reminded the Committee that erroneous forensic testimony could lead and has led to false convictions. She called attention to the voluminous digest of federal cases collected by the Reporter in the Agenda materials, illustrating the many times that forensic (and other) experts had been permitted to make clear overstatements about the conclusions that may reliably be drawn from their methods. She acknowledged the Department's frustration with the PCAST Report but pointed out that the Department may make the same arguments it is making about the reliability of its forensic testimony in court before a trial judge to overcome an objection based upon overstatement. She further noted that forensic testimony in state courts is particularly problematic and that even perfect adherence by the Department to its uniform language would be inadequate to fix the problem in state courts --- a problem that might be solved by the promulgation of a federal model. She noted the importance of adding a specific prohibition on overstatement to Rule 702 to alert courts to focus on that point. An amendment to Rule 702 would prevent the issue of overstatement from being ignored or overlooked and would signal to courts that they have a gatekeeping responsibility with respect to an expert's ultimate conclusions on the stand. In sum, she opined that an amendment would not prevent the government from presenting and defending reliable forensic testimony, but would prevent egregious overstatements by testifying experts.

Certainly, the concept of overstatement should be one of concern for forensic psychologists and the families they evaluate. Overstatement, and lack of scientific method, are at the core of cross examination on these issues.

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## RECOVERY IN A CIVIL CASE/SOL

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This simple header is not so simple. Recovery in a civil case depends on many factors, including bringing suit before the statute of limitations expires, and proving the elements of your case. To prevail in a civil case, one must also plead and prove the essential elements of the cause of action. The amount of recovery is dependent on many factors, including whether or not there is any type of statutory cap on regular or compensatory damages, and whether exemplary damages are also available. See [Chapter 41, Texas Civil Practice and Remedies Code](#) and related statutes.

**Statutes of limitations** on many common causes of action follow.

<b>TYPE OF CASE</b>	<b>Statute of Limitations</b>
<b>Assault and battery: 2 years</b>	Tex. Bus. & Com. Code Ann. § 2.725(a) (2020); Tex. Civ. Prac. & Rem. Code § 16.003(a) (2020)
<b>Contract: 4 years</b>	Tex. Bus. & Com. Code Ann. § 2.725(a) (2020); Tex. Civ. Prac. & Rem. Code § 16.004(a)(3), (a)(4) (2020)
<b>False imprisonment: 2 years</b>	Tex. Civ. Prac. & Rem. Code § 16.003(a) (2020)
<b>Fraud: 4 years</b>	Tex. Civ. Prac. & Rem. Code § 16.004(a)(4) (2020)
<b>Libel: 1 year</b>	Tex. Civ. Prac. & Rem. Code § 16.002(a) (2020)
<b>Medical Malpractice: 2 years</b>	Tex. Civ. Prac. & Rem. Code § 74.251(a) (2020)
<b>Personal injury: 2 years</b>	Tex. Civ. Prac. & Rem. Code § 16.003(a) (2020)
<b>Property damage: 2 years</b>	Tex. Civ. Prac. & Rem. Code § 16.003(a) (2020)
<b>Slander: 1 year</b>	Tex. Civ. Prac. & Rem. Code § 16.002(a) (2020)
<b>Trespass: 2 years</b>	Tex. Civ. Prac. & Rem. Code § 16.003(a) (2020)
<b>Wrongful death: 2 years</b>	Tex. Civ. Prac. & Rem. Code § 16.003(b) (2020)

For example, as to [fraud](#):

The elements of a fraud claim are (1) the defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) when the defendant made the representation, the defendant a) knew that the representation was false or b) made the representation recklessly, as a positive assertion, and without knowledge of its truth;

(5) the defendant made the representation with the intent that the plaintiff act on it; (6) the plaintiff relied on the representation; and (7) the representation caused the plaintiff injury. In re First Merit Bank, 52 S.W.3d 749, 758 ( Tex.2001).

The [Association of Certified Fraud Examiners](#) notes that:

A fraud victim's right to recover money or property, or their equivalent in monetary damages, from another person—and the remedies by which he can recover them—requires that the person obtained that money or property unlawfully (i.e., by conduct that violates one or more laws). A person who violates the law—either by conduct that is prohibited or by failing to fulfill a duty—is legally obligated to redress the injury or loss caused to the victim by that violation. The victim enforces that obligation to redress his loss through specified remedies that correspond to different legal offenses. Thus, to recover the proceeds of fraud, you must show that the loss was caused by unlawful conduct. In practical terms, this means you must be able to recognize which laws were potentially violated, and you must be able to match the facts and circumstances of a specific loss to one or more legal causes of action. This will be your legal theory of recovery. . .

. . .In civil law, a victim may not only recover from the principal offender, but he may also recover from a third party, as if the third party were a principal. That is, in civil law, a third party may be liable for the misconduct of another party. This is referred to as vicarious liability (i.e., the absolute liability of one party for the misconduct of another party). Vicarious liability might become important in planning a fraud recovery. If, for example, the primary actor is judgment-proof (insolvent or lacks funds to satisfy a judgment), you should consider seeking recovery from a vicariously liable third party. In short, vicarious liability might be a good option if it is not practicable to seek recovery from the primary actor for some reason. If seeking recovery from the primary actor is not practical, you will need to identify another liable person or entity, preferably one with insurance or with deep pockets. Briefly, the general rule is that employers, principals, co-conspirators, partners, joint venturers, and corporations are vicariously liable for any acts done on their behalf by their employees, agents, co-conspirators, partners, joint venturers, or directors and officers. But to hold a third party vicariously liable, the primary actor must have acted within the course and scope of his employment or contractual relationship.

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## **SPECIAL CONSIDERATIONS**

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### **CRIMINAL AND CIVIL MATTERS**

- Unique dynamics, including potential cognitive issues
- Finding evidence to support a claim that a purported victim knowingly, willingly and voluntarily consented
- Determining the mental capacity of the victim now and at past critical junctures
- What proves that the alleged victim had or lacked capacity to consent?
- Will the purported victim be available to assist in case development and prosecution?
- What must be done to accommodate the victim's physical, communication, cognitive and other needs throughout the case?
- What services might the victim require during the pendency of the case? (new care providers, handicap access, a proxy to gather documents, et cetera)

### **PHYSICAL ABUSE ISSUES**

- What was the proximate cause of the problem in dispute? (How is abuse distinguished from an accident, medical conditions, impact of medication)
- How can intentional conduct be differentiated from unintentional conduct (consider the impact of a TBI, cognitive dysfunction, or disease that may impact behavior)
- Perception: convincing a judge or jury that an elderly person or disabled person is capable of inflicting serious injury, yet not be in control when doing so

### **FINANCIAL ABUSE ISSUES**

- Two steps: first, did the victim have capacity. Second, was the victim's consent obtained by undue influence.
- If there is evidence that the victim's capacity is impaired, investigating how badly impaired the victim was at the time of taking or giving consent
- Who is the bad guy? A relative? A paid caretaker? A grifter engaged in a financial or telemarketing scam? (oh, we were just spending down so s/he could qualify for Medicaid)
- Tracing: using a forensic accountant to follow the money or other assets that were allegedly wrongfully transferred

- Don't presume that the conduct is simply a civil matter and cannot be dealt with via criminal prosecution

### **SEXUAL ABUSE ISSUES**

- Propriety and shame
- Presenting proof if the victim cannot speak for themselves
- Lack of physical evidence due to abating a report of abuse
- Consent (s/he wanted to have sex)
- SODDI (it wasn't me!)
- Jury's propensity to blame the victim, or simply refuse to believe that an elderly or incapacitated person can be the victim of abuse

### **NEGLECT ISSUES**

- Causation: did the victim suffer abuse, or were the injuries simply attributable to aging or disease?
- Prove *mens rea* – did someone, by act or omission, commit negligence? (reckless, malicious, criminal)
- Identify the responsible caregiver(s) to charge
- Establish the actor's or suspect's legal duty of care (It wasn't my fault. S/he wanted to die at home. S/he refused to eat. S/he said she'd had it and refused to take the medication)
- Distinguish criminal neglect from the victim's lifestyle choices (s/he refused to eat)
- Blasting through defense claims that the actor or suspect was simply doing their job, or had done the best they could in the circumstances, or simply obliged the victim's requests
- Surmounting jurors' sympathy with the actor's or suspect's caregiving situation by laying out how the actor or suspect engaged in neglect or criminal acts
- Medical expert witnesses, who can communicate with victims, ascertain their injuries, and assist the victims in participating in the case as fully as possible
  - Figure out what the victim needs; life is about accommodation.
  - Develop a rapport with the victim; build trust
  - Explore the facts after building trust
  - Allow the victim – who is elderly or incapacitated in some way, sufficient time to articulate their thoughts, needs and fear

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## DOCUMENTS IN PLACE THAT MAY IMPACT YOUR CASE

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**POWER OF ATTORNEY AND RELATED ESTATE PLANNING DOCUMENTS:** a POA is a legal document drafted to grant another individual to have decision making authority over a person's financial and/or health care decisions. Is there such an instrument in place? Does the victim have sufficient capacity to revoke the Power of Attorney? What about related estate planning documents?

**GUARDIAN:** an individual or agency court appointed to exercise limited or full decision-making power over the person and/or estate of the individual.

**WARD:** a person made the subject of a guardianship.

**DIVORCE DECREE:** establishing powers, duties and privileges in regard to a minor incapacitated child or to an incapacitated adult child.

**CONSERVATORSHIP:** a parent granted powers, duty and privileges as to a minor child, and/or as to an adult incapacitated child whose incapacity was apparent prior to the child attaining the age of 18.

**CRIMINAL RECORDS:** does an individual involved in the case have a prior criminal history?

**DEEDS:** were transfers of real property made by someone with the capacity to sign the documents? Who drafted the document?

**PROBATE RECORDS:** what are the bequests of ownership? Did the interest pass through probate? Or outside of probate via a trust instrument?

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## SODDI DEFENSE AND OTHER COMMON REFRAINS

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Attorneys have long used the defense of "some other dude did it" ("SODDI") or self-defense to combat allegations of abuse. Learn to marshal evidence and testimony accordingly.

**Examples:** If the perpetrator argues that the victim suffers from dementia and that the perpetrator was simply defending themselves, the victim, an expert witness, or another fact witness should be primed to testify that the victim has an illness and sometimes lashes out uncontrollably.

S/he is on blood thinners, and bruises very easily. Who can tell us how this bruise is different?



S/he asked me to take over the checking account. S/he told me it would be just fine if I reimbursed myself. After all, I'm certainly incurring costs to take care of them. Oh, and s/he said it would be fine for me to pay my bills from the checking account too.

By way of analogy, [a study of 542 cases](#) that occurred between 1998 and 2012 of sexual abuse of children reflected that:

- 1. Likelihood of prosecution increased where a child gave a detailed description of the alleged abuse.*
- 2. Convictions increased where the abuse occurred multiple times, or the abuse occurred over a period of more than one year.*
- 3. Successful cases were often dependent on the children's communication and language skills.*
- 4. Sexual abuse cases may be less likely to be prosecuted if the victimized children lacked the ability to give a detailed description of the events.*

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## **OVERLAP OF TEXAS FAMILY CODE AND TEXAS ESTATES CODE**

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*The terms "conservatorship" and "guardianship" are often used interchangeably.*

*Conservatorship and guardianship are NOT the same.*

[Chapter 153](#) of the Texas Family Code codifies terms for conservatorship, possession of, and access to children. This is the provision that sets out the definition of "best interest of child," as well as the powers of a conservator. This is the chapter that differentiates between Sole Managing Conservator, Possessory Conservator and Joint Managing Conservators. This is the chapter that establishes terms for access to and possession of a child.

[Chapter 154](#) of the Texas Family Code codifies terms for child support; Chapter F not only addresses child support for minors, but establishes criterion for child support payable for an adult disabled child. Texas Family Code Chapter 153.301 *et seq* allows for suit seeking post-majority support for a disabled child and/or an adult disabled child PROVIDED that the disability existed on or before the individual's 18<sup>th</sup> birthday. There is no provision for the state to be reimbursed by an individual's parents for expenses incurred for the benefit of an institutionalized adult. However, Subchapter F of Chapter 154 does allow for assignment of support to the Title IV-D agency. If a case does not involve the Title IV-D agency, the trial court has the discretion to designate a special needs trust through which support can be remitted. This chapter also allows a parent to seek access to and possession of an adult disabled child; provided, however, that the adult disabled child may refuse the access (due to the disability of minority being removed as a matter of law at age 18).

Sections 154.302-303 expand the possibilities of support of an adult disabled child to include provision for establishment of a special needs trust to facilitate remittances of support. Moreover, the adult child may receive support directly from a parent in the event the disability does not impair the adult child's ability to manage his or her affairs.

It is possible for:

1. [A parent](#) to have standing to petition for child support for an adult disabled child without having physical custody or a court ordered guardianship.
2. A [family district court](#) to increase support for a disabled adult child.
3. The trial court to consider [the child support guidelines](#), and grounds for deviation therefrom, in establishing or modifying support for an adult disabled child.
4. An [adult disabled child to file suit for support](#) when he had not been party to his parents' divorce.
5. A probate court and a district (family) court to have [concurrent jurisdiction](#); provided, however, that guardianship belongs exclusively to the probate court. Moreover, the mere fact that there is a district (family) court with continuing jurisdiction over the (adult) child does not preempt probate jurisdiction.
6. Support for an adult disabled child to be ordered, notwithstanding the fact that the adult [disabled child is enrolled in a local college program](#). The costs of the program may justify the need for a support order (though typically, child support would cut off at age 18. There are exceptions; to wit: if a child is enrolled as a student in a college in a concurrent program, whereby the Senior year of high school and presentation of a high school diploma are based on completion of classes at a college, OR, if the child's parents entered into a contract, known as an Agreement Incident to divorce, allocating the child's college costs).

See the [Garland](#) case, ably argued by my Underwood Perkins, P.C. colleague, Paulette Mueller.

In Texas, children attain majority at the age of 18. Once the child attains majority, the child is an adult. In treating adults, medical, dental and counseling professionals, among others, are bound by HIPAA requirements. Even if the "adult" child is incapacitated, unless a special needs child has sufficient capacity to execute a medical release or Special Medical Power of Attorney, the adult child's parent will have no right to access the child's health records, nor the right to confer with health care providers about the child's status. That's why the parents of incapacitated children are well advised to retain counsel and to pursue a guardianship over the adult child, to assure that the parent will have the on going right to make health care decisions, and to have the right of access to the adult child's medical records. Imagine managing medications without having the ability to confer with physicians, psychiatrists and other health care providers!

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## MORE THAN ONE WAY TO WIN

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Abuse of legal authority to act on behalf of another individual may be subject to criminal or civil prosecution. For instance, if someone abuses their power as an attorney-in-fact (via power of attorney) or over a ward (via a guardianship order), potential causes of action include:

- Breach of fiduciary duty
- Conversion
- Larceny
- Theft
- Embezzlement
- Financial Abuse
- Forgery
- Financial Exploitation
- Fraud

Just as a parent is to act in their child's best interest, a proxy decision maker is charged with upholding their fiduciary duty, and to act in the best interest of the older adult and/or disabled person for whom they provide care. In cases with big estates, it is possible to turn to prosecution for [tax evasion](#) as a means of seeking redress against an errant surrogate decision maker, in applicable circumstances.

If the concern is neglect at a nursing home, an offer of a plea deal or immunity to someone less culpable might lead to successful prosecution of more culpable parties. What evidence do you need? What evidence is admissible in regard to the crime charged? Might a different charge be warranted if it leads to more evidence?

In the case of [Crawford v. Washington](#), the U.S. Supreme Court dealt with the defendant's right of confrontation. Hearsay is an out of court statement offered to prove the truth of the matter asserted within the statement. Crawford, and the cases that follow this precedent, preclude use of hearsay statements made to a government agent where the speaker or the agent could have the reasonable expectation that the statements could be used in litigation, PROVIDED, that the preclusion rule does not apply where:

1. The witness is currently unavailable; and
2. At some point, the defendant had the chance to cross examine the witness.

In *Crawford*, Petitioner was tried for assault and attempted murder. Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. The State sought to introduce a recorded statement that petitioner's wife Sylvia had made during police interrogation, as evidence that the stabbing was not in self-defense. Sylvia did not testify at trial because of Washington's marital privilege.

Petitioner argued that admitting the evidence would violate his Sixth Amendment right to be ‘confronted with the witnesses against him.’

At his trial, the State played for the jury Sylvia’s tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner’s conviction after determining that Sylvia’s statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment’s guarantee that, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’ . . . According to our description of that right in *Ohio v. Roberts*, 448 U. S. 56 (1980), it does not bar admission of an unavailable witness’s statement against a criminal defendant if the statement bears ‘adequate ‘indicia of reliability.’ *Id.*, at 66. To meet that test, evidence must either fall within a firmly rooted hearsay exception’ or bear ‘particularized guarantees of trustworthiness.’ *Id.* The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband’s story that he acted in self-defense or ‘justified reprisal’; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a ‘neutral’ law enforcement officer. App. 76–77. The prosecution played the tape for the jury and relied on it in closing, arguing that it was ‘damning evidence’ that ‘completely refutes [petitioner’s] claim of self-defense.’ Tr. 468 (Oct. 21, 1999). The jury convicted petitioner of assault. . . Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

In Texas, as in every jurisdiction, there are exceptions to the hearsay rule, even in light of the *Crawford* holding. Texas Rule of Evidence 803 sets out exceptions to the hearsay rule, as follows:

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### **TRE Rule 803 – Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness**

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In Texas, the following items are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) **Present Sense Impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) **Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) **Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not

including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

**(4) Statement Made for Medical Diagnosis or Treatment.** A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

**(5) Recorded Recollection.** A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

**(6) Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with [Rule 902](#) (11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a Record of a Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) **Public Records.** A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) **Public Records of Vital Statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) **Absence of a Public Record.** Testimony — or a certification under [Rule 902](#) — that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

**(11) Records of Religious Organizations Concerning Personal or Family History.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

**(12) Certificates of Marriage, Baptism, and Similar Ceremonies.** A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

**(13) Family Records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

**(14) Records of Documents That Affect an Interest in Property.** The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) **Statements in Documents That Affect an Interest in Property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in Ancient Documents.** A statement in a document that was prepared before January 1, 1998 and whose authenticity is established.

(17) **Market Reports and Similar Commercial Publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) **Statements in Learned Treatises, Periodicals, or Pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) **Reputation Concerning Personal or Family History.** A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) **Reputation Concerning Boundaries or General History.** A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) **Reputation Concerning Character.** A reputation among a person's associates or in the community concerning the person's character.

(22) **Judgment of a Previous Conviction.** Evidence of a final judgment of conviction if:



- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
- (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
- (C) the evidence is admitted to prove any fact essential to the judgment; and
- (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

**(23) Judgments Involving Personal, Family, or General History, or a Boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

- (A) was essential to the judgment; and
- (B) could be proved by evidence of reputation.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1939; Pub.L. 94-149, § 1(11), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 13, 2013, eff. Dec. 1, 2013; Apr. 25, 2014, eff. Dec. 1, 2014; Apr. 27, 2017, eff. Dec. 1, 2017.)

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## WHAT CAN BE DONE TO DEVELOP THE CASE?

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[Holly Ramsey-Klawnsnik, PhD, LCSW, LMFT, NAPSA Director of Research](#), suggests the following:

**STRATEGIES FOR OFFERING AN INTERVENTION** The following tips are offered to those attempting to assist older adults and adults with disabilities experiencing ANE (sic: abuse, neglect or exploitation) to achieve safety and healing:

- Build rapport with victims, then use active listening to learn their needs and wishes.
- Offer services that meet the victim's needs, rather than the needs of others.

- Offer services in the victim’s environment if possible.
- Offer “tolerable harm-reduction strategies,” that is, services that are acceptable to the victim.
- Do not expect or pressure victims to make significant life changes quickly.
- Provide “trauma-informed care” (see Ramsey-Klawnsnik & Miller, 2017).
- Refrain from pushing victims to accept multiple services simultaneously.

It is also essential to make culturally-relevant services available. For example, in some APS/ American Indian Tribal collaborations, ANE interventions offered to victims include tribal healers and medicine persons, healing ceremonies, talking circles, and sweat lodges.

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## GATHER DATA FROM CURRENT OR PRIOR CIVIL AND/OR CRIMINAL CASES

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To work around the *Crawford* case, there may be statements that are admissible a hearsay exception. Did the alleged perpetrator intentionally prevent a witness from attending a hearing or trial? Are there ways of illustrating prior history of the dynamics and/or dysfunction between the victim and the accused that reflects that the defendant intentionally used their power over the victim to keep the victim from being present at trial? If the victim is suddenly unavailable, where might you find proof of intimidation? Remember: victims who retain capacity can choose to refuse help, including treatment, intervention, or assistance in filing suit or initiating a criminal complaint.

For a nominal fee: Federal cases can be accessed (unless a file or document has been locked), through [www.pacer.com](http://www.pacer.com). Information regarding drivers' license numbers and other vital stats can be accessed through [www.publicrecords.com](http://www.publicrecords.com). Basics on where folks reside, neighbors, work history, UCC filings, and if you are lucky, criminal history, can be found at [www.peoplelooker.com](http://www.peoplelooker.com).

Who can you count on to present your case if you have an impaired litigant or victim who cannot speak for themselves?



*"May I remind the witness that he is under water."*

Some cases may have both criminal AND civil components. Are there public records that you can use as a starting point to gather other documentation?

<a href="http://www.publicrecords.com">www.publicrecords.com</a>
<a href="http://www.peoplelooker.com">www.peoplelooker.com</a>
<a href="https://pacer.login.uscourts.gov/csologin/login.jsf">https://pacer.login.uscourts.gov/csologin/login.jsf</a>
<a href="#">Outline of Post-Crawford Cases - National District Attorneys Association (ndaa.org)</a>

**Expert Witnesses To Consider:**

treating physician (medical history),  
medical examiner (cause of death),  
pharmacist (drug interaction),  
psychiatrists focused on geriatric issues,  
VA or other public hospital employees with acumen in geriatric issues,  
APS social worker,  
hospice care provider,  
nursing home administrator,  
forensic accountant,  
certified fraud examiners, or  
bank fraud investigator .

**Possible Sources for Evidence**

Guardianships  
Will Contests  
Bankruptcy Cases  
Protective Orders  
Restraining Orders in Civil Cases  
Restraining Orders in Family Law Cases

Many professionals owe patients or clients the duty to maintain confidentiality. Wait for a subpoena unless you have a signed release before speaking with attorneys.

Certified Fraud Examiners (CFEs) possess unique expertise in preventing and detecting fraud.

<https://www.acfe.com/findacfe.aspx>

## **WORKING WITH MEDICAL EXPERTS**

**\* Confer with the expert witness prior to trial via ZOOM or at their office; they are professionals and will expect compensation for their time and acumen**

**\* Cover anticipated facts and documentation that will be the subject of direct and/or cross examination**

**\* Coordinate best day/time for expert testimony – if time allows, try to accommodate the expert's schedule**

**\* Concede that doctors and counselors have very busy schedules, frequently subject to change**

**\* Call for courtesy: request that the Court consider making the expert "subject to call" rather than waiting in the hall, and/or ask the court to accommodate the professional by taking their testimony "out of planned" order**



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## ADDITIONAL RESOURCES

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[DFPS - About Texas Adult Protective Services \(state.tx.us\)](http://state.tx.us)

Adult Protective Services responsibilities include:

- Investigation of [reports of abuse, neglect, and exploitation](#) of adults who are elderly or who have disabilities.
- Initiate [investigations](#) and providing [services](#) when those adults live in the community.
- Educate the public regarding [prevention of elder abuse](#).

### APS's Mission

*APS's mission is to protect older adults and persons with disabilities from abuse, neglect, and exploitation by investigating and providing or arranging for services, if needed, to stop or prevent further harm.*

On October 19, 2021, the Department of Justice issued its annual report to Congress on the DOJ's work to combat elder fraud and abuse. The Money Mule Initiative was highlighted in the report:

In the fall of 2020, the Department joined its law enforcement partners in the United States and abroad in a coordinated action period that tackled the pervasive problem of money mules. Money mules are individuals who assist fraudsters by receiving money from fraud victims and forwarding it to fraud organizers, many of whom are located abroad. Some money mules know they are assisting fraudsters, but others are unaware that their actions enable fraudsters' continued efforts. Many schemes that target older Americans—such as lottery fraud, romance fraud, technical support fraud, and government and business imposter schemes—use money mules. Eight United States law enforcement agencies joined the 2020 Money Mule Initiative. Led by the Department's Consumer Protection Branch, the FBI, and the U.S. Postal Inspection Service, the participating agencies included the Department of Labor Office of Inspector General, Federal Deposit Insurance Corporation Office of Inspector General, U.S. Immigration and Customs Enforcement's Homeland Security Investigations, Social Security Administration Office of Inspector General, U.S. Secret Service, and U.S. Treasury Inspector General for Tax Administration. The United States effort was conducted simultaneously with a Europol campaign, the European Money Mule Action. As part of the effort, agencies also engaged with consumer groups and private industry to increase awareness about money mules and the role they play in victimizing American consumers. During the two month effort, law enforcement agencies took action against approximately 2,300 money mules, far surpassing last year's effort, which acted against over 600 money mules. Actions occurred in every state in the country. Law enforcement served approximately 2,000 individuals with letters warning them that they were facilitating fraud and could face civil or criminal consequences for continuing their actions. Agents conducted over 450 interviews and on 30 instances seized funds or facilitated the return of victim funds.

The RAT Pack lives on through the FBI, to wit: another initiative recognized in the DOJ Report was the FBI's Recovery Asset Team.

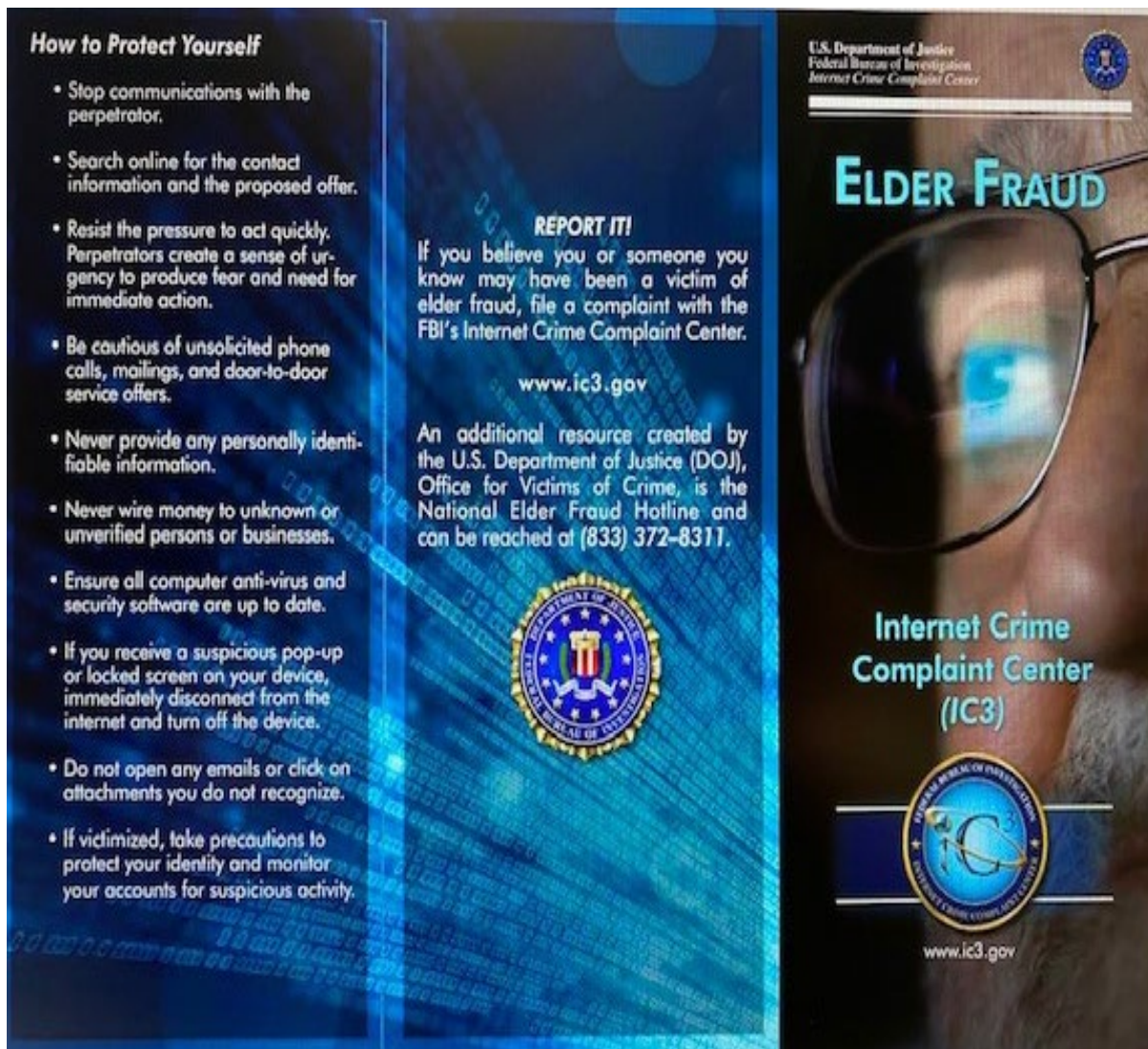
FBI Internet Crime Complaint Center (IC3) Recovery Asset Team The FBI established the IC3 Recovery Asset Team (RAT) in February 2018 to streamline communication with financial institutions and assist FBI field offices with freezing funds for victims who made transfers to domestic accounts under fraudulent pretenses. The RAT functions as a liaison between law enforcement and financial institutions as they conduct statistical and investigative analysis. From July 2020 – June 2021, IC3 RAT processed 1412 complaints, with a reported loss of \$389,047,768.74. RAT was able to successfully freeze \$279,568,471.30 from the total reported loss, leading to a 72% success rate. Of the 1412 incidents worked by RAT, 118 incidents involved victims over the age of 60 (excluding individuals reporting on behalf of a business). The reported loss for these victims totaled \$18,034,615.52. RAT was able to freeze \$13,585,586.34, for a success rate of 75%.

The DOJ 2021 Report also discusses the number of prosecutions in several states, including:



Last year, residents of California, Texas, Florida, and New York fled the greatest number of fraud complaints submitted by older Americans, with losses totaling approximately \$362 million. Confidence fraud/romance scams (\$281 million), Business Email Compromise/Email Account Compromise (BEC/EAC) (\$169 million), and tech support scams (\$116 million) were responsible for the greatest loss amounts, followed closely by investment fraud totaling approximately \$98 million. On a per-victim basis, several crime types showed significant increases from 2019. The number of identity thief victims increased approximately 176%, extortion victims were up approximately 90%, and non-payment/non-delivery victims increased by 88%. In addition to the 2020 Elder Fraud Report, IC3 also published a tri-fold brochure<sup>18</sup> entitled “Elder Fraud.” the brochure, which is available for distribution to the public, describes common fraud schemes affecting older adults and steps older adults may take to protect themselves.

The DOJ trifold is available at: [Elder Fraud Tri-fold.pdf \(ic3.gov\)](https://www.ic3.gov/Elder_Fraud_Tri-fold.pdf), and is depicted here:



### The Elder Abuse Prevention and Prosecution Act

This act was signed into law in October 2017 to prevent elder abuse and exploitation and improve the justice system's response to victims in elder abuse and exploitation cases. As a response to the increasing prevalence of crimes against the elderly, the Department of Justice, together with other federal, state, local, and tribal partners, created the Elder Justice Initiative.

### What is Elder Fraud?


Elder Fraud is defined as a financial fraud scheme which targets or disproportionately affects seniors. The FBI, including IC3, has worked tirelessly to educate this population on how to take steps to protect themselves from being victimized.

In 2020, the IC3 received 105,301 complaints from victims over the age of 60 with adjusted losses in excess of \$966 million. Age is not a required reporting field. These statistics reflect only those complaints in which the victim voluntarily provided their age range as "OVER 60."

### Common Elder Fraud Schemes

- **Romance scam:** Criminals pose as interested romantic partners on social media or dating websites.
- **Tech support scam:** Criminals pose as technology support representatives and offer to fix non-existent computer issues.
- **Grandparent scam:** Criminals pose as a relative – usually a child or grandchild – claiming to be in immediate financial need.
- **Government impersonation scam:** Criminals pose as government employees and threaten to arrest or prosecute victims unless they agree to pay.
- **Sweepstakes/charity/lottery scam:** Criminals claim to work for a charitable organization to gain victims' trust, or claim victim has won a foreign lottery or sweepstake, which they can collect for a "fee."
- **Home repair scam:** Criminals appear in person and charge homeowners in advance for home improvement services they never provide.

- **TV/radio scam:** Criminals target potential victims using advertisements about services, such as reverse mortgages or credit repair.



- **Family/caregiver scam:** Perpetrators are relatives or acquaintances of the elderly victims and take advantage of them or otherwise get their money.
- **Investment scam:** Criminals offer unsuitable investments, fraudulent offerings, and unrecognized products which can result in the theft or misappropriation of funds.

Julie Krawczyk and Steve Benton are doing nationally recognized work at Dallas' Senior Source. [Contact The Senior Source for help with aging-related needs.](#) Ft. Worth has established an Elder Financial Exploitation Center. [FEPC \(financialexploitationpreventioncenter.org\)](https://www.financialexploitationpreventioncenter.org) **Themes for such agencies are the three "T's": trauma, triage and triumph.**

[For Older Adults - Jewish Family Service of Greater Dallas \(jfsdallas.org\)](https://www.jfsdallas.org)

<https://www.longtermcarelink.net/listingprofiles/455-ChristianClausen-TX.htm>

[NAPSA & NCEA Brief: Understanding and Working with APS - Part 3 \(usc.edu\)](#)

APS workers must comply with a Code of Ethics and Practice Guidelines available at: [Recommended-Program-Standards.pdf \(napsa-now.org\)](#)

Governing ethical principles include: “Use family and informal support systems first as long as this is in the best interest of the adult,” and “Do no harm. Inadequate or inappropriate intervention may be worse than no intervention.”

[Seniors and Law Enforcement Together \(S.A.L.T.\) Texas Locations \(elderoptionsoftexas.com\)](#)

Dallas County SALT Council is supported by the Dallas Area Agency on Aging, AARP, Dallas County District Attorney's Office, and The Senior News Source. The key contact is Paul Zobisch, Publisher/Editor, The Senior News Source. Tel: 972-248-2573.

Local SALT groups are typically part of a national organization. The SALT Council began in 1996, as an offshoot of a national organization known as [TRIAD](#). The TRIAD includes police departments, sheriff's offices and representatives of senior citizen groups within a county. TRIAD refers to the three organizations included therein: AARP, the International Association of Chiefs of Police (IACP), and the National Sheriffs' Association (NSA). TRIAD is a partnership between law enforcement and senior citizens.

Purpose of [TRIAD](#) (source: [Seniors and Law Enforcement Together \(S.A.L.T.\) Texas Locations \(elderoptionsoftexas.com\)](#))

- *To decrease crime and the "fear" of crime in order to raise livability for our seniors.*
- *To increase and improve senior crime prevention and education.*
- *To improve local law enforcement's knowledge of the crime prevention needs of seniors.*
- *To identify the concerns of local senior citizens.*
- *To improve senior victim assistance.*
- *To involve senior citizens in crime prevention and the educational efforts of S.A.L.T. and to raise awareness of the community of these special issues.*

***What can S.A.L.T. do?***

*S.A.L.T. Council activities have included the following:*

- *Monthly programs on issues seniors have identified, i.e., telemarketing scams, mail theft, check fraud, ombudsman, etc.*

- *Presented training for officers on sensitivity issues with Alzheimer's patients encountered on the streets as lost or missing.*
- *Created, published and distributed brochure on Elder Abuse which raised awareness of issue and provided LOCAL support.*
- *Refrigerator cards which list crucial medical and emergency information about a resident with special needs to aid emergency personnel dispatched to the home.*
- *Neighborhood Watch programs to address the specific concerns of senior neighbors.*

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## CONCLUSION

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This paper is not intended to cover all elements of contract law, tort, and criminal law as they may be applied to the protection of disabled adults and/or the elderly. It is to entice and enlighten on how to prepare to be the best witness possible, and how to help prosecute a case involving neglect, abuse or exploitation. Hopefully, that goal was reached. Go forth and conquer!

[Wordsworth](#), for last words:

My Heart Leaps Up  
My heart leaps up when I behold  
A rainbow in the sky:  
So was it when my life began;  
So is it now I am a man;  
So be it when I shall grow old,  
Or let me die!  
The Child is father of the Man;  
And I could wish my days to be  
Bound each to each by natural piety.

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## Appendices

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Appendix 1: *Potential Experts*

Appendix 2: *Physical Abuse Cases*

Appendix 3: *Sexual Abuse Cases*

Appendix 4: *Financial Abuse Cases*

Appendix 5: *Neglect Cases*

Appendix 6: *Texas Lawyer Articles*

Appendix 7: *Samples of Cognitive Assessments*

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**APPENDIX 1: POTENTIAL EXPERTS**

<b>Experts</b>	<b>Why?</b>	<b>Locations</b>
<b>HEALTH CARE: Physicians, Nurses, EMTs, Frontline Workers</b>	Assess cognitive abilities including mental capacity, social functioning, undue influence, mental issues and personality disorders	Local hospitals, university departments of psychology, local medical schools, community health care professionals
<b>APS/CPS SOCIAL WORKERS/ POLICE OFFICERS</b>	Prior allegations against the accused perpetrator, plans offered to assist the victim and/or perpetrator, prior history of abuse in the family, statements taken at intake, cognitive status of victim	Adult Protective Services Texas Department of Family Protective Services Police Department
<b>ADVOCATES</b>	Figure out what is involved in your case and make referrals for assistance needed; if there has been a guardianship, this could include a court investigator	Judicial system: victim/witness coordinators Victim advocates Community based agencies re domestic abuse, sexual assault, domestic violence <a href="https://www.genesisshelter.org">https://www.genesisshelter.org</a> <a href="https://familyplace.org">https://familyplace.org</a> <a href="https://family-compass.org">https://family-compass.org</a>
<b>JURY CONSULTANT/ Trial preparation</b>	Help assess strengths and weaknesses of your case, of the opposition's case, create profile for preferred jurors and how to frame questions in voir dire. Can also assist in client preparation - how to best present testimony.	Ryan Malphurs <a href="mailto:ryan@consultdelphi.com">ryan@consultdelphi.com</a> Kevin Karlson <a href="mailto:Karlson.kevin@gmail.com">Karlson.kevin@gmail.com</a> Charles Bennett <a href="mailto:intake@charlesbennettlaw.com">intake@charlesbennettlaw.com</a> There are many. These 3 are local, respected friends.
<b>ELDER ABUSE AND NEGLECT</b>	While a hired expert, this "neutral" expert may help explain the dynamics and cycle of abuse to the judge/jury	Parkland Hospital, Nursing Homes (administrators) Advocacy agencies in the Metroplex, including Senior Source
<b>ANIMAL ABUSE</b>	If a person will abuse an animal, they may also abuse a person. Signs of manipulation and propensity for coercion are reflected in how we treat our pets.	Your favorite veterinarian, local humane society

## APPENDIX 2: PHYSICAL ABUSE CASES

<b>GERIATRICIAN</b> (MD with geriatric training); internist, cardiologist, other physician or gerontologist	To identify and describe injury to the victim, extent of harm, to opine on cause of injury or death, discuss disease symptoms and progression ication and description of injury, degree of harm, cause of injury/death, disease symptoms, progression and prognosis
<b>TREATING PHYSICIAN</b>	To identify and describe victim's injuries, degree of harm, cause of the injuries/death, discuss disease symptoms and progression Identification and description of injury, degree of harm, cause of injury/death, disease symptoms, progression and prognosis
<b>PHARMACIST, PHARMACOLOGIST</b>	Medication prescribed; interaction of meds
<b>PATHOLOGIST</b>	To describe injury, extent of harm, cause and manner of disease/death
<b>NURSE</b>	Think along the lines of someone who is well versed in wound care or dealing with special needs children or geriatric patients
<b>DIRECTOR OF NURSING/ NURSE INVESTIGATOR</b>	Can present testimony as to standard of card for nurses, or as to nursing home facilities
<b>APS/CPS WORKER</b>	Were there prior reports regarding the victim or the perpetrator? What were outcry statements at the time of an initial visit? Was the accused perpetrator a family member, and if so, how did they react at the time of the initial home visit?
<b>OCCUPATIONAL, SPEECH, OR PHYSICAL THERAPIST</b>	To identify injury, reported diagnosis, treatment protocol, what work remains to try to recover from injury sustained
<b>HOSPITAL DISCHARGE PLANNER</b>	To testify as to discharge care instructions given and referrals made to caregiver, observations of the statements and conduct of victim and caregiver
<b>OPHTHALMOLOGIST, OPTOMETRIST</b>	Identify eye injuries, prognosis
<b>DENTIST</b>	Identify dental injuries, prognosis

### **APPENDIX 3: SEXUAL ABUSE CASES**

<b>SANE/SART (Sexual Assault Nurse Examiner/Sexual Assault Response Team member)</b>	Who examined and collected evidence of sexual abuse? Describe injury, who Examination and collection of evidence, description of injury, victim statements and impact
<b>GERIATRICIAN (MD with geriatric training); internist, cardiologist, other physician or gerontologist</b>	Identify injury Testify as to degree of harm, cause of injury, symptoms, impact of underlying disease
<b>TREATING PHYSICIAN</b>	Identify and describe injury, speak to degree of harm, the cause of injury/death
<b>PHARMACIST/ PHARMACOLOGIST</b>	Testify as to interaction of medications, impact of same
<b>PATHOLOGIST</b>	Testify as to injury, description of degree of harm, cause/manner of injury and/or death
<b>ANESTHESIOLOGIST OR NRNA</b>	Testify as to drugs administered, whether appropriate dosage was administered, impact of same
<b>NURSE (think in home care, hospice, geriatrics)</b>	Testify as to the injury, the standard of care, cause of injury, pain endured as a result of the injury
<b>DIRECTOR OF NURSING/ NURSE INVESTIGATOR</b>	Testify as to the standard of care in hospitals, nursing homes, whether there is evidence of failure to comply with the standard of care, results of review of medical records, prognosis and progress of treatment
<b>APS/CPS WORKER</b>	Testify as to prior allegations against alleged perpetrator, statements made by suspect and/or by victim, prior history with agency
<b>GERIATRIC OR FORENSIC PSYCHIATRIST OR PSYCHOLOGIST</b>	Testify as to victim's capacity to consent or lack thereof, as well as evidence of undue influence that may have been exacted on victim by the accused
<b>COUNSELOR, THERAPIST</b>	Impact of assault on victim, interactions with victim and/or suspect, prior history



**APPENDIX 4: FINANCIAL ABUSE**

<p><b>BANKER/ACCOUNTANT FORENSIC AUDITOR TAX ATTORNEY</b></p>	<p>Can testify potentially as to metes and bounds of victim’s estate, breach of fiduciary duty, accounting principles and fiduciary duty, financial timeline, accounting of expenditures by perpetrator of victim’s funds</p>
<p><b>APS WORKER</b></p>	<p>Can testify as to prior allegations against accused, opine as to victim’s cognitive ability</p>
<p><b>GERIATRIC OR FORENSIC PSYCHIATRIST OR PSYCHOLOGIST; NEUROPSYCHOLOGIST</b></p>	<p>Can testify as to capacity/ability to consent regarding victim, victim’s ability to make informed decisions or lack thereof, vulnerability of victim to undue influence</p>
<p><b>ELDER LAW ATTORNEY</b></p>	<p>Can testify as to prior proceedings, prior findings as to victim’s capacity to consent, fiduciary duty, standard of care in elder law matters</p>
<p><b>PROBATE INVESTIGATOR OR EXAMINER</b></p>	<p>Can testify as to prior proceedings, investigation conducted on behalf of probate court in guardianship matter</p>

**APPENDIX 5: NEGLECT**

<b>WOUND CARE NURSE</b>	Can testify to and describe wound/injury, whether or not standard of care was maintained, instructions given to suspect, depth of pain associated with the injury
<b>VISITING OR HOME HEALTH NURSE</b>	Can identify the injury, can provide testimony as to observations on site at the home, can opine as to standard of care for in home treatment and instructions given, whether standard of care was met
<b>GERIATRICIAN (MD with geriatric training); internist, other physician or gerontologist)</b>	Can identify injury, degree of harm, can speak to potential cause of injury and/or death, can speak to impact of underlying disease, progression of same
<b>TREATING PHYSICIAN</b>	Can identify and describe injury, can speak to degree of harm to victim, can testify potentially as to cause of injury/death, instructions given to suspect as applicable, can speak to impact of underlying disease and impact of same
<b>PHARMACIST, PHARMACOLOGIST</b>	Can identify prescribed medications and interactions of same, impact on underlying conditions
<b>DIRECTOR OF NURSING/ NURSE INVESTIGATOR</b>	Can testify as to standard of care in nursing and assisted care facilities, whether there was evidence of failure to comply with standard of care, can review and potentially opine as to failure of standard of care, improper record keeping, improper administration of prescribed drugs
<b>APS/CPS WORKER COURT INVESTIGATOR</b>	Can testify as to prior allegations against the accused, service plans offered, statements made by accused and victim
<b>PATHOLOGIST</b>	Can identify injuries/cause of death

**APPENDIX 6: TEXAS LAWYER ARTICLES**

## Still Thrashing: Is the Thrash Case A Bleak Commentary on Incapacity?

Seniors need not adhere to Lt. Gov. Dan Patrick's survival of the fittest rhetoric. Seniors have hope, there are resources in Texas that provide services to the elderly, say attorneys Elisa Reiter and Daniel Pollack.

By **Elisa Reiter and Daniel Pollack** | March 21, 2021 at 06:31 PM



L-R Elisa Reiter and Daniel Pollack. Courtesy Photos

In 2019, we came to know the exploits of Charles Thrash and his long-time gal pal, Laura Martinez.

On March 4, 2019, Mr. Thrash married Ms. Martinez in Saledo, Texas, at the Black Swan Inn. On March 5, 2019, Laura Martinez Thrash presented her then 81-year-old husband, Charles Thrash, at an attorney's office. Mr. Thrash had

previously been declared incapacitated in a Bexar County, Texas guardianship proceeding. At the law offices of Phil Ross, Mr. Thrash was presented with documents to adopt Ms. Martinez's adult children (Joe Martinez, then 27, and Brittainy Martinez, then 25). On March 6, 2019, Charles Thrash's court appointed guardian, Mary Werner, arrived at the Thrash home in upscale Shavano Park, accompanied by four police officers. Ms. Werner removed Mr. Thrash from his home, and from the apparent clutches of Ms. Martinez.

Charlie and Laura had been seeing one another for several years; a May-December romance. Laura is 27 years younger than Charlie. Charlie was a longtime mechanic in San Antonio, living humbly for most of his life, while amassing a fortune estimated to be worth approximately \$3,000,000.

A [Report of the Court Investigator](#), filed of record on March 8, 2019 in Bexar County, Texas Probate Case 2017 PC, included findings that Mr. Thrash:

- Did not wish to marry Ms. Martinez;
- Did not have a problem with the guardianship so long as he could still work and spend time in his mechanic's shop;
- Opposed the sale of his cars, planes and automotive shop;
- Confirmed that Ms. Martinez hit him;
- Identified Phil Ross, Esq. as the owner of the Black Swan Inn, as well as being the attorney who drafted documents that Mr. Ross asked Mr. Thrash to write out. The documents beseeched the Bexar County Probate Court to grant Charles Thrash permission to marry Laura Martinez.
- Stated to the Court Investigator that "It was Laura's idea. I do not want to marry anyone."

In fact, "[h]e was very adamant about not getting married. He said his last divorce had cost him [\\$1 million](#)." While Mr. Thrash estimated his net worth at around \$500,000, his estate was valued at more than \$3,000,000, including his automotive shop, a collection of vintage automobiles, and the home in Shavano Park. Mr. Thrash resided in an apartment over his shop for many years.

The March 8, 2019 Report of Court Investigator indicated that Charlie's business accounts had been accessed for payments on Laura Martinez's home mortgage.

Since that very busy week two years ago, what [has happened?](#)

As of March 11, 2021, there were hundreds of filings of record on the Bexar County Clerk's docket sheet for the Thrash case, including:

- Discovery motions.
- Annulment of the marriage between Thrash and Martinez.
- Setting aside Thrash's adoption of Martinez's adult children.
- Sale of real and personal property:
  - 2016 Chevrolet Corvette 3LZ Z06
  - 1995 Beechcraft & 1989 Stoddard Hamilton
- Applications for safekeeping of property.
- An Anti-SLAPP motion.
- Motions for Sanctions.
  - Sanctions imposed against Attorney Phil Ross and his clients (Laura Martinez and Brittainy Martinez) in the amount of **\$220,000** for misconduct related to the incapacitated Ward, Charles Thrash (see above, facilitating improper marriage to an incapacitated person, and facilitating adoption of adult children by said incapacitated person).
- **4th Court of Appeals** dismissed Brittany Martinez's case, rejecting her request for a stay as moot.
- Texas Supreme Court dismissed the subsequent **Petition for Review**.

The Thrash case thrashes on.

What does the Thrash case tell us, particularly as we emerge from the COVID pandemic?

1. Exploitation of the elderly should be reported to **Adult Protective Services** at **1-800-252-5400 or www.txabusehotline.org**.
2. With the pandemic, many elderly individuals may have been subjected to abuse, neglect and/or exploitation with ramifications including bodily injury, sexual abuse, lack of personal hygiene, inability to provide self-care, and/or loss of property. Often, elder abuse and neglect is perpetrated by adult children or spouses, and/or other trusted caretakers. Because it often takes place behind closed doors, incidents of elder abuse and neglect are not easily identifiable. And so, it can continue undetected for years. Emotional abuse — the most subtle form of abuse — is particularly hard to recognize. This kind of abuse may take the form of insulting, intimidating, threatening, ignoring, or humiliating.
3. With **Governor Abbott** eliminating the need for mandatory masking, and declaring that businesses may open, we may find that the case of Charles Thrash and Laura Martinez is not an isolated one. As farfetched as it may seem, there

may be other individuals in Texas who have pushed an incapacitated individual to enter into an improper marriage as a means of exploiting the incapacitated spouse.

In *Bleak House*, Charles Dickens alludes to the fictional case of Jarndyce v. Jarndyce, writing that the case concerns the fate of a large inheritance:

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.

Do the elderly in Texas face litigation of dreary length, left perennially hopeless? After all, almost one year ago, [Texas Lt. Gov. Dan Patrick](#) suggested that he, and other senior citizens, should be willing to die in order to bolster the economy in the face of COVID stay in place orders. Seniors need not adhere to Lt. Gov. Patrick's survival of the fittest rhetoric. Seniors have hope. There are resources in Texas that provide services to the elderly, including:

- [Senior Source](#)
- [CNC Home Care](#)
- [Jewish Family Services of Greater Dallas](#)
- [Community for Permanent Supported Housing](#)

- **Elder Helpers**

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# TEXAS LAWYER

Commentary

## The Effect of COVID-19 on Nursing Home Abuse: A Legal Perspective

Numerous class-action and individual wrongful death lawsuits have been filed asserting that proper precautions were not maintained to keep nursing homes residents safe from contracting COVID-19.

By **Daniel Pollack and Elisa Reiter** | December 16, 2020 at 06:44 PM



(Photo: Raul Rodriguez/iStockphoto.com)

According to the Centers for Disease Control and Prevention, [in 2015](#) there were 1.3 million nursing residents. Numerous [class-action](#) and [individual wrongful death lawsuits](#) have been filed asserting that proper precautions were not maintained to keep nursing homes residents safe from contracting COVID-19. In due time, those lawsuits will work their way through the judicial system.

The NursingHomeGuide.org [reports](#) that

*The statistics reflecting incidents of abuse involving elderly residents in nursing homes and care facilities are both staggering and disheartening. At the broadest level, more than two million cases of elder abuse are reported every year, and almost one out of every ten elderly individuals will experience some form of elder abuse. Moreover, virtually all parties working closely with the elderly on topics such as nursing home abuse have noted that the overwhelming majority of abuse incidents remain unreported. Sadly, while those figures reflect a national epidemic of violating the vulnerable, but also, most likely grossly understate the problem of elder abuse in the United States.*

Has the pandemic also caused a spike in other kinds of allegations of nursing home abuse? Last April, the U.S. Attorney's Office for the District of Massachusetts and the Department of Justice's Civil Rights Division initiated an investigation into Soldiers' Home, a state-funded nursing facility for military veterans in Massachusetts. The allegations [cited](#) failures to provide adequate medical care to patients, both *generally* and during the COVID-19 pandemic.

Nursing home residents with Alzheimer's disease or dementia often have difficulty communicating. Even if there are minimal communication issues, some residents may be reluctant to report that they have been abused because they are afraid of staff retaliation. With relatives and friends curtailed from visiting and checking on loved ones, they will not know if the [nursing home resident](#) is:

- being provided satisfactory supervision, assistance and care by a sufficient number of staff;
- experiencing bedsores and pressure ulcers;
- being physically or sexually abused;
- being properly medicated;
- the victim of delayed or cancelled medical procedures;
- being unnecessarily exposed to staff who are not following proper sanitary procedures.

“[Coronavirus disease 2019](#) (COVID-19) is particularly deleterious to older adults, and there has been a massive increase in reports of elder abuse during the

pandemic”. In Dallas County, [Senior Source](#) established the Elder Financial Safety Center in 2014, with a goal of assuring “the financial security of older adults through prevention, protection and prosecution services”. Dallas County reported more than [138,233 COVID-19 cases and 1,275 deaths as of Wednesday](#), according to Dallas County Health and Human Services.

The [Texas Health and Human Services Commission](#) maintains a portal to facilitate reporting allegations of physical, mental, neglect or exploitation at licensed facilities, including allegations involving Assisted Living facilities and Home and Health Hospice facilities. Reports of an increase in [“elder orphans”](#) are on the rise due to the pandemic. Safety protocols prevent visits to nursing homes and elder care facilities. In Texas and beyond our state, family members cannot bird dog caretakers at long term care facilities in the way they could prior to the pandemic; moreover, family members face their own sandwich generation issues, plagued by unemployment and having their own resources taxed with adult children returning home, where those adult children are relying on financial aid from their parents - sometimes [to the peril of elderly parents](#).

[Texas Health and Human Services Commission](#) maintains records on standards for controlling infectious diseases inside Texas nursing homes and elder care facilities. Hundreds of Texas nursing homes violated standards for controlling infectious diseases since March, 2020. As of late October, 2020:

[West Oaks Nursing and Rehabilitation Center](#) tops the list in Central Texas with eight violations. In April, inspectors noted “the facility failed to establish and maintain an infection control program,” and “the facility did not keep a resident apart from the others if the resident has an infection that can [spread](#).”

Texas State House of Representative Julie Johnson, voted [‘Freshman of the Year’](#), by Texas Monthly for her work during the 86th Legislative session, notes the following in her 12/11/2020 COVID-19 update:

DSHS has submitted the first week’s allocation of COVID-19 vaccine to the Centers for Disease Control and Prevention. The first week’s allocation is

224,250 doses of the Pfizer vaccine to be shipped to 109 hospitals in 34 counties as early as the week of Dec. 14, depending on when the vaccine is authorized for use in the United States. As expected, the initial vaccine supply is limited, and the first week's allocation is based on information submitted by vaccine providers when they enrolled, including the number of health care workers who can be quickly vaccinated and vaccine storage capacity at each site. More vaccine will be available for more providers in the following weeks, including vaccine from Moderna once it is authorized. The distribution list for this week's allocation can be accessed [here](#).

Sadly, the distribution of vaccines will not exacerbate social isolation occasioned by the pandemic, particularly for the elderly. Social isolation, at home, or at assisted care facilities, ramps up the risk of elder abuse. Where can older adults go for solace and a holistic approach if facing abuse?

A [growing national movement](#) seeks to address the needs of elder abuse victims by providing temporary shelter with intensive services. These shelter programs, including varied models of shelter, are part of a burgeoning community collective called the [SPRiNG Alliance \(Shelter Partners: Regional. National. Global.\)](#) This movement focuses on accomplishing two goals: supporting a survivor's journey to medical, emotional, legal and financial health and securing safe and stable housing for them in the place they most want to be, which is most often the home they came from.

Resources exist in Texas to help individuals in assisted care and nursing home facilities, even in the era of social isolation necessitated by COVID-19.

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## The RIGHT Response to Elder Abuse

People seeking to age in place with dignity may need assistance; as attorneys, we should take steps to protect the elderly and disabled from abuse, neglect and exploitation.

By **Daniel Pollack & Elisa Reiter** | March 26, 2021 at 08:22 PM

The real extent of adult abuse, neglect, and exploitation is grossly unreported. The victims themselves are often hesitant to report mistreatment either because they are afraid of retaliation -- physical or mental -- or because they are simply unable to do so. Protecting older adults and incapacitated adults from abuse, neglect or exploitation means helping them to live in their own homes as long as possible, find appropriate living arrangements if necessary, and generally to remain as safe and self-sufficient as possible.

Even spotting a person who is a victim of abuse and in need of Adult Protective Services as they sit in a law office is not easy. Will you quickly notice telltale signs indicating that the person is not getting the care they need? Can you tell if the bruises or sores you see were inflicted intentionally? Is the person dressed appropriately or displaying signs of poor hygiene? Is the person experiencing untreated pain? Is the caregiver refusing to let you talk to the adult alone? Is the caregiver giving

contradictory statements about the adult’s behavior or health? Are there other yellow or red flags that may be hints of abuse or neglect? Abuse, neglect, or exploitation may be happening, but, from a legal perspective, you may hesitate taking the case because it does not seem ‘winnable.’ And you could be right.

In Dallas, the [RIGHT Care Program](#) is being implemented as a pilot project culling representatives from the Dallas Police Department, Dallas Fire Rescue and the Parkland Health and Hospital System. It’s purpose is to forge a collaborative effort to address mental health issues as such calls are received by 911 dispatch. Instead of one leg of the foregoing triumvirate being deployed, three members of the Rapid Integrated Group Healthcare Team (RIGHT) are sent to address the situation. The team includes a police officer, a licensed clinical social worker, a paramedic. Off-site clinicians are available in real time. T.C. Broadnax, Dallas City Manager, described his goal in requesting more funds targeted to the RIGHT Program in the latest [Dallas City Budget](#):

Expand the RIGHT Care program and increase access to appropriate health services to mitigate behavioral health crises and avoid unnecessary hospitalization, arrests, and interactions between residents and law enforcement

In the 2020-2021 Dallas City Budget, Broadnax summarizes the RIGHT Program, implemented as a test program in 2018, in South Dallas:

The pilot program was highly successful, with more than 4,600 crisis interventions, proactive follow-up visits, and referrals, resulting in a 29.5 percent reduction in mental health calls requiring an ambulance from 2017 (prior to RIGHT Care) to 2019. Involuntary hospitalizations have also

declined, and Parkland Health and Hospital System has seen fewer returns to the emergency department. Based on this success of the pilot, we are expanding the RIGHT Care program citywide, adding four new teams and new clinical resources for assessment and follow-up case management, allowing us to respond to up to 6,500 calls in FY 2020-21. In FY 2021-22, we plan to add five more teams to adequately respond to the 13,000 calls DPD receives each year. Along with the expansion of RIGHT Care, we are removing barriers to behavioral health care in communities with limited or no access to those services. By March 2021, we plan to present specific recommendations for counseling and other programs, and we intend to leverage additional investments from other government, community, and health care agencies.

**Mobile Crisis Response Team** In addition to mental health calls, police officers often encounter residents in vulnerable situations with immediate social service needs that officers are unable to meet. To care for those residents, the City will equip a mobile crisis response team that supports police officers when residents require direct services such as food, housing, transportation, or shelter in cases of domestic violence. The Office of Integrated Public Safety Solutions will oversee the team, which will consist of knowledgeable and dedicated social service professionals trained in de-escalation and connected to community organizations to provide immediate resources and access to long term assistance.

[Texas Attorney General Ken Paxton](#) addresses concerns related to elder abuse, including neglect, exploitation and neglect:

Abuse includes involuntary seclusion, intimidation, humiliation, harassment, threats of punishment, deprivation, hitting, slapping, pinching, kicking, any type of corporal punishment, sexual assault, sexual coercion, sexual

harassment, verbal abuse, or any oral, written, or gestured language that includes disparaging or derogatory terms, regardless of the person's ability to hear or comprehend.

Neglect means the failure of a caretaker to provide the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain.

Exploitation includes a caretaker's illegal use of a senior's resources for monetary or personal benefit, profit, or gain. Seniors may need help with their finances, but unless they hand control over to another person, they have the same right as anyone else to receive, spend, invest, save or give away their money. A family member, "friend" or nursing home may not take control of a senior's money without that person's permission.

One wonders if the phrase “involuntary seclusion” in the context of abuse might need a bit of tweaking in the Covid-19 era.

[Chapter 48 of the Texas Human Resources Code](#) creates the mechanism for investigating allegations of abuse, neglect or exploitation of an elderly and/or of a disabled person. Elderly equates to being 65 or older. “Person with a disability” can include someone with a mental, physical or intellectual disability of such a nature that the disability substantially impairs the person’s means of providing for their care and protection, applying to a person who is over 18, or a person under 18 who has had the disability of minority removed.



Attorneys must question whether a person presenting with elder abuse issues has or had concerns regarding:

- Capacity: Has there been a guardianship proceeding declaring the individual an incapacitated ward?
- Ability to consent: Does the individual appear to be lucid and aware of their surroundings and the impact of their allegations/requests?
- Life expectancy: Will the individual who has suffered abuse live long enough to provide testimony?
- Records: Will HIPAA laws impair an attorney or prosecutor's ability to access key records?
- Multiple forms of abuse: Is there more than one perpetrator, or more than one form of abuse occurring?

What might prevent reports of elder abuse? The victim may be so enmeshed with their caretaker - who may also be an abuser - that they choose to stay silent as a means of assuring continued care and housing. This may happen because of a fear of reprisal by the perpetrator, the loss of the love or companionship of a family member, or a fear of losing independence.

Often, first responders and other representatives of the criminal justice system simply lack training and proficiency in handling such cases. Such cases may also mandate the use of expert witnesses, such as physicians, psychiatrists or social workers with geriatric experience, or forensic accountants employed to trace claims of financial exploitation.

How can attorneys help an elderly person or person suffering from a physical or mental disability regarding claims of abuse, neglect or financial exploitation?

1. Listen. Give them time to tell their story. This may mean addressing more immediate concerns to build trust.
2. Patience. Treat them as an equal, not as a child. Do not patronize. Do not raise your voice.
3. Interview landscape. Turn off distractions. Keep the focus on the interviewee.
4. One-on-one conversation. The individual should be interviewed alone, away from caretakers, family members and others.
5. Accommodation. Address the person's special needs.

[Adult Protective Services in Texas](#) provides the following resources to investigate allegations of abuse, neglect or exploitation of the elderly or disabled:

*If the victim is in a nursing home or assisted living facility, or is in his or her home and relies on a home health provider, call the Texas Department of State Health Services at (800) 458-9858.*

*If the victim is a resident of a long-term care facility that receives Medicaid funding, report the criminal abuse, neglect or exploitation to the Attorney General's Medicaid Fraud Control Unit at (512) 463-2011 (Austin), toll-free at (800) 252-8011 or by e-mail at [mfcu@texasattorneygeneral.gov](mailto:mfcu@texasattorneygeneral.gov).*

*Abuse of a senior who is not in a healthcare facility can be reported to Adult Protective Services at (800) 252-5400.*

As individuals, we must recognize that William Wordsworth was correct: "...the child becomes the father of the man." People seeking to age in place with dignity may need assistance. As attorneys, we should take steps to protect the elderly and disabled from abuse, neglect and exploitation. Let's get this RIGHT.

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**APPENDIX 7: SAMPLES OF COGNITIVE ASSESSMENTS**

# Functional Activities Questionnaire

## Administration

Ask informant to rate patient's ability using the following scoring system:

- Dependent = 3
- Requires assistance = 2
- Has difficulty but does by self = 1
- Normal = 0
- Never did [the activity] but could do now = 0
- Never did and would have difficulty now = 1

Writing checks, paying bills, balancing checkbook	
Assembling tax records, business affairs, or papers	
Shopping alone for clothes, household necessities, or groceries	
Playing a game of skill, working on a hobby	
Heating water, making a cup of coffee, turning off stove after use	
Preparing a balanced meal	
Keeping track of current events	
Paying attention to, understanding, discussing TV, book, magazine	
Remembering appointments, family occasions, holidays, medications	
Traveling out of neighborhood, driving, arranging to take buses	
<b>TOTAL SCORE:</b>	

## Evaluation

Sum scores (range 0-30). Cutpoint of 9 (dependent in 3 or more activities) is recommended to indicate impaired function and possible cognitive impairment.

Pfeffer RI et al. Measurement of functional activities in older adults in the community. J Gerontol 1982; 37(3):323-329. Reprinted with permission of The Gerontological Society of America, 1030 15<sup>th</sup> Street NW, Suite 250, Washington, DC 20005 via Copyright Clearance Center, Inc.

These guidelines/tools are informational only. They are not intended or designed as a substitute for the reasonable exercise of independent clinical judgment by practitioners considering each patient's needs on an individual basis. Guideline recommendations apply to populations of patients. Clinical judgment is necessary to design treatment plans for individual patients. For more information, visit our Web site at [www.aviviahealth.com](http://www.aviviahealth.com). To contact our Chief Medical Officer, please call 1-888-4AVIVIA (1-888-428-4842).

### Informant Questionnaire on Cognitive Decline in the Elderly (IQCODE)

Now we want you to remember what your friend or relative was like 10 years ago and to compare it with what he/she is like now. 10 years ago was in 19\_\_\_. Below are situations where this person has to use his/her memory or intelligence and we want you to indicate whether this has improved, stayed the same, or got worse in that situation over the past 10 years. Note the importance of comparing his/her present performance *with 10 years ago*. So if 10 years ago this person always forgot where he/she had left things, and he/she still does, then this would be considered 'Hasn't changed much'. Please indicate the changes you have observed by *circling the appropriate answer*.

*Compared with 10 years ago* how is this person at:

	1	2	3	4	5
1. Recognizing the faces of family and friends	Much improved	A bit improved	Not much change	A bit worse	Much worse
2. Remembering the names of family and friends	Much improved	A bit improved	Not much change	A bit worse	Much worse
3. Remembering things about family and friends e.g. occupations, birthdays, addresses	Much improved	A bit improved	Not much change	A bit worse	Much worse
4. Remembering things that have happened recently	Much improved	A bit improved	Not much change	A bit worse	Much worse
5. Recalling conversations a few days later	Much improved	A bit improved	Not much change	A bit worse	Much worse
6. Forgetting what he/she wanted to say in the middle of a conversation	Much improved	A bit improved	Not much change	A bit worse	Much worse
7. Remembering his/her address and telephone number	Much improved	A bit improved	Not much change	A bit worse	Much worse
8. Remembering what day and month it is	Much improved	A bit improved	Not much change	A bit worse	Much worse
9. Remembering where things are usually kept	Much improved	A bit improved	Not much change	A bit worse	Much worse
10. Remembering where to find things which have been put in a different place from usual	Much improved	A bit improved	Not much change	A bit worse	Much worse

11. Adjusting to any change in his/her day-to-day routine	Much improved	A bit improved	Not much change	A bit worse	Much worse
12. Knowing how to work familiar machines around the house	Much improved	A bit improved	Not much change	A bit worse	Much worse
13. Learning to use a new gadget or machine around the house	Much improved	A bit improved	Not much change	A bit worse	Much worse
14. Learning new things in general	Much improved	A bit improved	Not much change	A bit worse	Much worse
15. Remembering things that happened to him/her when he/she was young	Much improved	A bit improved	Not much change	A bit worse	Much worse
16. Remembering things he/she learned when he/she was young	Much improved	A bit improved	Not much change	A bit worse	Much worse
17. Understanding the meaning of unusual words	Much improved	A bit improved	Not much change	A bit worse	Much worse
18. Understanding magazine or newspaper articles	Much improved	A bit improved	Not much change	A bit worse	Much worse
19. Following a story in a book or on TV	Much improved	A bit improved	Not much change	A bit worse	Much worse
20. Composing a letter to friends or for business purposes	Much improved	A bit improved	Not much change	A bit worse	Much worse
21. Knowing about important historical events of the past	Much improved	A bit improved	Not much change	A bit worse	Much worse
22. Making decisions on everyday matters	Much improved	A bit improved	Not much change	A bit worse	Much worse
23. Handling money for shopping	Much improved	A bit improved	Not much change	A bit worse	Much worse
24. Handling financial matters, e.g. the pension, dealing with the bank	Much improved	A bit improved	Not much change	A bit worse	Much worse

25. Handling other everyday arithmetic problems, e.g. knowing how much food to buy, knowing how long between visits from family or friends	Much improved	A bit improved	Not much change	A bit worse	Much worse
26. Using his/her intelligence to understand what's going on and to reason things through	Much improved	A bit improved	Not much change	A bit worse	Much worse

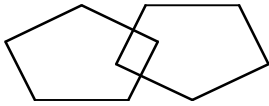


# Mini-Mental State Examination (MMSE)

Patient's Name: \_\_\_\_\_

Date: \_\_\_\_\_

**Instructions: Score one point for each correct response within each question or activity.**

Maximum Score	Patient's Score	Questions
5		"What is the year? Season? Date? Day? Month?"
5		"Where are we now? State? County? Town/city? Hospital? Floor?"
3		The examiner names three unrelated objects clearly and slowly, then the instructor asks the patient to name all three of them. The patient's response is used for scoring. The examiner repeats them until patient learns all of them, if possible.
5		"I would like you to count backward from 100 by sevens." (93, 86, 79, 72, 65, ...) Alternative: "Spell WORLD backwards." (D-L-R-O-W)
3		"Earlier I told you the names of three things. Can you tell me what those were?"
2		Show the patient two simple objects, such as a wristwatch and a pencil, and ask the patient to name them.
1		"Repeat the phrase: 'No ifs, ands, or buts.'"
3		"Take the paper in your right hand, fold it in half, and put it on the floor." (The examiner gives the patient a piece of blank paper.)
1		"Please read this and do what it says." (Written instruction is "Close your eyes.")
1		"Make up and write a sentence about anything." (This sentence must contain a noun and a verb.)
1		"Please copy this picture." (The examiner gives the patient a blank piece of paper and asks him/her to draw the symbol below. All 10 angles must be present and two must intersect.)  
30		TOTAL

### **Interpretation of the MMSE:**

<b>Method</b>	<b>Score</b>	<b>Interpretation</b>
Single Cutoff	<24	Abnormal
Range	<21	Increased odds of dementia
	>25	Decreased odds of dementia
Education	21	Abnormal for 8 <sup>th</sup> grade education
	<23	Abnormal for high school education
	<24	Abnormal for college education
Severity	24-30	No cognitive impairment
	18-23	Mild cognitive impairment
	0-17	Severe cognitive impairment

### **Interpretation of MMSE Scores:**

<b>Score</b>	<b>Degree of Impairment</b>	<b>Formal Psychometric Assessment</b>	<b>Day-to-Day Functioning</b>
25-30	Questionably significant	If clinical signs of cognitive impairment are present, formal assessment of cognition may be valuable.	May have clinically significant but mild deficits. Likely to affect only most demanding activities of daily living.
20-25	Mild	Formal assessment may be helpful to better determine pattern and extent of deficits.	Significant effect. May require some supervision, support and assistance.
10-20	Moderate	Formal assessment may be helpful if there are specific clinical indications.	Clear impairment. May require 24-hour supervision.
0-10	Severe	Patient not likely to be testable.	Marked impairment. Likely to require 24-hour supervision and assistance with ADL.

### **Source:**

- Folstein MF, Folstein SE, McHugh PR: "Mini-mental state: A practical method for grading the cognitive state of patients for the clinician." *J Psychiatr Res* 1975;12:189-198.