

**ELDER ABUSE AND EXPLOITATION:
THE ETHICAL DUTY OF THE ATTORNEY**

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ADVANCED ELDER LAW COURSE

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CHAPTER 9

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SELECTED PUBLICATIONS

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“Office Practice Tips for the Elder Law Attorney.” HBA Elder Law Institute, South Texas College of Law, May 2, 1997. Speech and Publication.
“How to Avoid Conflicts and Crisis in the Family.” (Surrogate Decision Making) Daily Court Review, June 2, 1997.
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"On Death and Dying: Counseling the Terminally III and the Families Left Behind" 26th Advanced Estate Planning and Probate, June 2002, Dallas, Texas

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DEDICATION

This paper is dedicated to our seniors. They deserve our respect, affection and protection.

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I. Introduction

“Elder abuse” has been defined by the American Medical Association (AMA) Department of State Legislation as:

An act or omission which results in harm or threatened harm to the health or welfare of an elderly person. Abuse includes intentional infliction of physical or mental injury; sexual abuse; or withholding of necessary food, clothing and medical care to meet the physical and mental health needs of an elderly person by one having the care, custody, or responsibility of an elderly person.

American Medical Association, Model Elderly Abuse Reporting Act.

There are three separate categories of elder abuse:

- **Domestic elder abuse** usually takes place in the older adult’s home or in the home of the caregiver. The abuser is often a relative, close friend, or paid companion.
- **Institutional abuse** refers to abuse that takes place in a residential home (such as a nursing home), foster home, or assisted-living facility. The abuser has a financial or contractual obligation to care for the older adult.
- **Self-neglect** is behavior of an older adult that threatens his or her own health or safety. Self-neglect is present when an older adult refuses or fails to provide himself or herself with adequate food, water, clothing, shelter, personal hygiene, medication, and safety precautions. Older Americans Act of 1965, Pub. L. No. 89-73, sec. 302, § 136(a), 101 Stat. 926, 23 (1987).

Mistreatment of the elderly person may include physical, psychological, or financial abuse or neglect, and it may be intentional or unintentional. Intentional mistreatment involves a conscious and deliberate attempt to inflict harm or injury, such as verbal abuse, sexual abuse, or battering. Unintentional mistreatment occurs when an inadvertent action results in harm to the

elderly person. Unintentional mistreatment is usually due to ignorance, inexperience, or a lack of ability or desire of the caretaker to provide proper care. Sara C. Aravanis et. al., *American Medical Association, Diagnostic and Treatment Guidelines on Elder Abuse and Neglect* (1992) [hereinafter *AMA Elder Abuse Guidelines*].

A 1983 study found that the abuser is a relative in approximately 86% of the cases and in 75% of the cases the abuser lived with the elderly person. In addition to the physical effects of abuse, there are the added effects of lowered self-esteem, isolation from peers and the community, depression, anxiety, sleep disorders, and attempted suicide. R. S. Marin & R. K. Meryez. *Victims of Elder Abuse in Treatment of Family Violence* 136-64 (R. T. Ammerman & M. Hersen eds., John Wiley & Sons 1990). Fatalities can result from both injuries and consequences of neglect such as diabetic crisis and dehydration.

It is estimated that only one in fourteen elder mistreatment cases is reported to a public agency. *AMA Elder Abuse Guidelines* at 6. Social isolation and dependence of the elderly person increases the risk of mistreatment. *Id* at 7.

Elder abuse is a prevalent and recurring problem in our state and nation. In fiscal year 2014, Texas Adult Protective Services (APS) completed 81,681 investigations of abuse, neglect or exploitation involving adults living at home. Of these, 54,731 or 67% were confirmed. Texas Department of Family and Protective Services, *2014 Data Book 7* (2014), available at <http://www.dfps.state.tx.us> (Search “2014 Data Book”; then follow “DFPS - 2014 Annual Report and Data Book” hyperlink) (last visited Feb. 3, 2015). Furthermore, according to a 2004 Survey of Adult Protective Services which collected data from all 50 states and Guam, Texas had the highest rate of substantiated elder abuse reports at 72.4%. Pamela B. Teaster et. al., *The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older* (2006), http://www.ncea.aoa.gov/Resources/Publication/docs/2-14-06_FINAL_60_REPORT.pdf (last visited Jan. 27, 2015). Although the 2014 figures of 67% are slightly lower than the 2004 figures of 72.4%, the percentage of substantiated reports

in Texas remains high. Additionally, national estimates conclude that for every case of elderly abuse in the home, thirteen incidents go unreported. *NCEA Fact Sheet: Elder Abuse Prevalence and Incidence*, March, 2005, <http://www.ncea.aoa.gov/resources/publication/docs/finalstatistics050331.pdf> (last visited Feb. 3, 2015). If this estimation holds true for Texas, the amount of unreported cases of elder abuse is substantial.

In Region VI, which is Harris County and surrounding counties, the number of referrals increased in 2014 by 59% since 2004 (2004 total is 11,772 and 2014 total is 18,701), of which 10,178 were confirmed allegations. The majority of the confirmed cases were elder self-neglect.

II. Mandatory Reporting of Elder Abuse

While some states retain voluntary reporting statutes, Texas has adopted a mandatory reporting statute which authorizes criminal punishment for those who do not comply. Tex. Hum. Res. Code Ann. § 48.051 (West Supp. 2014). This statute imposes a duty to report on everyone, including attorneys, that have cause to believe that an elderly person is being abused, neglected or exploited. § 48.051. There is no exception. It applies to professionals whose knowledge of the abuse, exploitation or neglect is obtained during the scope of their employment or whose professional communications are generally confidential. If an attorney, clergy member, medical practitioner, social worker or mental health professional discovers abuse, neglect or exploitation, they must report it. Confidentiality is waived under these circumstances.

The penalty for not reporting elder abuse is a Class A misdemeanor which is punishable by “a fine not to exceed \$4,000; confinement in jail for a term not to exceed one year; or both such fine and confinement.” Tex. Penal Code Ann. § 12.21 (West 2011); Tex. Hum. Res. Code Ann. § 48.052 (West 2014). Also, if an individual knowingly or intentionally reports information that they know is false, they are subject to a Class A misdemeanor. Tex. Hum. Res. Code Ann. § 48.053 (West 2014). Additionally, the reporting statute provides immunity from civil and criminal

liability for persons who report elder abuse unless the report is made in bad faith or with a malicious purpose. Tex. Hum. Res. Code Ann. § 48.054 (West 2014).

“Compliance with mandatory reporting laws is critical in stemming elder abuse.” Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 Conn. L. Rev. 77, 81 (1998). However, cases that concern § 48.051 and the elder abuse reporting requirement are virtually nonexistent in Texas. Moreover, there is a lack of case law concerning the criminal punishments for a failure to report. An Elder Law Journal article from 1995 notes that while states impose punishments for failing to report, prosecutions are rare. Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary yet Underutilized Response to Elder Abuse*, 3 Elder L.J. 165, 170 (1995).

Although reporting of suspicious cases is thus statutorily required, criminal enforcement of these reporting laws is typically nonexistent. Few actual cases of prosecution against professionals can be found. One case involved the abuse of a resident at a psychiatric center, and the administrator was convicted of failure to report. *People v. Davis*, 25 Cal. Rptr. 3d 92, 93–94 (Cal. Ct. App. 2005). The other case involved a nursing home resident who was beaten, and subsequently died. The in-house counsel was convicted of failing to report elder abuse and sentenced to one year in jail and a \$1,000 fine. *State v. Kaiser*, 139 S.W.3d 545, 548 (Mo. Ct. App. 2004). The ratio of reported cases to all instances of mistreatment is impossible to calculate. However, when estimates of the number of reported cases are compared to prevalent studies, it is clear that the threat of criminal penalties has done little to ensure reporting. Prosecutors are rarely aware of the failure to report. Therefore, a lack of criminal enforcement is not surprising. Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 Conn. L. Rev. at 117-18.

While there is little case law concerning the actual failure to report abuse, there are a couple cases concerning the problematic nature of the

“reasonable cause to believe” language of mandatory reporting statutes. In Easton v. Sutter Coast Hospital, 80 Cal. App. 4th 485 (Cal. Ct. App. 2000), plaintiffs sued defendant for reporting potential elder abuse which turned out to be unsubstantiated. Likewise, in Muller v. Olympus Healthcare Group, Inc., No. CV0072945S, 2001 Conn. Super. LEXIS 1211 (Conn. Super. Ct. May 1, 2001), a doctor was sued for reporting elder abuse that was unsubstantiated and allegedly led to financial difficulties for the plaintiff. In both cases, the courts found that the immunity provisions in each mandatory reporting statute shielded the defendants from civil liability. The Muller court stated that the immunity provision would serve little purpose if it applied only to complaints which prove true after investigation. These cases provide a small insight into the importance of the Tex. Hum. Res. Code Ann. § 48.054 immunity provision and the extent to which the state encourages reporting by protecting the reporter.

Although prosecutions under Tex. Hum. Res. Code Ann. § 48.052 may be few and far between, the law is nonetheless enforceable and in effect. Attorneys must be aware of their duty to report in order to comply with the law. Prosecutors must also be aware of the statute making the failure to report a Class A misdemeanor.

A General Accounting Office (GAO) study “surveyed forty public officials from [APS] agencies in twenty-five states and found that they rated a high level of public and professional awareness as the most effective factor in elder-abuse identification.” Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary yet Underutilized Response to Elder Abuse*, 3 Elder L.J. at 180. Also, a North Carolina study found that 80% of physicians did not know they had a duty to report elder abuse. *Id.* at 181. If 80% of physicians—who are responsible for monitoring the health of their elderly clients—did not know that they had a duty to report, one may wonder how many attorneys—who are employed to deal with legal issues—actually know that they also have a duty to report elder abuse. Notably, a program in Middlesex County, Massachusetts, confirmed that an increased awareness of mandatory reporting laws increased the amount

of elder abuse reports. *Id.* In Middlesex County “there was a 350% increase in elder-abuse reports [during a program in which] Massachusetts provided special training on the state’s mandatory abuse reporting law.” *Id.*

Texas Adult Protective Services (APS) has made efforts to educate the public on elder abuse, such as designating May as elder abuse prevention month. In 2006 and 2007, APS launched a statewide effort to educate Texans about elder abuse during the “It’s Everyone’s Business,” campaign.

<http://www.dfps.state.tx.us/everyonesbusiness/default.asp> (last visited Jan. 29, 2015). During this campaign, which is still ongoing, APS provides an adult abuse prevention kit to any interested individuals. Texas Department of Family and Protective Services, *Adult Abuse Prevention Kit*, at <http://www.dfps.state.tx.us/everyonesbusiness/kit.asp> (last visited Jan. 29, 2015). APS states that this kit is “designed to help create public awareness about the problem of adult abuse.” *Id.* at 1. APS also provides instruction on how to use the kits effectively. *Id.* While educating the public on the problem and prevalence of elder abuse is the logical first step in preventing abuse, the information APS provides does not mention the mandatory reporting requirement. The mandatory reporting requirement is only mentioned on the page explaining how to report elder abuse.

While it may make them more likely to complete the process of reporting, the placement of the mandatory reporting information could be considered less effective because it is unlikely to help those that have not inquired about reporting. In view of the findings from studies in North Carolina and Massachusetts, as well as the GAO study, APS may want to focus their efforts equally on informing the public of both elder abuse and the mandatory reporting requirement of such abuse.

III. Similarities Between Elder and Child Abuse Statutes

In Texas the same statute that makes abuse of a child a crime also makes abuse of an elderly individual a crime. Tex. Penal Code Ann. § 22.04

(West Supp. 2014). Although the statutes making the failure to report abuse of a child or elderly person a crime are not exactly the same, they are substantially similar. Both statutes (1) require a person believing there to be abuse to report it; (2) were made in an effort to protect a vulnerable individual from others; (3) require professionals to report suspected abuse; and (4) have similar protections for these vulnerable individuals. Compare Tex. Hum. Res. Code Ann. §§ 48.051-48.052, with Tex. Fam. Code Ann. §§ 261.101, 261.109(b) (West 2014). Further, elders, like children, are often unable, reluctant, or fearful of making a report on their own and may need others to do so because “of a fear that the report will be to no avail, may place the elder in a worse situation, or may lead to unwanted legal proceedings.” Jill C. Skabronski, *Elder Abuse: Washington’s Response to a Growing Epidemic*, 31 Gonz. L. Rev. 627, 643 (1996).

Though cases concerning Tex. Hum. Res. Code Ann. § 48.051 are virtually nonexistent in Texas, the section is very similar to Tex. Fam. Code Ann. § 261.101, and additionally, the statute making abuse of an elderly person or child is the same. These similarities may allow us to look at case law and law review articles concerning mandatory reporting of child abuse to see how Texas courts might treat failures to report elder abuse. Texas courts have held, and several law review articles have stated, that the failure of a professional, including an attorney, to report child abuse is punishable as a misdemeanor. *Johnson v. State*, 926 S.W.2d 334, 342 (Tex. App.—Fort Worth 1996) (Barron, P., dissenting) (noting that the failure of an attorney to report suspected abuse is a Class B misdemeanor); Mary E. Hazlewood, *The New Texas Ad Litem Statute: Is it Really Protecting the Best Interests of Minor Children*, 35 St. Mary’s L.J. 1035, 1058, 1066 n.170 (2004); Lesley E. Daigle, *Empowering Women to Protect: Improving Intervention with Victims of Domestic Violence in Cases of Child Abuse and Neglect; A Study of Travis County, Texas*, 7 Tex. J. Women & L. 287, 297 (1998). In 2009, Tex. Fam. Code Ann. § 261.109 was amended, making the failure to report child abuse a Class A misdemeanor.

IV. Abuse and Neglect in Institutions

Institutional elder abuse and neglect refers to mistreatment that occurs in nursing homes, board and care homes, and other assisted-living facilities.

In institutions, elder abuse may be perpetrated by a staff member, another patient, an intruder, or a visitor. The forms of abuse and neglect that occur in institutions are virtually the same as those that occur in domestic settings. One form of mistreatment that is of special concern in institutions is the failure to carry out a plan of treatment or care. This may involve unauthorized use of physical or chemical restraints or the use of medication or isolation as punishment, for staff convenience, or as a substitute for treatment and in conflict with a physician’s order. Substandard care or routine neglect can result in declining health, serious deterioration, pain, and emotional trauma. The plan of care is a critical document, used to determine whether action or inaction by facility staff is abusive or neglectful.

Older persons in institutional care are at risk for mistreatment both because of their extreme vulnerability and because of inadequate training and experience among caregivers. Residents of nursing facilities are typically dependent, extremely frail, and/or chronically ill, and many do not have regular visitors who can monitor their care. Cognitive, vision, and hearing impairments are common. A recent government report states that at least one-half of all nursing home residents—about 600,000 individuals—suffer from dementia. Patients with cognitive impairment may be resistant to care, and difficult to help. In addition, problems such as insufficient resources, staff shortages, high turnover, and inadequate supervision and training increase the risk of mistreatment.

National standards for care in nursing homes are based on public policy set forth in the *Nursing Home Reform Act of 1987*. The *Nursing Home Reform Act of 1987* is codified at 42 U.S.C. § 1395i-3 et seq., 42 U.S.C. § 1396r et seq., and 42 C.F.R. § 483 et seq). This law, as part of the Omnibus Budget Reconciliation Act, is often referred to as “OBRA 87,” which became

effective in October 1990. The intent of the law and its regulations is to promote high quality care and to prevent substandard care, abuse, and neglect.

The law provides that a set of residents' rights are ensured for each person. These include: protection against Medicaid discrimination; the right to participate in health care decisions and to give or withhold consent for particular interventions; safeguards to reduce inappropriate use of physical and chemical restraints; provisions to ensure proper transfers or discharges; and full access to a personal physician, the long term care ombudsman, and other advocates. Each resident has the right to be free from verbal, sexual, physical, or mental abuse, corporal punishment, and involuntary seclusion. According to the federal guidelines for implementation of the law, "abuse means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm or pain or mental anguish, or deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being."

Residents also have the right to be free from physical restraints or psychoactive drugs administered for purpose of discipline or convenience. The inappropriate use of physical or chemical restraints is of special concern. Federal guidelines specify that "the decision to apply physical restraints should be based on the assessment of each resident's capabilities, an evaluation of less restrictive alternatives, and the ruling out of their use. The plan of care should also contain a schedule or plan of rehabilitative training to enable the progressive removal of restraints or the progressive use of less restrictive means, as appropriate." *AMA Elder Abuse Guidelines* at 15-16.

V. Texas Elder Bill of Rights

For citizens who are 60 years of age and older, Texas provides a so-called "bill of rights" statute. Tex. Hum. Res. Code Ann. §§ 102.002–.003 (West 2013). This statute tracks OBRA 87 and is

even more specific in the duty of nursing homes in respect to resident's rights.

VI. Common Forms of Abuse (from *AMA Elder Abuse Guidelines* at 9-11)

Symptoms of elder mistreatment may result from physical abuse or neglect, psychological abuse or neglect, financial or material abuse or neglect, or any combination of these. In a broad sense, elder mistreatment encompasses violation of any legal or human rights that are accorded members of society. These rights promote concepts of self-respect and dignity, and include the rights to liberty, property, privacy, and free speech.

Physical abuse involves acts of violence that may result in pain, injury, impairment, or disease. Examples include:

- Pushing, striking, slapping, or pinching
- Force-feeding
- Incorrect positioning
- Improper use of physical restraints or medication
- Sexual coercion or assault (sexual contact or exposure without the older person's consent or when the older person is incapable of giving consent)

Physical abuse is suspected when the elderly presents with unexplained injuries, when the explanation is not consistent with the medical findings, or when contradictory explanations are given by the patient and the caregiver. Signs of physical abuse include: bruises, welts, lacerations, fractures, bumps, rope marks (note bilateral injuries and injuries in various stages of healing); laboratory findings indicating medication overdose or under medication; and unexplained venereal disease or genital infections.

Physical neglect is characterized by a failure of the caregiver to provide the goods or services that are necessary for optimal functioning or to avoid harm. This may include:

- Withholding of health maintenance care, including adequate meals or hydration, physical therapy, or hygiene
- Failure to provide aids such as eyeglasses, hearing aids, or false teeth

- Failure to provide safety precautions

Physical neglect may be suspected in the presence of dehydration, malnutrition, decubitus ulcers, poor personal hygiene, or lack of compliance with medical regimens.

Psychological abuse is conduct that causes mental anguish in an older person. This includes:

- Verbal berating, harassment, or intimidation
- Threats of punishment or deprivation
- Treating the older person like an infant
- Isolating the older person from family, friends, or activities
- Refusing to allow visitors to see the older person alone

Psychological neglect is the failure to provide a dependent elderly individual with social stimulation. This may involve:

- Leaving the older person alone for long periods of time
- Ignoring the older person or giving him or her the “silent treatment”
- Failing to provide companionship, changes in routine, news, or information

The possibility of psychological abuse or neglect should be investigated if the older person seems extremely withdrawn, depressed, or agitated; shows signs of infantile behavior; or expresses ambivalent feelings toward caregivers or family members.

Financial or material abuse involves misuse of the elderly person’s income or resources for the financial or personal gain of a caretaker or advisor, such as:

- Denying the older person a home
- Stealing money or possessions
- Coercing the older person into signing contracts or assigning durable power of attorney to someone, purchasing goods, or making changes in a will

Financial or material neglect is failure to use available funds and resources necessary to sustain or restore the health and well-being of the older adult.

Financial abuse or neglect should be considered if the patient is suffering from substandard care in the home despite adequate financial resources, if the patient seems confused about or unaware of his or her financial situation, or has suddenly transferred assets to a family member. Older adults are particularly vulnerable to this type of mistreatment, yet it may be the most difficult to identify.

Violation of personal rights occurs when caretakers or providers ignore the older person’s rights and capability to make decisions for himself or herself. This failure to respect the older person’s dignity and autonomy may include:

- Denying the older person his or her rights to privacy
- Denying the older person the right to make decisions regarding health care or other personal issues, such as marriage or divorce
- Forcible eviction and/or placement in a nursing home

This type of abuse may be recognized through reports by the elderly person or through observation of family or caregiver interactions.

VII. Protecting the Client

Many cases of abuse are determined to be self-neglect which can be caused by dementia. Texas Disciplinary Rules of Professional Conduct requires that an attorney take reasonable action to secure the appointment of a legal guardian if the lawyer reasonably believes that the client lacks capacity and such action is necessary to “protect the client”. Tex. Disciplinary Rules Prof’l Conduct R. 1.02(a), (g), *reprinted in Tex. Gov’t. Code Ann., tit. 2, subtit. G, app. A, § 9* (West 2013).

Some of the signs that there may be problems that warrant further investigation or reporting are:

- Financial abuse
 - Sudden bank account changes, especially an unexplained withdrawal of large sums of money when accompanied to the bank by another person

- Additional unexplained names on an elder's bank signature card
- Substandard care of the senior despite adequate finances
- Sudden transfer of assets or changes in a will
- An elder's report of financial exploitation
- Frequent expensive gifts from elder to caregiver
- Elder's personal belongings, papers, credit cards missing
- Numerous unpaid bills
- A recent will when elder seems incapable of writing will
- Caregiver's name added to bank account
- Elder unaware of monthly income
- Elder signs on loan
- Frequent checks made out to "cash"
- Unusual activity in bank account
- Irregularities on tax return
- Elder unaware of reason for appointments with banker or attorney
- Caregiver's refusal to spend money on elder
- Signatures on checks or legal documents that do not resemble elder's
- Physical abuse
 - Bruises, welts, wounds on the body
 - Weight loss
 - Lack of hygiene
 - Sprains, dislocations or internal injuries
 - Laboratory reports of overdose or under use of medication
 - Dehydration and malnutrition
 - Pain from touching
 - Sunken eyes of cheeks
 - Soiled clothing or bed
 - Lack of necessities such as food, water, utilities
- Behavioral signs
 - Fear
 - Anxiety, agitation
 - Anger
 - Isolation, withdrawal
 - Depression
 - Non-responsiveness, resignation, ambivalence

- Contradictory statements, implausible stories
- Hesitation to talk openly
- Confusion or disorientation

The fear of being institutionalized is one of the factors that keeps elderly victims from reporting the abuse or causes them to recant their stories after they do report. Thus the family is usually the last to know if someone has taken advantage of their loved one.

The person who is most vulnerable to abuse has the following characteristics:

- Decline in functional skills such as memory, calculation and information processing
- Social isolation
- Physical dependence on others
- Particular susceptibility to flattery
- Easily intimidated or low self-esteem
- Home ownership
- Wealth
- Lack of knowledge and understanding of potential consumer rights frauds and scams
- Financial risk taking behavior
- Willingness to divulge personal information to strangers

If a caregiver is involved, the following signs may be present:

- Prevents elder from speaking to or seeing visitors
- Anger, indifference, aggressive behavior toward elder
- History of substance abuse, mental illness, criminal behavior, or family violence
- Lack of affection toward elder
- Flirtation or coyness as possible indicator of inappropriate sexual relationship
- Conflicting accounts of incidents
- Withholds affection
- Talks to elder as if they are a burden

If abuse of exploitation is suspected, attorneys may consider asking the following questions:

- Has anyone at home ever hurt you?
- Has anyone ever touched you without your consent?

- Has anyone ever made you do things you didn't want to do?
- Has anyone taken anything that was yours without asking?
- Has anyone ever scolded or threatened you?
- Have you ever signed any documents that you didn't understand?
- Are you afraid of anyone at home?
- Are you alone a lot?
- Has anyone ever failed to help you take care of yourself when you needed help?

Adapted from Mount Sinai/Victim Services Agency Elder Abuse Project, *Elder Mistreatment Guidelines for Health Care Professionals: Detection, Assessment and Intervention* (1988).

Any questions answered affirmatively should be followed up to determine how and when the mistreatment occurs, who perpetrates it, and how the clients feels about it and copes with it. Efforts should be made to determine how serious the danger is, and what the older adult thinks can be done to prevent the mistreatment from recurring.

If an attorney suspects abuse or exploitation, the following actions should be initiated:

- Call Adult Protective Services at 1-800-252-5400 or use the secured website: <https://www.txabusehotline.org>. All intake reports start at these two connections. Once the report is made, an investigator will be assigned to investigate and take appropriate action.
- If a facility is involved call the abuse hotline for APS Facility Investigation at 1-800-647-7418.
- Reports may be made orally or in writing. The caller does not have to identify himself and these reports are confidential. If the caller chooses to identify himself, it assists the investigator in that there is a contact for further information if necessary.
- A person may also call any of the statutory probate courts and speak with the guardianship coordinator. The probate courts will require an "information letter" to be faxed/mailed to the court. See Tex. Est. Code Ann. § 1102.003 (West 2014). Upon

receipt of the letter, it will be assigned to a court and an investigation will commence. The letter should be as complete as possible regarding any assets, names of friends and/or relatives, income and sources and if there is any imminent danger.

The information letter should include the following:

- Name, address, telephone number, county of residence, date of birth of the alleged incapacitated person;
- Type of residence of the alleged incapacitated person, for example, a healthcare facility, etc.;
- Relationship between the informant and the alleged incapacitated person;
- Names and telephone numbers of any known friends or relatives of the alleged incapacitated person;
- Whether guardian of the person and estate has been appointed in the state of Texas;
- Whether the alleged incapacitated person has executed a power of attorney, and if so, the appointed agent's name, address, and telephone number;
- The property of the alleged incapacitated person;
- The amount and sources of monthly income of the alleged incapacitated person; and
- The nature and degree of the alleged incapacitated person's incapacity and whether that person is an imminent danger to his person and/or estate.

Tex. Est. Code Ann. § 1102.003 (West 2014). The Court will then appoint a court investigator to conduct a more thorough investigation or in the alternative a guardian ad litem.

This author would like to recommend that if an attorney is faced with these issues, please refer to "*Is Your Client Really Non Compos Mentis*" by Sarah Patel Pacheco and Sharon Gardner, 30th Annual Estate Planning and Probate Course, June 2006, Houston.

VIII. The Attorney and the Incapacitated Client

The time may arise where the attorney notices that their long-term client is unable to manage their affairs. The primary duty of the attorney is to protect your client. Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct require that an attorney take reasonable action to secure the appointment of a legal guardian or other representative if the lawyer reasonably believes that the client lacks capacity and such action is necessary to *protect the client*. Tex. Disciplinary Rules Prof'l Conduct R. 1.02(g) (emphasis added). See Franks v. Roades, 310 S.W. 3d 615 (Tex. App.—Corpus Christi 2010, no pet.).

If the client has executed and has existing estate planning documents that appoint persons to make medical and financial decisions if he/she is unable, the attorney may wish to contact those individuals. The attorney may want to include some sort of authorization prior to the incapacity or at the time of execution of the estate planning documents in the form of a signed authorization to be kept in the file.

If the client has not designated any individuals and does not have these estate planning documents, the attorney may write the letter as outlined in the preceding section to the court or may consider filing an application for guardianship of the client. The attorney should request the appointment of an independent third party selected by the court.

If the attorney has a relationship with other family members, and knows the family dynamics, a phone call expressing the concerns regarding the incapacity may also be an option.

Any of these actions would fall within the “reasonably necessary” category of protecting the client.

IX. The Client as the Perpetrator

Sometimes, attorneys discover that their client is not the stellar person that an attorney supposes he is. Usually this happens when a client becomes a guardian and the motive is not so much the care of the incapacitated ward but to enrich himself.

A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

Tex. Disciplinary Rules Prof'l Conduct R. 1.02(c).

The author thanks Sarah Patel Pacheco for granting permission to republish Section VI on her paper *Guardianships: Recognizing Various Fiduciary Relationships, Duties and Issues That Commonly Arise in Guardianship Proceedings and Related Litigation*, State Bar of Texas, May 6-7 2004, Houston Texas Chap 9 Sect VI p.27-32.

This section focuses on the attorney representing a guardian but would apply to representing any client who has accepted a fiduciary role regarding an elderly person such as powers of attorney as well as guardians.

X. Duties of Guardian’s Counsel to Ward

A. Overview

The age old question of who is the client has become increasingly complicated in recent years. Generally, the attorney-client relationship is a contractual relationship whereby the attorney agrees to render professional services for the client. Parker v. Carnahan, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied). The resulting contract may be either expressed or implied from the actions of the parties. Once established, the attorney-client relationship imposes numerous duties on the lawyer. These include the duty to use utmost good faith in dealings with the client, to maintain the confidences of the client, and to use reasonable care in rendering professional services to the client. Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied); see also Yaklin v. Glusing, Sharpe & Krueger, 875 S.W.2d 380, 383 (Tex. App.—Corpus Christi 1994, no writ).

“When a lawyer has confidential information clearly establishing that the lawyer’s client has committed a criminal or fraudulent act in the commission of which the lawyer’s services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.” Tex. Disciplinary Rules Prof’l Conduct R. 1.02(e).

B. Theft by Guardian

Attorneys representing guardians should clearly and carefully advise their clients of their fiduciary duties at the time of their appointment and assist those clients in complying with the provisions of the Texas Estates Code during the period of their administration. However, the realities of practicing law teach us that not all clients are perfect and not all clients follow their attorney’s advice. When those clients are acting as a fiduciary, the client’s actions may become a reflection on his or her attorney. Furthermore, the client may have unknowingly used the lawyer’s services to further the client’s fraudulent conduct.

For example, a person may have obtained guardianship to gain control of an individual’s assets and to use those for his or her personal benefit. Upon discovering the nefarious conduct, the attorney representing the guardian must decide whether he or she can continue to represent the guardian and, regardless, whether they can do anything ethically to rectify or mitigate the damage to the ward.

When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud. Tex. Disciplinary Rules Prof’l Conduct R. 1.02(d).

First the attorney may, but is not required to, disclose information gained from attorney-client communications regarding theft of a ward’s property, or fraud on the ward’s estate, to the Court presiding over the guardianship. Section 1.05(c) of the Texas Disciplinary Rules of

Professional Conduct provides that a lawyer may reveal confidential information:

- (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
- (2) When the client consents after consultation.
- (3) To the client, the client’s representatives, or the members, associates, and employees of the lawyer’s firm, except when otherwise instructed by the client.
- (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.
- (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
- (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer’s associates based upon conduct involving the client or the representation of the client.
- (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
- (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.

Tex. Disciplinary Rules Prof’l Conduct R. 1.05(c).

Furthermore, a comment to Rule 1.05 indicates that full protection of client information is not justified when a client plans to or engages in criminal or fraudulent conduct or where the culpability of the lawyer’s conduct is involved. *Id.* at cmt. 10. The comment elaborates on several situations where an attorney may disclose client communications. See *Id.* A lawyer may reveal information relating to the representation in order to avoid assisting a client’s criminal or fraudulent conduct, and Rule 1.05(c)(4) permits doing so. Furthermore, an attorney has a duty to not to use false or fabricated evidence, and Rule

1.05(c)(4) permits revealing information necessary to comply with this rule. For a lawyer who may have been unknowingly involved in past conduct by the client that was criminal or fraudulent, the lawyer's services were made an instrument of the client's conduct and, therefore, the comments state that the "lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable." *Id.* at cmt. 12. Rules 1.05(c)(6) and (8) give the attorney the discretion to reveal both unprivileged and privileged information in order to serve those interests.

Finally, when an attorney learns that a client intends to commit conduct that is criminal or fraudulent, his or her knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. The comments state that "[w]hen the threatened injury is grave, the lawyer's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information." Tex. Disciplinary Rules Prof'l Conduct R. 1.05 cmt. 13 grants the lawyer the professional discretion, "based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act." *Id.* Comment 14 provides that:

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

do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

Tex. Disciplinary Rules Prof'l Conduct R. 1.05 cmt. 14.

The client's conduct may not be discovered until the time of the annual accounting. It may be that the client has taken funds that belong to the estate for his own benefit.

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When a client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer may not reveal the client's wrongdoing, except as permitted or required by Rule 1.05. See Tex. Disciplinary Rules Prof'l Conduct R. 1.05. However, the lawyer also must avoid furthering the client's unlawful purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required. See Tex. Disciplinary Rules Prof'l Conduct R. 1.15(a)(1).

At a minimum, the attorney should consider resigning as attorney of record. This also allows the attorney to comply with comment 21 to Rule 1.05 which provides that "[i]f the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.15(a)(1)." Tex. Disciplinary Rules Prof'l Conduct R. 1.05 cmt. 21.

However, due to the mandatory reporting requirements regarding elder abuse, this author believes the attorney must report.

In addition, Texas Rules of Evidence 503 (Rule 503) sets out the following categories of situations which the attorney-client privilege does not protect communications:

1. Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
2. Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transactions;
3. Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;
4. Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
5. Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Tex. R. Evid. 503(d).

If a guardian is embezzling funds from the ward's estate, which is a crime, the attorney-client privilege is waived.

There is no case law directly on point regarding a guardianship. However, the cases show that the fraud must be ongoing or contemplated when the action took place. See Coats v. Ruiz, 198 S.W.3d 863, 876 (Tex. App.—Dallas 2006, no pet.); Freeman v. Bianchi, 820 S.W.2d 853, 861–62 (Tex. App.—Houston [1st] 1991, orig.

proceeding), *mand. denied*, 844 S.W.2d 223 (Tex. 1992).

The courts have indicated that when a client informs his attorney of intent to commit a future crime, that communication is not for the purpose of facilitating the renditions of professional legal services. Henderson v. State, 962 S.W.2d 544 (Tex. Crim. App. 1997). The Court in Henderson examined the interplay of the Disciplinary Rules and Rule 503 regarding revelation of information to prevent potential death or serious bodily injury: “The client cannot use Rule 503 to prevent an attorney’s disclosure, in accordance with the disciplinary rules, of ongoing or future criminal activity.” Id. at 556. Such communication is “arguably” not for the purpose of facilitating the rendition of professional legal services, so the privilege presents “no bar to disclosure.” Id. at 555.

C. Possible Attorney-Client Relationship

An issue that has arisen in the last few years is whether an attorney representing a guardian also represents the ward. At least one Texas court has recognized that a guardian’s retention of an attorney for a ward establishes an attorney-client relationship as between the attorney and the ward. See Daves v. Comm’n for Lawyer Discipline, 952 S.W.2d 573 (Tex. App.—Amarillo 1997, pet. denied). In Daves, the parents of a minor retained an attorney to file an application to be appointed the minor’s legal guardian. The parents then also sought permission from the guardianship court to allow the attorney to represent the minor in pursuing a cause of action for personal injuries. After the settlement of a fee and other disputes with the parents’ prior counsel, the attorney was charged with violating the Texas Disciplinary Rules of Professional Conduct and subsequently suspended from the practice of law. The violations included conflicts of interest in the representation of both the parents and the minor.

The attorney first alleged that he had no attorney-client relationship with the minor/ward as a matter of law because he was not “court-appointed.” Id. at 576. The appellate court, however, held that comment 12 to Rule 1.02 of the Texas Disciplinary Rules of Professional

Conduct does not provide that a lawyer must be court appointed to represent a person under disability. *Id.* at 577 (comments to Rule 1.02 only applies to that particular rule and does not apply to the other rules, including conflicts of interest). The appellate court further held, regardless of Rule 1.02, that the actions of the attorney and the parents/guardian clearly demonstrated that the attorney was representing the minor/ward. The court held that an “attorney-client relationship may be implied if the parties by their conduct manifest an intent to create such a relationship.” *Id.* at 577 (citing Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied); Parker v. Carnahan, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied); Duval Cnty. Ranch Co. v. Alamo Lumber Co., 663 S.W.2d 627, 633 (Tex. App.—Amarillo 1983, writ ref’d n.r.e.)). Finally, the court held that even if Rule 1.02 did apply, the parents, as guardians, had a duty to the minor/ward and they retained the attorney to assist them in pursuing the minor/ward’s claims. Therefore, even though retained by the parents, the court found that the attorney “had a duty not only to the Parents as co-guardians, but also to the Child whose claims he was asserting, and the attorney-client relationship was established between the Child and [the attorney] under comment 12 to Rule 1.02.” *Id.* at 577.

Furthermore, the Texas Disciplinary Rules of Professional Conduct also appears to recognize that a person under a disability, via a guardianship or otherwise, can be the “client.” See Tex. Disciplinary Rules Prof’l Conduct R. 1.02 cmt. 13 (“If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client.”).

The possible existence of an attorney-client relationship could also be argued based on Texas decisions that have found an attorney-client relation existed between a minor child and the attorney retained by the child’s next friend. On point is the decision of Byrd v. Woodruff, 891 S.W.2d 689, 700–01 (Tex. App.—Dallas 1994, writ dism’d by agr). In Byrd, a minor’s parents, as next friend, retained an attorney to pursue a

cause of action relating to personal injuries incurred by the minor child. The court also appointed a guardian ad litem to represent the minor’s best interests. A settlement was ultimately reached and the minor’s settlement proceeds were to be placed in a trust for the benefit of the minor. The court approved the proposed settlement. Upon reaching majority, the minor sued the attorney for negligence, legal malpractice, and breach of fiduciary duty. *Id.* at 697. The trial court granted the attorney’s motion for summary judgment resulting in the dismissal of the minor’s claims. Reversing the trial court, the Dallas Court of Appeals held that the attorney acted as the minor’s attorney and an attorney-client relationship existed between the attorney and the minor. *Id.* at 701. As such, the attorney “had a duty to protect [the minor’s] interests.” *Id.* This duty included seeing that the minor’s assets were properly managed and protected for her benefit. *Id.* The appellate court further held that the attorney could be liable for a third party’s negligence or wrongful conduct when the conduct is foreseeable. *Id.*; see also Broughton v. Humble Oil & Ref. Co., 105 S.W.2d 480, 485 (Tex. Civ. App.—El Paso 1937, writ ref’d) (attorney retained by agent is deemed to be attorney of principal’s selection).

While a Texas case directly on point has yet to be decided, Texas could follow the lead of other states that have recognized the existence of an attorney-client relationship between the lawyer and both the guardian and the ward. See Fickett v. Superior Court, 558 P.2d 988, 990 (Ariz. Ct. App. 1976) (rejecting attorney’s claim of no privity, court found that attorney who undertakes to represent guardian of incompetent person assumes relationship not only with guardian but also with ward.); Schwartz v. Hamblen, 659 N.E.2d 61, 64 (Ill. App. Ct. 1995), *rev’d on other grounds sub nom.* Schwartz v. Cortelloni, 685 N.E.2d 871 (Ill. 1997). Like Texas, these states follow the general rule that an attorney owes a duty only to the person who is his or her client. Geaslen v. Berkson, Gorov & Levin, Ltd., 613 N.E.2d 702, 704 (Ill. 1993). However, they have recognized that an exception must exist when an attorney is hired by a client specifically for the purpose of benefiting a third party. Pelham v. Griesheimer, 440 N.E.2d 96, 100 (Ill. 1982);

Schechter v. Blank, 627 N.E.2d 106, 109 (Ill. App. Ct. 1993); see also McLane v. Russell, 546 N.E.2d 499, 502 (Ill. 1989). In determining whether a duty is owed to a third party, the key factor to be considered is whether the attorney acted at the direction of or on behalf of the client for the benefit of a third party. Schwartz v. Cortelloni, 685 N.E.2d 871, 875-76 (Ill. 1997); Pelham, 440 N.E.2d at 100.

D. Possible Duties Regardless of Privity

Texas law has long held that when an attorney, acting for his client, participates in fraudulent activities, his or her actions are “foreign to the duties of an attorney.” Querner v. Rindfuss, 966 S.W.2d 661, 666 (Tex. App.—San Antonio 1998, pet. denied) (quoting Poole v. Hous. & T.C. Ry. Co., 58 Tex. 134, 137 (Tex. 1882)) (estate attorney may be held liable for fraud); McKnight v. Riddle & Brown, P.C., 877 S.W.2d 59, 61 (Tex. App.—Tyler 1994, writ denied); Likover v. Sunflower Terrace II, Ltd., 696 S.W.2d 468, 472 (Tex. App.—Houston [1st Dist.] 1985, no writ). In such event, the attorney may be held personally liable if he or she “knowingly commits a fraudulent act or knowingly enters into a conspiracy to defraud a third person.” Querner, 966 S.W.2d at 666 (citing Likover, 696 S.W.2d at 472). The attorney cannot shield himself or herself from liability on the basis that he or she was an agent of the client because no one is justified on that ground of knowingly committing a willful and premeditated fraud for another. Id. (citing Poole, 58 Tex. at 137–38; Likover, 696 S.W.2d at 472; Hennigan v. Harris Cnty., 593 S.W.2d 380, 383 (Tex. Civ. App.—Waco 1979, writ ref’d n.r.e.)).

“When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyers conduct.” Tex. Disciplinary Rules Prof’l Conduct R. 1.02(f).

Therefore, depending on the facts of the case, an attorney could be held liable for fraud, conversion, conspiracy, unjust enrichment, breach of fiduciary duty and constructive fraud. Querner, 966 S.W.2d at 670–71. Each claim

must, however, be considered in light of the actions shown to have been taken by the attorney in order to determine whether he or she can be held liable for such actions. If the facts show that the attorney actively engages in fraudulent conduct in furtherance of some conspiracy or otherwise, the attorney can be held liable. Id. at 666.

Similarly, if the facts show that an informal fiduciary relationship or confidential relations exists, the attorney may also be held liable. Id. at 667. The Texas Supreme Court has recognized the difficulty of formulating a definition of “fiduciary” that is sufficient to cover all cases. Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp., 823 S.W.2d 591, 593 n.3 (Tex. 1992). In Texas, certain informal relations may give rise to a fiduciary duty. These informal fiduciary relationships have been called “confidential relationships” and may arise “where one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one.” Id. at 594 (quoting Fitz-Gerald v. Hull, 237 S.W.2d 256, 261 (Tex. 1951)). Confidential relationships exist in those cases “in which influence has been acquired and abused, in which confidence has been reposed and betrayed.” Tex. Bank & Trust Co. v. Moore, 595 S.W.2d 502, 507 (Tex. 1980) (quoting Higgins v. Chi. Title & Trust Co., 143 N.E. 482, 484 (Ill. 1924)). The existence of confidential relationships is usually a question of fact. Crim Truck & Tractor, 823 S.W.2d at 594.

The unique relationship between the attorney representing the guardian and the ward raises issues whether the guardian could be held liable to the ward even in the absence of an attorney-client relationship. Consider the following hypothetical situation: Wife has been serving as guardian for her husband (Ward) for years. Wife asks the attorney (Attorney) representing wife as guardian to seek authority for her to withdraw all her and Ward’s community estate under Tex. Est. Code Ann. § 1353.002 (West 2014) (Section 1353.002 allows for management outside of court supervision and control). Attorney for wife knows that she is considering divorcing Ward. Attorney believes that wife will attempt to dispose of all community assets before divorce.

Under the hypothetical, the attorney has sufficient knowledge to be aware that the wife is seeking to manage and dispose of the ward's assets outside the guardianship. If he or she is successful in gaining the wife unsupervised control of the community estate, does the attorney expose himself to claims of fraudulent conduct, conversion of the ward's assets, and conspiracy, and allegations that an informal fiduciary or confidential relationship existed between the attorney and the ward and, if so, whether the attorney breached a fiduciary duty to the ward? Some would say yes. Others would say no.

Consider another increasingly common situation in which the attorney for the guardian learns the guardian is about to or has converted the ward's assets. See discussion supra. Does the attorney have a duty to advise the court of the theft? Rule 1.05(c)(7)-(8) of the Texas Disciplinary Rules of Professional Conduct authorizes the disclosure as conversion is a criminal or fraudulent act. See Tex. Disciplinary Rules Prof'l Conduct R. 1.05(c). They do not, however, mandate it. This raises the question whether the special relationship of the attorney for the guardian imposes such a duty in light of the ability to advise the court presiding over the guardianship and, thus, avoid or mitigate any damages.

In addition, conversion is a form of financial exploitation and Texas has the mandatory reporting requirement. See discussion supra pages 2-4.

Until this issue is decided by the Texas Supreme Court, practitioners should be aware that certain actions could increase the potential exposure to such claims. For example, if the attorney signed the pleadings as counsel for the guardianship, one could argue that he or she intended to represent the guardianship rather than the individual serving as guardian. See Querner, 966 S.W.2d 661 (estate attorney may be held liable for fraud). In Querner, the appellate court noted that the fact that the executor retained an attorney who characterized his representation as "the attorney for the estate" raised a fact question whether there was privity or a fiduciary

relationship between the attorney and the beneficiaries of the estate. Id. at 670.

XI. Powers of Attorney and Financial Exploitation

The Statutory Powers of Attorney can be a wonderful estate planning document which can save the estate several thousands of dollars by eliminating the need for a guardianship. However, they only work if the appropriate person is appointed as the attorney in fact. The person must be scrupulously honest and place the principal's best interest first.

Sometimes the temptation is too great and the agent takes assets from the principal. Sometimes that is the intention all along.

A current example is the Wallis case. Decedent had named his attorney in fact as beneficiary on his retirement plan and life insurance policy. After the decedent changed the beneficiary designations, the attorney in fact changed it back. The court found she had breached the duty to act with integrity and good faith. She had a duty to inform the decedent of all actions she took pursuant to the power of attorney which she did not do. Estate of Wallis, No. 12-07-00022-CV, 2010 WL 1987514 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.).

As attorneys there is a duty to fully explain the ramifications of the POA document and discuss with the client the qualifications he should consider in the selection of an agent. If there is no one that the client trusts, a corporate trustee may be the only option.

XII. Informal Fiduciary Liability

Similarly, a person may also be held liable if the court finds an informal fiduciary relationship or a confidential relationship exists. Querner, 966 S.W.2d at 667. Under Texas law, "[a]n informal fiduciary duty may arise from a moral, social, domestic or purely personal relationship of trust and confidence." Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276, 287 (Tex. 1998). Further, confidential relationships exist in those cases "in which influence has been acquired and abused, in which confidence has

been reposed and betrayed.” Moore, 595 S.W.2d at 507 (quoting Higgins, 143 N.E. at 484). “In resolving the problem of the existence or not of a fiduciary relationship,” the Texas Supreme Court “has severely scrutinized transactions between parties where trust and confidence is reposed by one, and personal profit is gained by another.” Id. at 508. In addition, a Texas Court of Appeals mentioned factors it considers when determining whether a confidential relationship exists: family kinship, advanced age or poor health, and evidence that the elderly individual had confidence in and trusted the other individual. Hatton v. Turner, 622 S.W.2d 450, 458 (Tex. Civ. App.—Tyler 1981). The existence of a confidential relationship is usually a question of fact. Crim Truck & Tractor, 823 S.W.2d at 594.

disciplinary rules of conduct that guide attorneys require action.

An example of a Texas court finding an informal fiduciary relationship is In re Youngblood, No. 07-70072, 2009 WL 1232103 (Bankr. S.D. Tex. Apr. 29, 2009). In In re Youngblood, the Plaintiffs had alleged conversion, theft, common-law fraud, and breach of fiduciary duty due to the withdrawal of \$40,000 by the granddaughter over a period of six months. The Court found that a granddaughter owed a fiduciary duty to her grandmother “based on an informal relationship of confidence.” Id. at *9. Although the two never had a formal agreement making the granddaughter a fiduciary, the grandmother invited her granddaughter to live in her home, and the grandmother entrusted the granddaughter with her financial affairs. The Court found it relevant that the grandmother “was made vulnerable by her age and a stroke.” Id.

XIII. Conclusion

With the aging and longevity, the older population has increased tremendously over the past decade. However, living longer does not equate into having a fulfilling good life. It is the duty of all persons to take time to become part of the seniors in their lives and to periodically visit with them to ensure that they are okay.

If something is not okay, it is mandatory that the neighbor, friend, or colleague must report it. As attorneys the standard is higher. In many cases attorneys may be the first to observe a problem. Not only does the law require action but also the

CHILD AND ELDER ABUSE

Abuse or Neglect in Long Term Care Facilities, Texas Department of Aging and Disability Services (DADS)

888-963-7111 (Health facility compliance)

www.dshs.state.tx.us

Abuse/neglect of children or elders in licensed health care facilities, investigation of complaints against facilities or persons licensed by TDH, community education on health care, individualized advice, mailing of forms-documents and referral services.

Office of Consumer Affairs, Texas Department of Family and Protective Services (DFPS)

800-720-7777 (Austin)

www.dfps.state.tx.us

Receives complaints from the public, persons being investigated, and others relating to open abuse investigations.

Texas Department of Family and Protective Services (DFPS)

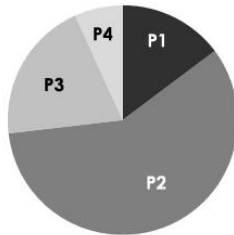
800-252-5400 (Austin) (Abuse/Neglect Hotline)

800-647-7418 (Abuse in MHMR facilities)

www.dfps.state.tx.us

Intakes 24 hours a day of complaints relating to abuse, neglect, or exploitation of children, the elderly, or people with disabilities; referral for investigation by local TDPRS office.

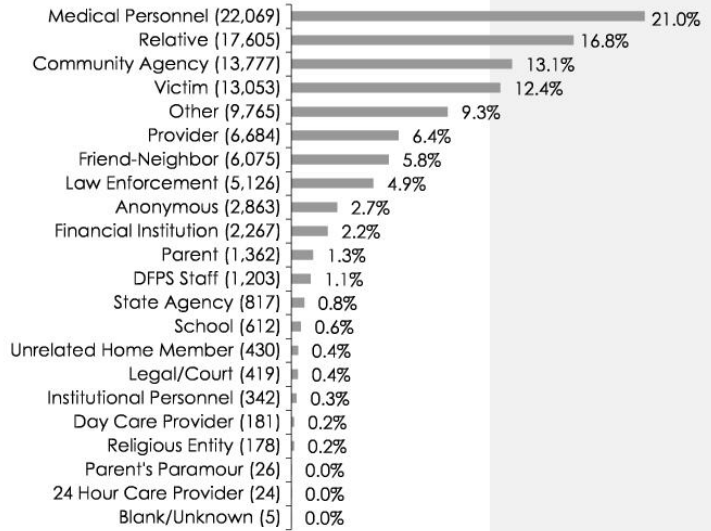
APS In-Home Intake Reports* by Priority Fiscal Year 2014



Priority	Intakes	%
P1	15,165	14.7%
P2	60,185	58.4%
P3	20,687	20.1%
P4	6,987	6.8%
Total	103,024	

* Intakes included by the date intake closed.
Refer to the definitions section for priority definitions.

Source of Report for APS In-Home Intake* Reports Fiscal Year 2014



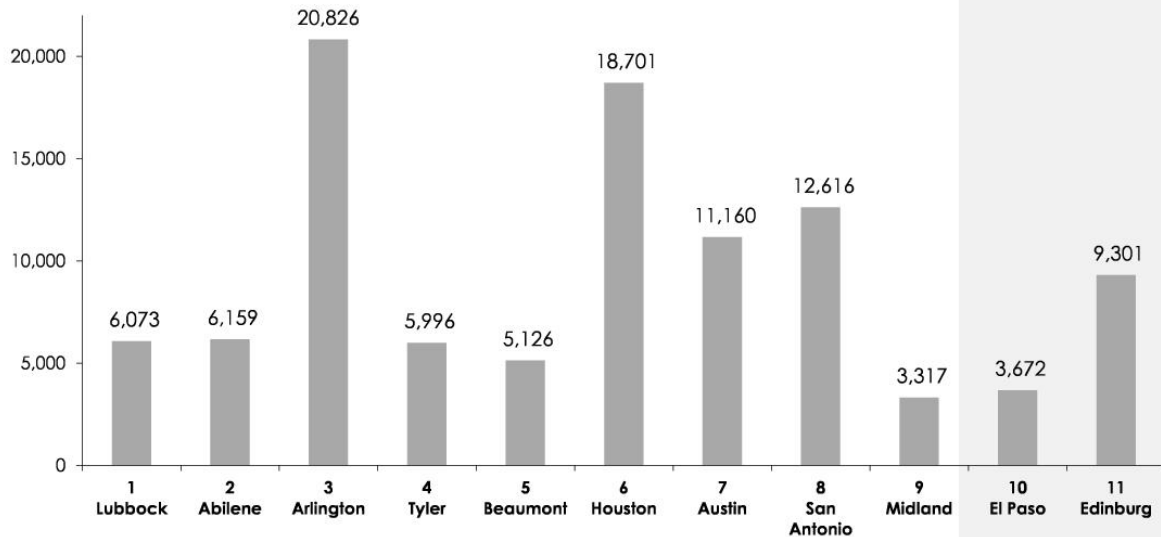
State Total: 104,883

Note: A report of abuse/neglect/financial exploitation may come from multiple sources making the source total higher than the total number of intakes.

* Intakes included by the date intake closed.

APS In-Home Intake Reports* by Region Fiscal Year 2014

State Total 103,024

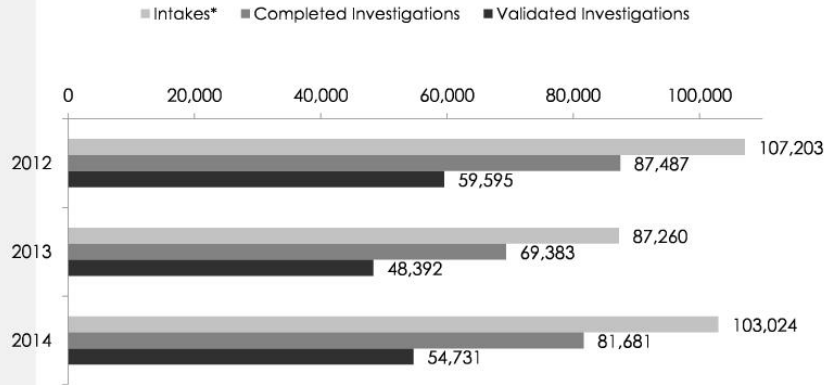


Note: 77 Reports did not have a region identified.

* Intakes included by the date intake closed.

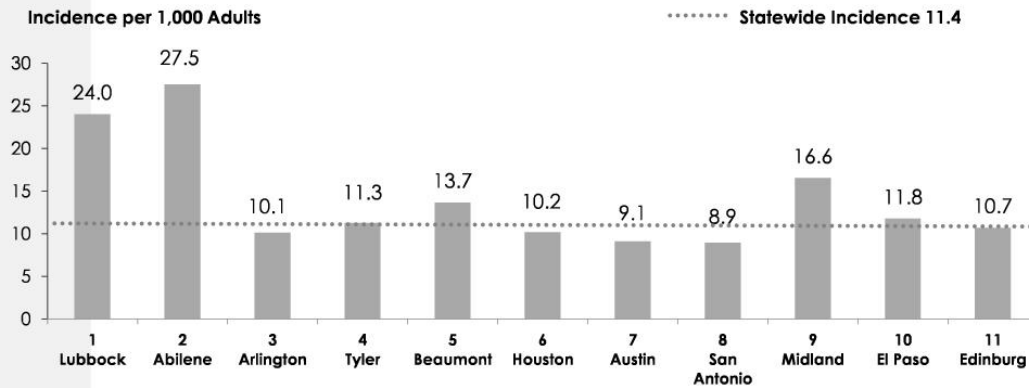
12 Adult Protective Services In-Home

**APS In-Home Intakes, Completed and Validated Investigations
Fiscal Years 2012 - 2014**



* Intakes included by date intake closed.

**Incidence of Maltreatment per 1,000 Adults in Texas Adult Population by Region
Fiscal Year 2014**



Note: Calculations are based on the percent of validated APS In-Home investigations. Unreported incidences are not reflected.

**Perpetrator Characteristics In Validated APS In-Home Investigations
(Characteristic as % of Total Validated Perpetrators*)
Fiscal Year 2014**

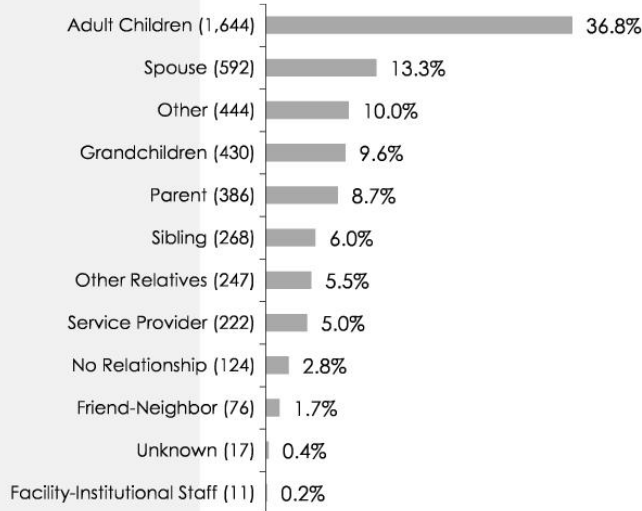
Characteristic	Female		Male		Unknown		Subtotal	
	Count	% of Total	Count	% of Total	Count	% of Total	Count	% of Total
Age								
Under 18	63	1.4%	90	2.0%	0	0.0%	153	3.4%
18-25	152	3.4%	176	4.0%	1	0.0%	329	7.4%
26-35	337	7.6%	269	6.0%	2	0.1%	608	13.7%
36-45	443	9.9%	334	7.5%	3	0.1%	780	17.5%
Over 45	1,358	30.5%	1,217	27.3%	11	0.2%	2,586	58.0%
Unknown	2	0.0%	2	0.0%	1	0.0%	5	0.0%
Race/Ethnicity **								
Anglo	1,082	24.2%	1,037	23.2%	5	0.1%	2,124	47.5%
African American	462	10.3%	332	7.4%	3	0.1%	797	17.8%
Hispanic	624	14.0%	565	12.7%	3	0.1%	1,192	26.8%
Native American	3	0.1%	3	0.1%	0	0.0%	6	0.2%
Asian	25	0.6%	14	0.3%	0	0.0%	39	0.9%
Other	159	3.6%	137	3.1%	7	0.1%	303	6.8%
Marital Status								
Child, Not Applicable	58	1.3%	85	1.9%	0	0.0%	143	3.2%
Divorced	204	4.6%	129	2.9%	0	0.0%	333	7.5%
Married	568	12.7%	506	11.3%	2	0.0%	1,076	24.0%
Separated	69	1.5%	49	1.1%	0	0.0%	118	2.6%
Single, Never Married	295	6.6%	372	8.3%	0	0.0%	667	14.9%
Widowed	132	3.0%	35	0.8%	0	0.0%	167	3.8%
Unknown	1,029	23.1%	912	20.4%	16	0.4%	1,957	44.0%
Total	2,355	52.8%	2,088	46.8%	18	0.4%	4,461	

*Does not include self as perpetrator investigations (i.e. a finding of self-neglect).

** As recommended by the Health and Human Services Commission (HHSC) to ensure consistency across all HHSC agencies, in 2012, the Department of Family and Protective Services (DFPS) adopted the HHSC methodology on how to categorize race and ethnicity. As a result, data broken down by race/ethnicity in 2012 and after is not directly comparable to race/ethnicity data in 2011 and before.

Note: Each victim may have more than one perpetrator at the end of an investigation.

**Perpetrators* in Validated In-Home Investigations
Fiscal Year 2014**



State Total 4,461

**Does not include self as perpetrator investigations (i.e. a finding of self-neglect).*

Note: Each victim may have more than one perpetrator at the end of an investigation.

**Number of Referrals Made to Law Enforcement in
Completed APS In-Home Cases by Region
Fiscal Year 2014**

Region	Referrals
1 Lubbock	190
2 Abilene	160
3 Arlington	1,581
4 Tyler	449
5 Beaumont	152
6 Houston	1,980
7 Austin	894
8 San Antonio	175
9 Midland	153
10 El Paso	209
11 Edinburg	212
Unknown	4
State Total	6,159

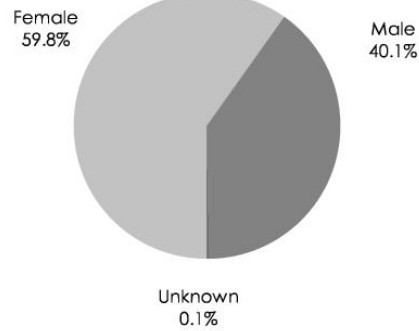
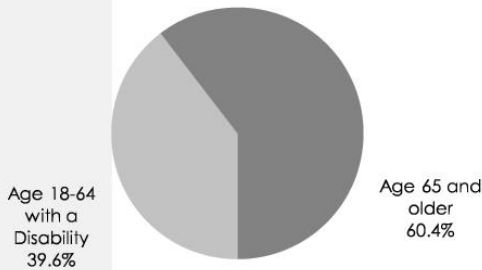
Note: Referral may have been made in previous fiscal year.

**APS Victims of Family Violence in Validated
In-Home Investigations by Region
Fiscal Year 2014**

Region	Victims
1 Lubbock	134
2 Abilene	143
3 Arlington	717
4 Tyler	159
5 Beaumont	106
6 Houston	506
7 Austin	350
8 San Antonio	379
9 Midland	53
10 El Paso	145
11 Edinburg	317
State Total	3,009

**Characteristics of Validated APS Victims
in Completed In-Home Investigations
Fiscal Year 2014**

Race/Ethnicity *	Female		Male		Unknown		Subtotal	
	Count	% of Total	Count	% of Total	Count	% of Total	Count	% of Total
Anglo	17,338	31.7%	11,438	20.9%	48	0.1%	28,824	52.7%
African American	7,209	13.2%	4,400	8.1%	12	0.0%	11,621	21.3%
Hispanic	7,049	12.9%	5,377	9.8%	17	0.0%	12,443	22.7%
Native American	78	0.1%	47	0.1%	0	0.0%	125	0.2%
Asian	220	0.4%	124	0.2%	1	0.0%	345	0.6%
Other	823	1.5%	535	1.0%	14	0.0%	1,372	2.5%
Total Victims	32,717	59.8%	21,921	40.1%	92	0.1%	54,730	



Age	Count	%
Age 18-64 with a Disability	21,657	39.6%
Age 65 and older	33,073	60.4%
Total	54,730	

Gender	Count	%
Female	32,717	59.8%
Male	21,921	40.1%
Unknown	92	0.1%
Total	54,730	

* As recommended by the Health and Human Services Commission (HHSC) to ensure consistency across all HHSC agencies, in 2012, the Department of Family and Protective Services (DFPS) adopted the HHSC methodology on how to categorize race and ethnicity. As a result, data broken down by race/ethnicity in 2012 and after is not directly comparable to race/ethnicity data in 2011 and before.

Validated Allegations in APS In-Home Investigations by Type of Abuse/Neglect/Financial Exploitation Fiscal Year 2014

Region	Emotional/ Verbal Abuse	Financial Exploitation	Medical Neglect	Mental Health Neglect	Physical Abuse	Physical Neglect
1 Lubbock	22	53	1,063	479	66	3,891
2 Abilene	43	63	974	268	72	3,553
3 Arlington	282	239	2,959	1,326	293	10,473
4 Tyler	63	58	552	187	42	3,123
5 Beaumont	33	45	542	164	34	2,571
6 Houston	133	200	2,313	1,037	192	9,432
7 Austin	115	123	1,299	756	160	4,417
8 San Antonio	138	182	1,027	330	157	4,646
9 Midland	16	20	681	356	16	1,899
10 El Paso	44	35	594	309	52	1,641
11 Edinburg	96	89	1,020	790	135	4,211
Unknown	1	1	9	8	0	24
State Total	986	1,108	13,033	6,010	1,219	49,881

Region	Suicidal Threat	Sexual Abuse	Total	% by Region	Unduplicated Validated Victims*	% Unduplicated by Region
1 Lubbock	0	1	5,575	7.7%	4,137	7.6%
2 Abilene	0	1	4,974	6.9%	3,844	7.0%
3 Arlington	0	7	15,579	21.5%	11,507	21.0%
4 Tyler	0	1	4,026	5.6%	3,371	6.2%
5 Beaumont	0	3	3,392	4.7%	2,751	5.0%
6 Houston	0	5	13,312	18.4%	10,178	18.6%
7 Austin	0	5	6,875	9.5%	5,072	9.3%
8 San Antonio	0	7	6,487	9.0%	5,188	9.5%
9 Midland	0	1	2,989	4.1%	2,053	3.8%
10 El Paso	0	3	2,678	3.7%	1,869	3.4%
11 Edinburg	0	7	6,348	8.8%	4,734	8.6%
Unknown	0	0	43	0.1%	26	0.0%
State Total	0	41	72,278		54,730	

* Victims have been unduplicated by investigation stage.

Duration of Service Delivery Stages for APS In-Home Cases During Fiscal Year 2014

Days	Cases	%
Under 30	22,910	55.2%
31-60	10,236	24.7%
61-90	4,340	10.4%
91-120	2,017	4.9%
121-180	1,360	3.3%
181-365	571	1.4%
Over 1 Year	62	0.1%
Total	41,496	

APS

Adult Protective Services In-Home Overview

The mission of Adult Protective Services is to protect people age 65 and older and adults with disabilities from abuse, neglect, and financial exploitation by investigating and providing or arranging for services necessary to alleviate or prevent further maltreatment.

APS serves persons who are reported to be abused, neglected, or financially exploited, and are age 65 or older or age 18-64 with a disability.

Total Average Filled Full Time Equivalent (FTE) Staff*

Caseworkers	538.7
Supervisors	85.5
Other Staff	135.6
APS Program Support	75.0
Total APS In-Home Staff	834.8

Worker Demographics

Turnover Rate	25.2%
Agency Tenure:	
Less Than 1 Year	21.6%
1 - 3 Years	19.0%
Greater than 3 Years	59.5%
Entry Salary*	\$30,532.92
Average Age	41.0
Race/Ethnicity:	
African American	34.0%
Anglo	36.1%
Hispanic	28.3%
Other	1.7%

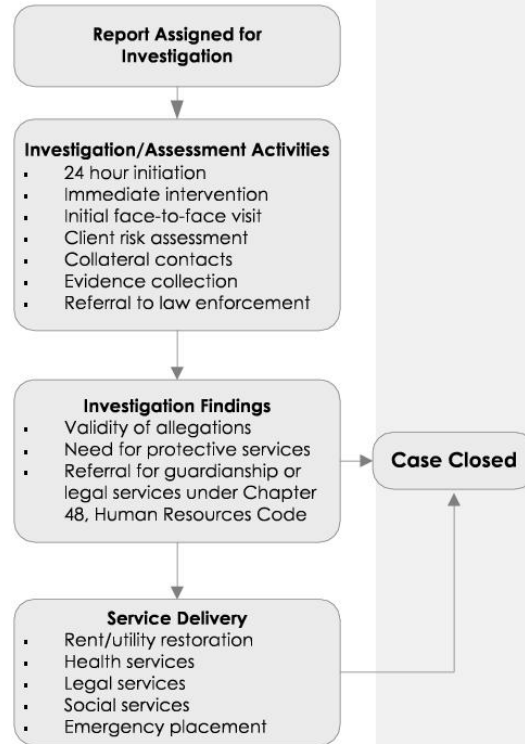
Supervisor Demographics

Turnover Rate	8.0%
Tenure as Supervisor:	
Less Than 1 Year	21.2%
1 - 3 Years	23.5%
Greater than 3 Years	55.3%
Entry Salary*	\$41,416.08
Average Age	46.6
Race/Ethnicity:	
African American	34.1%
Anglo	38.8%
Hispanic	25.9%
Other	1.2%

APS Expenditures*

APS In-Home Staff	\$44,338,990
Purchased Client Services	\$7,688,766
Total APS Expenditures	\$52,027,756

* Source: DFPS Office of Finance and FY 2016-17 LAR (plus benefit replacement pay)



Note: The chart is for reference only and does not necessarily represent the flow of a case.

Statistics FY 2014

Completed In-Home Investigations	81,681
Validated In-Home Investigations	54,731
Completed In-Home Service Delivery Stages	41,496

Most Common...

Person reporting abuse/neglect/financial exploitation
Medical Personnel (21.7%)

Allegation validated
Physical Neglect (69.0%)

Validated perpetrator
Relationship: Adult Children (36.8%)
Gender: Female (52.8%)
Age: Over 45 (58.0%)

Characteristic of client
Gender: Female (59.8%)
Age: 65 and Older (60.4%)