

**DUE PROCESS RIGHTS IN ADULT
PROTECTIVE SERVICES INVESTIGATIONS**

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Patty is a Shareholder in the firm of Schoenbaum, Curphy & Scanlan in San Antonio, a tax and estate planning boutique until Patty brought a new dynamic to the firm—government benefits law. Her clients routinely come in to plan for life and death with Advanced Directives and Estate planning; to talk about nursing home eligibility and use of the Medicaid program; to preserve eligibility for government benefits (SSI, Medicaid and Medicare) in light of a personal injury award and to help young families obtain benefits for disabled children to enhance the child's potential.

Patty is *Certified as an Elder Law Attorney by the National Elder Law Foundation as recognized by the Texas Board of Legal Specialization. She is also a Fellow in the American College of Trusts and Estate Counsel, and an active member of groups focused on Trust, such as the Special Needs Alliance. She is named in the 2011 Inaugural Edition, *Martindale-Hubbell Bar Register of Preeminent Women Lawyers* and again in 2012 & 2013, *Best Lawyers in America* in Elder Law (2007-2013), listed in *Texas Monthly Super Lawyers 2004-2013* in Elder Law, listed in the top 50 Lawyers in South and West Texas (2013) by *Texas Monthly Super Lawyers*, and listed in *Scene in SA San Antonio's Best Lawyers* in Trust and Estate Law (2008-2013). In the fall, 2013, Patty was named the Outstanding Attorney in San Antonio in Elder Law and Estate Planning by the San Antonio Business Journal. She enjoys law so much that in her spare time, she is an Adjunct Professor of Law at St. Mary's University teaching Elder Law, is co-author of a book entitled *Elder Law* published by Thomson-Reuters (formerly West Publishing). But if you ask Patty what her greatest achievements are, she would say they are her daughter, Kristen, who is a University of Texas Law School grad and General Counsel for FoodCorps, her son, Jason, who is an Aggie/Penn State grad now working in Denver as a geo-mechanical engineer and her first grandchild, Isaac James, who will have to choose between UT & A&M someday.

Patty grew up on the southside of San Antonio and after spending most of her life as a city girl, she is now experiencing the joys of living in the country among the Live Oaks and Blackjack trees of La Vernia, Texas (population 933).

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DUE PROCESS RIGHTS IN ADULT PROTECTIVE SERVICES INVESTIGATIONS

I. INTRODUCTION

We originally presented a session on “Handling APS Investigations” during the State Bar Advanced Elder Law Course in 2011. This paper is a sequel, of sorts, building on issues we previously raised in that session about the need for private legal representation of alleged/designated victims and alleged/designated perpetrators in investigations conducted by the Texas Department of Family and Protective Services – Adult Protective Services (APS). The first portion of this paper updates issues related to handling APS investigations. New to the paper is the second portion – which elaborates on the lack of procedural and substantive due process protections for the alleged/designated victims and the alleged/designated perpetrators. The due process portion of the paper focuses on several actual recent cases where the lack of due process in APS investigations 1) put the alleged/designated victim (and his/her estate) at risk, 2) put the alleged/designated perpetrator of abuse, neglect and exploitation at risk, and 3) presented opportunities for private legal counsel and the courts to intervene for the benefit of all involved.

II. INCIDENCE OF ABUSE, NEGLECT AND EXPLOITATION IN TEXAS

According to the Texas Department of Protective Services – Adult Protective Services (APS) website, the mission of APS is: To protect older adults and persons with disabilities from abuse, neglect and exploitation by investigating and providing or arranging for services as needed to stop or prevent further harm.

The website further indicates that the growing population of elderly people and growing awareness of adult abuse have dramatically increased reports of abuse, neglect and exploitation. The website indicates the incidence of APS investigations has increased. In 2014, the most recent year reported on the website, APS completed 81,681 investigations of abuse, neglect, or exploitation involving adults living in Texas communities, plus handled 11,387 facility investigations. Of these, 54,731 were confirmed. This data is divided by 11 Health and Human Services regions, with the Arlington region having the most, 20,826 investigations, and the Midland region having the least, with 3,317 investigations. There is plenty of work to be done by elder law attorneys in this area - here is a chart of the intakes and validations for 2014:

<u>Region</u>	<u>Intakes</u>	<u>Validations</u>	<u>%</u>
Lubbock	6,073	4,138	68%
Abilene	6,159	3,844	62%
Arlington	20,826	11,507	55%
Tyler	5,996	3,371	56%
Beaumont	5,126	2,751	53%
Houston	18,701	10,178	54%
Austin	11,160	5,072	45%
San Antonio	12,616	5,188	41%
Midland	3,317	2,053	62%
El Paso	3,672	1,869	51%
Edinburgh	9,301	4,734	51%

On numerous occasions we have been told by clients who are “alleged perpetrators” that an APS investigator has dissuaded the person from hiring an attorney, indicating “why do you need an attorney if you have nothing to hide?” No one knows how many of the validations might have been avoided had persons being investigated had legal representation. Likewise, there may have been more validations had elder law attorneys been engaged in collateral proceedings, such as guardianship and emergency removal cases, against perpetrators of abuse, neglect and exploitation.

It is also important to note that the statistics cited above represent the progress since the passage of Senate Bill 6 in 2005, which reformed the Texas APS system (discussed in more detail below). The reform effort enhanced APS’ ability to properly investigate abuse, neglect and exploitation of the elderly and disabled, while at the same time increasing the risk of unfounded validations based on faulty investigations.

Elder law and guardianship attorneys are increasingly called upon to participate or otherwise engage in some aspect of APS “in-home” investigations. The attorney’s role can arise in several respects:

- 1) In defense of allegations against family members;
- 2) In defense of allegations against caretakers;’
- 3) In defense of allegations against professionals;
- 4) Appointment as attorney ad litem in Chapter 48 removal proceeding;
- 5) Appointment as guardian ad litem;
- 6) Pursuing guardianship of client on referral by APS;
- 7) Private retention by the subject of investigation;
- 8) Reporting suspected abuse, neglect or exploitation

Once the APS in-home investigation is completed, and in the event there is a “validation” of abuse, neglect, and/or exploitation on the “perpetrator”, the elder law attorney may also be called upon to provide

representation in an appeal of the APS findings. However, it is important to note that only certain “perpetrators” are entitled to a formal administrative review hearing in front of an Administrative Law Judge. All other “perpetrators” are only entitled to an internal “Administrative Desk Review” by regional internal office staff.

This paper reviews the process used by APS to conduct an in-home investigation, techniques the elder law attorney might use in the context of an APS investigation and, in the event of a validation on the client, provides some guidance in navigating through an APS appeal.

III. A BRIEF HISTORY OF ADULT PROTECTIVE SERVICES

The current Adult Protective Services website provides the following description of the history of the Texas Adult Protective Services program:

The Adult Protective Services (APS) Program began in Texas in the mid-1970's with the passage of Title XX of the Social Security Act, which required that states receiving Title XX funds assure that the states' human services systems would protect children, elder adults and adults with disabilities from abuse, neglect and exploitation. During the 72nd Legislature, the Texas Department of Family and Protective Services (DFPS) was created, at which time the APS program was transferred under DFPS.

(http://www.dfps.state.tx.us/Adult_Protection/About_Adult_Protective_Services/APS_history.asp)

Beginning in early 2003, the Honorable Max Higgs, Statutory Probate Judge in El Paso, Texas, decided to begin conducting public hearings in APS cases after having observed many situations where elderly and disabled Texans had been abused, neglected and exploited by perpetrators without proper intervention by APS, even after multiple intakes to the agency. Higgs would determine if APS had been involved with persons who would come before the Court in guardianship and probate proceedings, in addition to emergency removal proceedings filed by the agency. Higgs appointed a few selected attorneys as ad litem in these proceedings, allowed a record to be built with sworn testimony, videos and photographs, and packaged the cases and sent them to Governor Rick Perry. Governor Perry issued Executive Order RP 33, and ordered the Texas Inspector General to investigate alleged breakdowns in the Adult Protective Services system.

Following the Inspector General's investigation, the Texas Health and Human Services issued a rather disturbing preliminary report on deficiencies and failures in the APS system, which can be found at http://www.hhsc.state.tx.us/pubs/051904_PR_RP33.html. HHSC's final report on proposed APS reform on November 15, 2004, and is posted on the APS website at <http://www.dfps.state.tx.us/Documents/About/pdf/aps-final-report.pdf>. The Executive Summary states:

Governor Rick Perry issued Executive Order RP 33 on April 14, 2004, directing the Health and Human Services Commission (HHSC) to oversee the systemic reform of the Adult Protective Services (APS) program within the Department of Family and Protective Services (DFPS). The executive order was motivated by reports of serious problems within the APS program.

HHSC immediately began an intensive review of the APS program and issued a preliminary report on May 19, 2004, with findings from case readings from the El Paso area. HHSC submitted a plan to reform APS to Governor Perry on July 12, 2004, that recommended corrective actions across all aspects of the program.

This final report, required by the executive order, documented the improvements that were to be made as a result of the executive order to strengthen APS policies and procedures, improve program organization and administration, and build and enhance strong community relations. The report also described the next steps for each area.

The estimated cost of the APS reform plan was \$34.1 million over three years, with 38 percent of this amount to be expended during the initial state fiscal year. The plan provided for adding 144 casework staff to the agency's then total of 446 for a 32 percent increase by fiscal year 2007.

Under the plan, the state guardianship program transferred to the Department of Aging and Disability Services (DADS).

HHSC took several key actions that will enhance the protection of the elderly and those with disabilities:

- A five-question tool used by APS to determine a client's mental capacity was to be replaced with a more comprehensive client assessment tool that examined a client's living conditions, financial

status, medical status, mental status, and social interaction and support....

- Key management changes were to be implemented to strengthen oversight and support of local APS offices. Directors for each region were to be hired and new positions were to be allocated to the nine regions based on an improved resource allocation formula.
- A new set of guiding principles and a decision tree tool were to provide caseworkers with clear decision points and a process for determining when to seek additional help from supervisors or subject matter experts.
- The guardianship process was to be redesigned to improve screening. In addition, moving the program to DADS was to prevent conflicts of interest in determining which clients need guardianship services.
- Training was to be enhanced through \$1.5 million provided by Governor Perry through the Texas Workforce Commission. The training was to blend supervised field experience with computer-based and classroom training.

The APS reform plan also called for implementation of a performance management system focused on accountability and outcomes, and technology and policy improvements to ensure that caseworkers are able to effectively use information about prior cases.

It is with this context that we now discuss APS investigations in the State of Texas.

IV. INITIATION OF APS IN-HOME INVESTIGATIONS

The Adult Protective Services website (https://www.dfps.state.tx.us/adult_protection/) provides this scenario as a typical APS in-home investigation case:

A. Portrait of an In-Home Client

(all names in this scenario are fictitious):

Mrs. Gregg was admitted to the hospital with a ruptured left eye due to untreated glaucoma. Her hair was matted and her clothes were soiled. She had sores on her legs and her toenails were so long they curved over and under her feet. Mrs. Gregg lived with a daughter who had a history of mental illness. APS found that their home was infested with roaches and cluttered with trash inside and out. A nephew, who was representative payee, was grossly exploiting both mother and daughter. APS arranged, through other state and community agencies, home-delivered meals, in-home care,

ongoing medical treatment and direct deposit of the clients' social security checks, and for the daughter to be taught to write checks and manage money.

Regardless of the reason for the elder law attorney's involvement in the above scenario, the attorney should understand that, in conducting this investigation, the APS caseworker would refer to the APS In-Home Handbook, which can be found on-line at <https://www.dfps.state.tx.us/handbooks/APS/default.asp>. The Handbook draws references from Chapter 48, Title 2 of the Texas Human Resources Code (HRC) and Chapter 40 of the Texas Administrative Code (TAC).

Upon the intake into the APS hotline, the intake worker would assign the case a priority, ranging from 1 (most urgent) to 5 (least urgent). See 40 TAC § 705.6101 and Chapter 1600 of the APS Handbook. This case would likely be given a very high priority.

The case may very well have warranted an Emergency Order for Protective Services under Section 48.208 of the Human Resources Code. The APS caseworker would refer to Chapter 4500 of the APS Handbook for guidance to conduct the emergency removal. If APS pursued the emergency removal, APS would initiate the removal in a court with probate jurisdiction, and the court would have to appoint an attorney ad litem to represent the elderly or disabled person. See HRC §48.208(g). See also APS Handbook Section 4000 – Legal Actions.

In this scenario, the elder law attorney could also be retained by Mrs. Gregg to respond to the APS intervention. Whether involved as the attorney ad litem or as retained counsel, the threshold question for Mrs. Gregg's legal representative would be: does she have capacity to refuse APS services, or does the State of Texas need to intervene in her life? The above scenario does not include an analysis of Mrs. Gregg's capacity – what is APS' plan to permanently resolve Mrs. Gregg's situation?

Chapter 48.208(a) allows an emergency removal only when, because of mental or physical impairment, the person is incapable of understanding the nature of the services offered and agreeing to receive or reject protective services. This capacity assessment is critical in determining whether APS intervention and an emergency order for protective services is warranted. The details of the EOPS process is outlined in Chapter 48.208 of the Texas Human Resources Code and should be reviewed very thoroughly by counsel.

Mrs. Gregg more than likely was reported to APS by hospital staff and/or someone in the community who found her in the described condition. The attorney should ask the APS caseworker about prior intakes into the Department – there may be and often is

a prior history of APS involvement with a client who later comes to the attention of a court. The history of prior interventions (or lack thereof) is very important to ascertain.

1. Obtaining the APS case file.

One issue that must always be addressed in an APS investigation is the methodology used in the investigation, and the reliability of the initial report, of information from collateral sources, and of factual findings by the department. Whether counsel is representing the alleged or designated perpetrator, the APS client, the guardian, or is involved in some other capacity, counsel must obtain the APS case file.

Section 705.7107 of the TAC establishes the right to access to the APS file, and allows redacted records to be released to the APS client, a court-appointed guardian of an APS client, an attorney, attorney ad litem, or other court appointed legal representative of the APS client, an alleged or designated perpetrator of abuse, neglect, or exploitation of an APS client (the perpetrator is only entitled to those portions of the investigation records that relate to the alleged or designated perpetrator), and the reporter or otherwise a person interviewed as a part of an investigation of abuse, neglect, or exploitation (the reporter or person interviewed is also only entitled to that portion of the investigation record that relates to that person's interview).

It is common for APS to object to production of redacted records, and for counsel seeking the records to have to subpoena the records and secure an order from the Probate Court ordering the production of the records. On occasion, it may be necessary to request the Court to review *unredacted* records for the Court to obtain a full understanding of the content of the records, particularly when there is an allegation that a false report was made to APS.

The attorney should also determine whether the intake qualifies as a “complex case” or a recidivist case, which would require a more developed investigation. *See* Section 48.1521 and 48.1523 of the Human Resources Code, respectively.

2. The APS Investigation.

The APS Investigator will be guided by Chapter 1300 of the APS Handbook in conducting the investigation of the allegations made against the alleged perpetrators.

Chapter 1300 of the APS Handbook is primarily derived from Chapter 48 of the Human Resources Code. HRC 48.002 provides the key definitions for the terms “elderly person”, “disabled person”, “abuse”, “exploitation”, and “neglect”. There are multiple variations and gradations of abuse, neglect, and exploitation referenced in the APS Handbook. *See also* TAC Section 705.1001.

Section 48.151 of the Human Resources Code requires APS to initiate a “prompt and thorough investigation” as needed to evaluate the accuracy of the report and to assess the need for protective services (absent a meritless or frivolous report). Section 48.152 requires, at a minimum, an interview with the elderly or disabled person “if appropriate” as well as persons “thought to have knowledge of the circumstances.” Beyond these mandates, the Code requires APS to develop rules to govern the investigations.

3. Sensitive and High-Profile Cases

From the outset of the investigation, the APS caseworker will consider whether the case is “high profile” or “sensitive.” *See* Chapter 2134, APS Handbook. Chapter 2134 of the APS Handbook appears to be derived from policy only – there is no statutory basis for these provisions of the APS Handbook.

According to the APS Handbook, “Sensitive and high profile cases require additional safeguards to protect confidentiality. Cases designated as sensitive are stored in a protected area in IMPACT to limit access by staff, even for inquiry purposes.” In such a case, the APS caseworker marks the case as sensitive. The supervisor approves the sensitive case designation, which restricts all access to the case to 1) the primary and secondary APS specialists; 2) the assigned APS specialist’s chain of command; and 3) staff with the sensitive case security attribute in IMPACT. Chapter 2134 references the following examples of sensitive and high profile cases:

- A DFPS employee is the alleged victim or the alleged perpetrator.
- The spouse, relative, significant other, or household member of a DFPS employee is the alleged victim or the alleged perpetrator.
- The alleged victim is a ward of a guardianship agency or program.
- the case has gained or is suspected to gain the attention of a legislator.
- A non-DFPS employee in the same office, such as a DADS or DSHS employee, is the alleged victim or the alleged perpetrator.
- The alleged victim or the alleged perpetrator is a high profile individual, such as a county judge, legislator, or district attorney.
- The case has gained or is expected to gain media attention.
- The client has died under unusual circumstances.
- Regional Management staff determines that the case requires special handling for other similar reasons.

There is, indeed, a substantial likelihood that an attorney who handles enough APS investigations will

encounter cases of great public interest. Media outlets are interested in stories involving the vulnerable, and the attorney may be faced with media scrutiny of a high-profile APS investigation. The attorney should refer to several key provisions of the Texas Disciplinary Rules of Professional Conduct.

B. Ethical Considerations

The attorney can face a complex and difficult situation when, within the context of an APS investigation, a client or former client with diminished capacity (or the family of the client or perhaps some random third party) makes allegations of abuse, neglect, or exploitation against the attorney. There are cases where the attorney attempts to continue to represent the interests of an incapacitated client who is under investigation by APS. Rule 1.02 should be consulted in this instance:

1. Rule 1.02: Scope and Objectives of Representation

- (a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a clients decision:
- (1) concerning the objectives and general methods of representation;
 - (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;
 - (3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify....
- (g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for,

Comments: Client Under a Disability

Paragraph (a) assumes that the lawyer is legally authorized to represent the client. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purpose of this rule.

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. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such

appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. *See* Rule 1.05 (c)(4), d(1) and (d)(2)(i) in regard to the lawyer's right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.

Rule 1.03 also offers guidance in the attorney's relationship with the APS client:

2. Rule 1.03 Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comments: Client Under a Disability

In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, childrens' opinions regarding their own custody are given some weight. The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect. *See also* Rule 1.02(e) and Rule 1.05, Comment 17.

See Franks v. Roades, 310 S.W.3d 615 (Tex. App. - Corpus Christi-Edinburg 2010) (Court of Appeals reversed sanction of attorney who represented daughter/agent under of attorney in guardianship proceeding on the mother/principal, who was the attorney's original client. Court found attorney was protected by complying with Rule 1.02.

3. Rule 3.07: Trial Publicity

- (a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

- (b) A lawyer ordinarily will violate paragraph (a), and the likelihood of a violation increases if the adjudication is ongoing or imminent, by making an extrajudicial statement of the type referred to in that paragraph when the statement refers to:
- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness; or the expected testimony of a party or witness;
 - (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense; the existence or contents of any confession, admission, or statement given by a defendant or suspect; or that person’s refusal or failure to make a statement;
 - (3) the performance, refusal to perform, or results of any examination or test; the refusal or failure of a person to allow or submit to an examination or test; or the identity or nature of physical evidence expected to be presented;
 - (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or
 - (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed creates a substantial risk of prejudicing an impartial trial.

Please note the exception to the Rule:

- (c) A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:
- (1) the general nature of the claim or defense;
 - (2) the information contained in a public record;
 - (3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;
 - (4) except when prohibited by law, the identity of the persons involved in the matter;
 - (5) the scheduling or result of any step in litigation;
 - (6) a request for assistance in obtaining evidence, and information necessary thereto;
 - (7) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest....

To the extent applicable, the parameters established by Rule 3.07 must be weighed against the great public interest in ensuring a viable adult protective services system.

C. Disposition of the Case.

The APS Handbook provides the most guidance on how APS will dispose of the case in the event there is a “validation” of the allegations in the intake report.

Section 705.1001 of the Texas Administrative Code provides terminology defining the subject of the investigation throughout the process.

Alleged perpetrator: A person who is reported to be responsible for the abuse, neglect, or financial exploitation of an alleged victim.

Designated perpetrator: An alleged perpetrator who has been determined in a validated finding to have abused, neglected, or financially exploited a designated victim.

Sustained perpetrator: A designated perpetrator whose validated finding of abuse, neglect, or financial exploitation of a designated victim has been sustained by an administrative law judge in a due process hearing including a release hearing or Employee Misconduct Registry (EMR) hearing, or the designated perpetrator has waived the right to a hearing.

It was actually not until just a few years ago that APS began notifying an alleged perpetrator that he or she was being investigated by APS or that an adverse finding was rendered. In one recent case, the Department of Aging and Disabilities Services attempted to terminate contracts with a state-licensed adult foster provider based on an APS validation of exploitation against the foster provider. The foster provider was aware that there had been APS investigations years before, but did not know she was the alleged perpetrator or that allegations against her had been validated. Upon notification of the Department by legal counsel, APS took the position that at the time of investigation the alleged perpetrator did not have the right to know of the investigation or of the findings. However, APS did concede that the now “designated perpetrator” should have been given a hearing before the findings were released to DADS.

The Texas Administrative Code establishes procedures for Release Hearings when APS validates an allegation of abuse, neglect or financial exploitation of a designated victim and the findings are to be released outside of DFPS to an entity which allows the designated perpetrator access to adults with disabilities, adults aged 65 or older, or children. The perpetrator must be given prior written notification (except in emergencies) and an opportunity to appeal. *See* 40

TAC Section 705.4105 and Chapter 5400, “Due Process”, APS Handbook).

D. Reports of Criminal Conduct to Law Enforcement Agency

Pursuant to Human Resources Code § 48.1522, an APS caseworker or supervisor who has “cause to believe” that an elderly or disabled person has been abused, neglected or exploited “in a manner that constitutes a criminal offense” under the law (including Texas Penal Code § 22.04 – Injury to a Child, Elderly Individual, or Disabled Individual), the caseworker or supervisor “shall” immediately notify appropriate law enforcement agencies and provide the agency with a copy of the investigation report in a timely manner.

It is entirely possible that the APS investigation report may be lacking in detail, accuracy, and defensible findings, and that law enforcement will rely on the investigation report to initiate a prosecution against the Designated Perpetrator. It is also likely that APS will make this report to law enforcement before the Designated Perpetrator is made aware of APS’ findings against her or him, or perhaps even that he or she is the subject of the investigation. This is yet another reason for legal counsel to become engaged at the earliest possible moment of the investigation.

V. ADMINISTRATIVE DESK REVIEW

Beginning about six years ago, APS decided to begin notifying the alleged perpetrator of the investigation and, in the event of a validation, began providing the designated perpetrator a right to a face-to-face administrative appeal within a designated employee within the local APS office.

This process did not last long. In July, 2010, the APS Handbook was amended to incorporate Chapter 5300 – “Administrative Desk Review for Designated Perpetrators.”

The “administrative desk review” is an “informal review conducted by the regional director or designee for APS. The Handbook indicates “the outcomes of the reviews offered to designated perpetrators under this section are final and cannot be appealed.”

All Designated Perpetrators will be limited to an Administrative Desk Review unless the Designated Perpetrator is:

- subject to inclusion on the Employee Misconduct Registry (EMR) (see 5410 Employee Misconduct Registry (EMR));
- eligible for due process, but not subject to inclusion on the EMR (see 5420 Due Process for Non-EMR Cases); or
- a school employee (see 5441 Administrative Review for School Employees).

Designated Perpetrators may also be ineligible for an administrative desk review if:

- the allegations are valid-no fault, or self-neglect;
- during the investigation, the APS specialist was unable to locate the perpetrator despite reasonable efforts to do so;
- during the investigation, it was determined it would place the client at risk of harm to interview the perpetrator;
- notifying the perpetrator of the findings would place the client, the reporter, or any other person who participated in the investigation of the allegations at risk of serious physical or emotional harm; or
- notifying the perpetrator will make it impossible to provide services to the client.

Law enforcement or prosecuting attorneys may request the notification be delayed because of a pending criminal investigation or court proceeding.

To be clear, the administrative desk review is not due process. The authors have spoken with a regional attorney for APS, who confirmed that APS does not even attempt to represent the administrative desk review to be due process.

The designated perpetrator does not have the right to be present during the administrative desk review, does not have the right to confront witnesses or the APS investigation staff, and does not have a right to appear before an impartial tribunal; however, “he or she may submit, along with a request for review, the reasons he or she disagrees with the finding, as well as any other written statements, documents, and so on, that he or she wishes to have considered during the review.”

If there is a validation, the APS caseworker notifies (with some exceptions) the designated perpetrator of the investigation findings and the eligibility to request an administrative desk review via certified mail. (Section 5320, APS Handbook). The regional director or his/her designee conducts the administrative desk review, and must be at least a subject matter expert or higher and cannot have directly supervised the caseworker or have been involved in the investigation. The review must occur within 45 days of the request for the review is received by the Department (with more exceptions).

The Designated Perpetrator can send in papers and documentation to try to reverse the caseworker’s findings (chances are these were previously provided to the investigator or obtained by the investigator during the investigation stage of the case); however, the Designated Perpetrator cannot have a face-to-face interview or any hearing whatsoever to appeal a finding that could cost the DP a job, a career, and

possibly held in abeyance until some later time and then lead to his or her prosecution and imprisonment.

Pursuant to § 5330 of the APS Handbook, the regional director or designee (subject matter expert level or higher) completes the administrative desk review. The reviewer must not have directly supervised the APS specialist or have been involved in the investigation.

Upon receiving the request for the Administrative Desk Review, the reviewer is expected to examine the entire case record and any external documentation. The reviewer may seek additional information from the APS specialist and supervisor involved in the case. If the reviewer determines the investigation is incomplete, the reviewer:

- postpones the administrative desk review; and
- directs the APS specialist to request a data correction to reopen the investigation stage so further investigation can be conducted.

If the reviewer decides to overturn (not alter or uphold) the finding, the reviewer sends the perpetrator the Notification of Results of Administrative Review (Form 2263) form letter informing the perpetrator of the outcome of the administrative desk review. Because the administrative desk review is complete, the perpetrator does not need to provide any additional information.

However, if upon initial examination of the case, the reviewer believes the finding should be upheld or altered to Unable to Determine, the review is not completed until the perpetrator has had an opportunity to:

- request and review a copy of the case record; and
- provide additional information in writing regarding the allegations.

Pursuant to § 5331 of the APS Handbook, the Administrative Desk Review and notification to the designated perpetrator of the outcome of the review are completed within 45 days from the date that the request by the perpetrator is received unless:

- court proceedings related to the abuse, neglect, or financial exploitation are pending at the time;
- court proceedings are started after the review is requested;
- the reviewer determines the investigation is incomplete and further investigation is necessary;
- the perpetrator has indicated he or she has requested a copy of the case record to review before providing any additional information or statements about the allegations; or
- the perpetrator has indicated (in writing or via phone call to the program administrator) a delay

in receiving records (such as bank statements, hospital records) requested in response to the validated allegation.

If court proceedings are involved, APS should postpone the review until the court proceedings are completed. DFPS makes a good faith effort to complete the review within the 45-day time frame. However, failure to do so within the given time frame does not waive the review or reverse the finding.

The reviewer then sends the Designated Perpetrator the “Notification of Results of Administrative Desk Review form letter” informing the perpetrator of the outcome of the administrative desk review. **The outcome is final and cannot be appealed.** The findings and outcome are not released outside the Department. The findings of the case and outcome of the administrative desk review are not released outside DFPS. However, a court in which a guardianship is pending will be notified. (APS Handbook §5335). Additionally, findings of abuse, neglect and/or exploitation against a Designated Perpetrator may be resurrected at some point in the future, such as if the Designated Perpetrator applies for guardianship on a loved one and the probate court requests a history of investigations on the applicant, or if there is some other kind of background check performed on the Designated Perpetrator. Also, the finding will be preserved and referenced in the event another intake is reported regarding the Designated Perpetrator.

The APS policies do not explain why there is a distinction between the appeal process for Designated Perpetrators where the validation finding is to be released, and Designated Perpetrators where the validation is determined to by APS to not be worthy of release. The author has been advised by APS staff that if the APS validation is kept internally within the APS files and never made public, why would the Designated Perpetrator care? Wise but disinterested observers respond: why do the investigation and make validations if no one knows and no one cares?

In every instance where the authors have been approached by an Alleged or Designated Perpetrator about being the subject of an APS investigation, that person has cared about the investigation and about the outcome, regardless of whether APS findings are released or remain internal within the agency. There is simply no rational basis for the distinction made by APS in the review and appeal process.

VI. DUE PROCESS

In May, 2014, APS revised a significant portion of § 5400 of the APS Handbook entitled “Due Process.” Nothing up to this point of the paper has had anything to do with due process, and cannot be considered due process.

Employee Misconduct Registry (APS Handbook §5410-5416)

The Employee Misconduct Registry (EMR) is a public database maintained by DADS pursuant to Health & Safety Code, Chapter 253. The purpose of the Employee Misconduct Registry is to ensure that unlicensed personnel who commit acts of abuse, neglect, or exploitation against residents and consumers are denied employment in certain facilities. A person whose name is listed on the EMR is permanently denied certain types of employment. Agencies whose employees are subject to the EMR may not employ a person listed on the EMR. Employers might use the EMR as an employment screening tool.

The APS specialist uses a multi-step process when determining EMR eligibility. The APS specialist determines whether an employee is EMR eligible, an EMR eligible employee has a validated finding of abuse, neglect, or financial exploitation; and the validated finding of abuse, neglect, or financial exploitation rises to the level of reportable conduct.

If the EMR process is declined by APS legal or state office, and APS staff intends to release the findings of the investigation outside of DFPS, the perpetrator must be offered non-EMR due process as outlined in § 5420 - Due Process for Non-EMR Cases.

If the finding is appropriate for an EMR hearing, immediately upon receiving a Request for EMR Hearing, APS is to forward the request to the administrative hearings docket clerk for assignment to an administrative law judge (ALJ). The ALJ schedules a hearing as soon as possible and sends a Notice of Hearing to the employee and to the EMR attorney. The hearing is usually held in the same DFPS region where the alleged reportable conduct took place. In the event the ALJ finds against the employee, the employee may request judicial review of an ALJ's finding of reportable conduct. To request judicial review, the employee files a petition for judicial review in a Travis County district court no later than 30 calendar days after the Hearing Order is received by the employee.

Due Process Resulting from Investigations Not Involving Release of APS Findings in Non-EMR Cases (APS Handbook §5420-5423) (apparently derived from DFPS Rules, 40 TAC §705.4105(d)(1))

The APS Handbook gives examples of Designated Perpetrators who 1) are not confined to the Administrative Desk Review process, and 2) whose cases do not involve the EMR.

Many licensed professionals will fall into this category of investigation.

APS provides the following examples of cases that fall within this category:

- licensed professionals, such as nurses, social workers, attorneys, and psychologists;
- employees of home and community support services agencies (HCSSAs) who do not hold a professional license and are not subject to inclusion in the EMR because their actions do not rise to the level of reportable conduct;
- a person who is privately hired and paid by the alleged victim or on behalf of the alleged victim to provide personal care services and who has other employment (such as at an HCSSA, a state-supported living center, a state hospital, or a home or community support services setting) that allows the perpetrator access to children or other vulnerable adults and the opportunity to commit similar acts of abuse, neglect, or financial exploitation;
- a person who is a designated perpetrator for abuse, neglect, or financial exploitation against a family member and whose employment (such as at an HCSSA, a state-supported living center, a state hospital, or HCS settings) allows the perpetrator access to children or other vulnerable adults and the opportunity to commit similar acts of abuse, neglect, or financial exploitation; and
- DADS guardianship specialists in their role as guardian for a person who is a ward of DADS. See 5100 Confidentiality, Disclosure, and Release of Case Information.

In these instances, APS must provide the designated perpetrator with **complete due process** before APS may release the investigation finding of Valid outside of DFPS.

In June, 2012, APS modified its Handbook to remove the Administrative Desk Review as the first step of this appeal process, and instead initiated an "Administrative Review", which is similar to the process used before the invention of the "Administrative Desk Review."

Now, to ensure that the designated perpetrator receives due process, the APS specialist follows a two-stage process that involves an administrative review **and** a release hearing.

Step 1: Administrative Review (APS Handbook § 5422)

The first step in providing due process for non-EMR cases is to offer the designated perpetrator an "administrative review" of the investigation findings. An administrative review is an informal review conducted by an APS regional director or designee. The administrative review is required before offering a release hearing to the designated perpetrator. If the designated perpetrator is an

employee of DADS who is acting as an agent for DADS Guardianship Services program, the administrative review is conducted by a reviewer from the APS region that conducted the investigation. If APS determines that a delay in releasing the findings will place persons age 65 or older or adults with disabilities in a state of or at risk of serious harm, APS may release the findings before offering due process to the designated perpetrator.

The regional director or designee for Adult Protective Services conducts the administrative review. The reviewer must not have directly supervised the APS specialist or have been involved in the investigation. The review is conducted within 30 calendar days from the date the request by the perpetrator is received unless:

- the perpetrator requests the review be postponed because he or she has not received the case record yet; or
- court proceedings related to the abuse, neglect, or financial exploitation are pending at the time or are started after the review is requested.

If court proceedings are involved, APS postpones the review until the court proceedings are completed. DFPS makes a good faith effort to conduct the review within the 30 day timeframe. However, failure to do so in the given timeframe does not waive the hearing or reverse the finding.

At the administrative review, the perpetrator may:

- appear in person at the administrative review and may be accompanied by a representative;
- submit written material that is relevant to the case;
- have a certified interpreter provided by DFPS if the perpetrator does not speak English or is deaf, or may provide his or her own interpreter; or
- all of the above. (APS Handbook §5422.1)

Formal rules of evidence are not applicable to the administrative review. The perpetrator may make statements, provide information, or ask questions. The perpetrator may bring statements from additional witnesses. No live testimony from witnesses other than from the perpetrator is accepted at this informal review. The reviewer may clarify issues, ask questions, and gather any information needed for a decision.

Within 45 days of the administrative review, the reviewer makes a decision to sustain, alter, or reverse the original APS findings based on the same requirements and criteria that APS specialists and supervisors use to conduct investigations and reach conclusions.

If a perpetrator does not agree with the administrative review findings, he or she must request a release hearing by mailing the Request for a Release Hearing back to APS.

The request must be postmarked within 20 calendar days after the official notice is mailed by DFPS or the right to a release hearing is forfeited. If a hearing is not requested within 20 calendar days after the official notice is mailed by DFPS, the regional director or designee releases the findings. Regional staff may use discretion and wait 30 calendar days after the official notice is mailed by DFPS to receive a request.

Step 2: Release Hearing (APS Handbook §5423)

If the finding at the administrative review is upheld, the APS specialist offers the designated perpetrator a release hearing.

A release hearing is a formal due process hearing conducted by an administrative law judge (ALJ). If the ALJ upholds the finding on the allegation of abuse, neglect, or financial exploitation, then APS releases the findings outside of DFPS.

The release hearing is conducted by the state office of administrative hearings (SOAH). The director of administrative hearings in the Office of General Counsel appoints an attorney to represent DFPS and seek a hearing date from SOAH. The attorney has authority over the manner and substance of the presentation of the DFPS case.

The hearing is held in the region responsible for the investigation, unless the ALJ determines that good cause exists for moving the hearing.

At any time before the conclusion of the hearing, the case may be informally disposed of by withdrawal, default, settlement, or other actions by DFPS staff.

If the ALJ sustains the APS findings, the regional director for Adult Protective Services, in coordination with the regional attorney, approves the manner and content of the release of data.

If the ALJ does not find that abuse, neglect, or financial exploitation is shown by a preponderance of the evidence or finds that the perpetrator is incorrectly designated, the AP's designation must be changed to conform to the ALJ's determination.

Due Process For Client Protection

Section 5430 of the APS Handbook follows essentially the same process outlined above for investigations in which there is a need to release APS findings and that do not fall in the above categories but where the release is to occur "for the protection of APS clients."

Cases Involving School Personnel

Section 5440 of the APS Handbook outlines the process for handling appeals for school employees.

VII. CASE SCENARIOS FOR CONSIDERATION

Grandmother and Grandson

Facts: Grandmom, 82 years old, unexpectedly comes into about \$1,000,000.00 resulting from Texas oil and gas interests. Grandson is living with her, unemployed and needing money. He doesn't have a driver's license and cannot cash checks. Grandmom signs checks in blank but writes in the amount on each check. A care provider for Grandmom's husband calls in a report to APS, indicating she believes the grandson is exploiting his Grandmom. APS initiates an investigation, securing Grandmom's bank records and medical records without her consent. APS interviews her, but does not advise her of a right to counsel, and does not tell her they are obtaining her medical and financial records. APS does not perform a psychiatric assessment to determine her capacity to make her decisions or to give gifts. Grandmom seeks out legal counsel who secures a psychiatric evaluation on Grandmom from a board certified geriatric psychiatrist who is also an attorney. The MD/JD indicates mom is completely competent to give away her money. Counsel for Grandmom sends the evaluation to APS, and asks on behalf of Grandmom that the APS investigation be terminated.

Outcome: APS refuses to terminate the investigation. The APS Regional Director sends Grandmom's counsel this response:

1. APS does not advise anyone of rights to counsel as we are not law enforcement officers. If we take legal action, we are very good at notifying legal counsel appointed to or hired by the client through our APS attorney or county attorney of the pending proceedings and status of client.
2. Grandmom was very pleasant and forthcoming in assisting us with our investigation. It is apparent she was not aware of the total amounts of the checks she wrote and it appears deception and undue influence resulted in her actions.
3. We do not require a capacity evaluation as APS will not be seeking guardianship or other legal action that would affect Grandmom at this time. Our intent is to stop the exploitation.
4. We have authority and a duty under Chapter 48.152 of the Texas Human Resource Code to continue investigation **even if the client refuses:** INVESTIGATION. (a) An investigation by the department or a state agency shall include an interview with the elderly or disabled person, if appropriate, and with persons thought to have knowledge of the circumstances. If the elderly or disabled person refuses to be interviewed or cannot be interviewed because of a physical or mental impairment, the department shall continue the investigation by interviewing other persons thought to have knowledge relevant to the investigation. (b) The investigation may include an interview with an alleged juvenile perpetrator of the alleged abuse, neglect, or exploitation. (c) The department or state agency may conduct an interview under this section in private or may include any person the department or agency determines is necessary.

We have reported suspected criminal activity to law enforcement as required under: 48.1522. REPORTS OF CRIMINAL CONDUCT TO LAW ENFORCEMENT AGENCY. (a) Except as provided by Subsection (b), if during the course of the department's or another state agency's investigation of reported abuse, neglect, or exploitation a caseworker of the department or other state agency, as applicable, or the caseworker's supervisor has cause to believe that the elderly or disabled person has been abused, neglected, or exploited by another person in a manner that constitutes a criminal offense under any law, including Section 22.04, Penal Code, the caseworker or

supervisor shall: (1) immediately notify an appropriate law enforcement agency, unless the law enforcement agency reported the alleged abuse, neglect, or exploitation to the department; and (2) provide the law enforcement agency with a copy of the investigation report of the department or other state agency, as applicable, in a timely manner.

Analysis: Counsel for Grandmom spoke with APS Policy Counsel in Austin, and confirmed that it is the position of APS that the Texas Legislature has mandated the agency to investigate and make findings on **all intakes** of abuse, neglect, and exploitation of called in on a Texan over age 65 **and** any adult Texan with a disability. The functional and mental capacity of the alleged victim is irrelevant to the APS investigation. Grandmom's capacity in this scenario is irrelevant. APS is under no obligation to consider her capacity unless APS makes the decision to pursue guardianship, which it did not. The Regional Director, and APS Policy Counsel, indicated that Grandmom had no due process rights into the investigation into her affairs and her finances. She could not intervene, take the case to court, or appeal in any way. APS validated on the grandson for exploitation¹, and tendered its investigation to law enforcement for investigation. Note: APS Handbook § 4220 states,

The APS specialist's opinion about alleged victims' decision-making capacity is never the sole basis of not providing protective services to alleged victims who are determined to be unsafe. APS seeks evaluations from medical or mental health professionals to determine whether alleged victims are physically or mentally capable of making informed decisions about the need for protective services.

Grandmom, who is completely competent, has no due process rights regarding the intervention by State of Texas – through APS - into her personal and financial affairs.

Pastor and Parishioner

Facts: Pastor of a church which an elderly widowed parishioner has attended for many years takes parishioner to numerous medical and other appointments. The church allows parishioner to live in the church parsonage for \$300.00 per month. Parishioner periodically gives gifts to Pastor and other friends, some of whom are members of the church. Parishioner gives pastor \$1,000.00 to go on vacation, and updates her estate plan with a prominent

probate/real estate attorney before the pastor leaves for vacation. The attorney interviews both the pastor and the parishioner, and determines that parishioner has the capacity to update her estate plan, which names the pastor as guardian, agent under powers of attorney, and executor and beneficiary of parishioner's will. Several weeks later pastor goes on vacation and, while he is away, parishioner becomes disoriented and confused. Parishioner's bank calls APS, which initiates an investigation into pastor. Pastor is told by APS to stay away from parishioner, and that his authority as agent under power of attorney is revoked. Pastor retains counsel and counsel seeks to discuss the investigation with the APS caseworker and supervisor. APS refuses, indicating its investigation is closed. Pastor does not receive letter indicating findings for three weeks, during which APS continues its investigation and interviews additional witnesses. APS never performs a psychiatric evaluation on parishioner, and does not initiate a proceeding under Chapter 48 of the Human Resources Code. Instead, APS allows parishioner to move 80 miles away from the church with the owner of a roadside café in the middle of nowhere that is going bankrupt. Church friends and the pastor are prevented from interacting with Parishioner. No one has legal authority to manage parishioner's funds or to make medical decisions for her.

Outcome: Pastor is concerned about parishioner, and initiates a guardianship pursuant to § 1102 of the Texas Estates Code. The Probate Court appoints a guardian ad litem who is a registered nurse to investigate the need for guardianship. The Probate Court also orders an independent psychiatric evaluation on parishioner and appoints a temporary guardian of her person and estate. The psychiatric evaluation indicates that parishioner is now totally incapacitated, contrary to her apparent condition just four months before. Pastor tenders the vehicle and personal possessions which were left at the parsonage to the temporary guardian.

Analysis: There is such a thing as state-sanctioned neglect and abuse. It is evident that in this proceeding the State of Texas through APS intentionally avoided going to court for the benefit of parishioner, instead relying on informal means to try to address her needs. The pastor, and the Court, intervened for her protection in spite of actions taken by APS. The pastor is pending an Administrative Desk Review in which he will do his best to challenge this shoddy investigation. However, the pastor has no due process rights regarding the intervention by State of Texas – through APS - into his parishioner's personal and financial affairs, even though he was designated by her, through legal counsel, as her agent and guardian. The pastor has no right to a hearing with a judge, to present evidence, or to challenge the investigation before an

impartial tribunal. The pastor is only allowed to submit documents for consideration by an APS supervisor who is part of the staff that validated upon him for exploitation.

Home Health Care Provider and Client

Facts: Home Health Care Provider was also agent under power of attorney for a client who was living in her own home. Client was chronically behind on payments for services, and eventually signed her car over to the Provider to offset the growing bill for home health care services. Provider sold the car for a few thousand dollars and applied the proceeds to offset the bill to Provider. Client then calls APS and reports Provider for exploitation. Provider retains counsel and a certified public accountant to provide a financial analysis of statements and payments – the analysis shows that Client still owes Provider funds. APS refuses to meet with Provider’s attorney and CPA, and closes the case, validating on Provider. APS never performs a psychiatric evaluation on Client, and leaves Provider holding \$10,000.00 in cash and cashier’s checks that belong to Client (despite repeated requests by Provider and her counsel to direct Provider as to what should be done with the funds).

Outcome: Provider initiated a guardianship proceeding for the benefit of client. The Probate Court appointed a psychiatrist who found Client to be mentally incapacitated and in need of a guardian of her person and estate. The guardianship is currently set for hearing, at which time Provider will tender the \$10,000.00 to the temporary guardian. Provider is pending an Administrative Review as she has a license, and will appeal to the State Office of Administrative Hearings in the event she loses at the Administrative Review.

Analysis: APS investigations are required to be “thorough” – in this case there was no psychiatric assessment on Client, and no effort to ensure a decision maker was in place to secure and manage Client’s funds. Provider will have to expend funds on legal representation at the Administrative Review and, presumably, at the Release Hearing before SOAH. The Court will likely appoint a Permanent Guardian of the Person and Estate for Client.

VIII. CONCLUSION

The authors have had one case – the one previously mentioned involving the adult foster provider whose license was threatened by the APS findings reported to DADS. In that case, APS validated on the foster provider for allegedly stealing \$130.00 from a resident of the foster home. Evidence presented to the administrative law judge demonstrated

that the theft did not occur, and that the resident actually owed the foster provider for services rendered. The APS supervisor who testified stated that the case, in her opinion, was “cut and dried.” The ALJ responded that the case was anything but “cut and dried” and found against APS, reversing its validation of exploitation on the foster provider.

The authors are hopeful that the Texas Legislature will consider reforms to ensure that every alleged victim and every alleged perpetrator involved in APS investigations receives proper due process. In the meantime, there is a significant role that elder law attorneys can and should play in ensuring accountability from APS, as well as proper outcomes in APS investigations for the good of all concerned.

¹Patty Stichter notes that the APS Regional Director of Region 8 has provided the following definition for “exploitation” as the correct standard for analysis:

The executive commissioner may adopt a rule as an alternative definition of "abuse," "neglect," and "exploitation," for purposes of conducting an investigation as provided in Texas Human Resources Code 48.002(c). The rule promulgated by the executive commissioner is more comprehensive than the Code definition of exploitation.

(a) In this chapter [Chap. 705 of the Texas Administrative Code], when an alleged perpetrator is a caretaker or paid caretaker, family member, or other individual who has an ongoing relationship with the alleged victim, financial exploitation is defined as the illegal or improper act or process of an alleged perpetrator using, or attempting to use, the resources of the alleged victim, including the alleged victim's social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the alleged victim. There is no informed consent when it is:

- (1) not voluntary;
- (2) induced by deception or coercion; or
- (3) given by an alleged victim who the actor knows or should have known to be unable to make informed and rational decisions because of diminished capacity or mental disease or defect. 40 T.A.C. §705.1011(a).

