

# HANDLING APS INVESTIGATIONS

## **TERRY W. HAMMOND**

Terry W. Hammond & Associates

300 East Main, Suite 1426

El Paso, Texas 79901

Tel. (866) 582-6680

Fax (888) 922-2820

Website: [www.hammondlaw.net](http://www.hammondlaw.net)

e-mail: [terry@hammondlaw.net](mailto:terry@hammondlaw.net)

State Bar of Texas

## **ADVANCED ELDER LAW COURSE**

April 7, 2011

Houston

## **CHAPTER 3**



**TERRY W. HAMMOND, JD, NCG**  
**300 East Main Street, Suite 1426**  
**El Paso, Texas 79901**  
**Tel. (866) 582-6680**  
**Fax (888) 922-2820**  
**Website: [www.hammondlaw.net](http://www.hammondlaw.net)**  
**e-mail: [terry@hammondlaw.net](mailto:terry@hammondlaw.net)**

## **BIOGRAPHICAL INFORMATION**

### **EDUCATION**

B.S. in Education, Texas A&M University  
M.A. in History, Texas A&M University  
J.D., Texas Tech University School of Law

### **PROFESSIONAL ACTIVITIES**

Manager, Terry W. Hammond & Associates, El Paso, Texas  
Guardianship Consultant and Mediator, Terry W. Hammond  
Consulting, El Paso, Texas  
Board Member, Alternatives to Guardianship  
Past Executive Director, National Guardianship Association  
Past President, National Guardianship Association  
Past Board Member, National Guardianship Association  
Past Chair, National Guardianship Network  
Past Chair, Texas Guardianship Advisory Board  
Past Board Member, Texas Guardianship Association  
Member, National Guardianship Association  
Member, Texas Guardianship Association  
Member, El Paso Probate Bar Association

### **HONORS**

President's Award, National Guardianship Association  
Outstanding Advocate, National Alliance for the Mentally Ill (El Paso Chapter)  
Outstanding Member, Texas Guardianship Association  
Outstanding Attorney, Texas Young Lawyer's Association (El Paso Chapter)  
Lucy G. Acosta Humanitarian Award, LULAC Project Amistad, El Paso, Texas



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## HANDLING APS INVESTIGATIONS

### INTRODUCTION

According to the Texas Department of Family and 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 necessary to alleviate or prevent further maltreatment.*

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 2004, the most recent year reported on the website, APS completed 61,342 investigations of abuse, neglect, or exploitation involving adults living in Texas communities. Of these, 44,694 were confirmed. Averaged out over 254 counties, there would have been 241 investigations per county, and 176 validations per county in 2004. Of course, the bulk of the reports and validations are in the more populous counties; however, there is plenty of work to be done by attorneys in this area in all communities.

On numerous occasions I 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 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 pre-date 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 proportionally increasing the risk of unfounded validations based on faulty investigations.

Attorneys are increasingly called upon to be advocates 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 alleged victim;
- 8) Private retention by the family of the alleged victim
- 9) Private Retention by the alleged perpetrator;
- 10) 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 of the “perpetrator”, the attorney may also be called upon to provide representation in an appeal of the APS findings.

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 the mysteries of an APS appeal.

### A BRIEF HISTORY

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](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](http://www.hhsc.state.tx.us/pubs/051904_PR_RP33.html). HHSC issued its 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, documents the improvements that are being 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 describes the next steps for each area:

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

Under the plan, the state guardianship program will transfer to the Department of Aging and Disability Services (DADS). Because DADS would absorb these responsibilities within current authorized levels, this move frees up 57 positions at DFPS that will be used to add 50 caseworkers and seven supervisors to the APS program. The additional staff will lower

average daily caseloads in the current year from 35 to 30 per caseworker. The reform plan recommends adding an additional 63 caseworkers through fiscal year 2007 to reduce caseloads to 28 per worker.

The plan also calls for adding 24 specialized staff to DFPS this fiscal year to provide expertise in financial exploitation, self neglect, judicial affairs and community network building.

The APS reform plan also calls for investing \$4.6 million this year to deploy mobile technology to support caseworkers in the field. Access to Tablet PCs, telemedicine, and digital cameras will allow APS investigators to more efficiently assess a client's situation and determine what services are needed. State support for local guardianship programs would increase under the plan, growing to \$250,000 this fiscal year and to \$500,000 a year in the 2006-2007 biennium....

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

- The five-question tool used by APS to gauge a client's mental capacity will be replaced with a more comprehensive client assessment tool that examines a client's living conditions, financial status, medical status, mental status, and social interaction and support....
- Key management changes have been implemented, and DFPS is moving from a five-district structure to an organization with nine regions. This will strengthen oversight and support of local APS offices. Directors for each region are being hired and new positions have been allocated to the nine regions based on an improved resource allocation formula.
- A new set of guiding principles and a decision tree tool now 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 has been redesigned to improve screening. In addition, moving the program to

DADS will prevent conflicts of interest in determining which clients need guardianship services.

- Training has been enhanced through \$1.5 million provided by Governor Perry through the Texas Workforce Commission. The training blends supervised field experience with computer-based and classroom training.

The APS reform plan also calls 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.

A great deal of work already has taken place to strengthen the APS program, but there is much more to be done. APS must rebuild and improve community relations, retain trained and experienced staff, and fully implement the new management structure. HHSC will continue to actively monitor the APS reform efforts.

High quality casework, driven by strong policies and performance standards, must be the foundation of the state's APS program. The APS reform plan will help ensure that the state's policies, procedures, and resources are used effectively to support caseworkers' effort to protect the elderly and people with disabilities in Texas.

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

## INITIATION OF THE IN-HOME INVESTIGATION

The APS website (<http://www.dfps.state.tx.us>) provides this scenario as a typical APS in-home investigation case:

### 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 <http://www.dfps.state.tx.us/handbooks/APS/default.jsp>. 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 § 705.2916 and Section 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 Section 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 oppose 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's services? The above scenario does not include an analysis of Mrs. Gregg's capacity.

Section 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 rejecting protective services. This capacity assessment is critical in determining whether APS intervention and an emergency order for protective services (EOPS) are warranted. The details of the EOPS process are outlined in Section 48.208 of the Texas Human Resources Code and should be reviewed very thoroughly by counsel.

Mrs. Gregg more 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.

### 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, respectively.

### THE APS INVESTIGATION

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

Section 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 40 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.

### 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 Section 1700, APS Handbook. Section 1700 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. APS takes additional steps to limit access to information in sensitive and high profile cases.” In such a case, the APS caseworker consults the supervisor as soon as there is reason to believe a case is sensitive or high profile. 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. Section 1700 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.
- A non-DFPS employee in the same office, such as a DADS or DSHS employee, is the alleged victim or the alleged perpetrator.
- The perpetrator is a DADS employee acting in the role of agent for the guardian.
- The alleged victim or the alleged perpetrator is a high profile individual, such as a county judge, legislator, or district attorney.
- The case has statewide media interest.
- 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.

### 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:

#### **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 decisions:

(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, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

#### **Comment: Client Under a Disability**

12. 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.

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. 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:

#### **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.

#### **Comment: Client Under a Disability**

5. 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.... See also Rule 1.02(e) and Rule 1.05, Comment 17.

In the above situation with Mrs. Gregg, it's a pretty good bet that the neighbors who lived around her were upset and had likely made reports to city officials, the health department, and perhaps even APS in the past. I worked on a similar case where the APS client was a former mayoral candidate and an outspoken citizen. She had hoarded around 60 cats and was performing experiments on them, and you could smell the house from a block away. There is a very good chance media will cover this kind of case, and even though the attorney is dealing with a state agency, Rule 3.07 could be implicated.

**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 create 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.

Regardless of whether the case is routine or sensitive, low profile or high profile, the APS caseworker is to use the same basic investigative process in every case. Section 2300 of the APS Handbook outlines the investigative process used in every case, including conducting interviews, collecting documentary evidence, taking photographs, and collecting physical evidence.

Section 2400 of the APS Handbook contains a detailed process for use in determining the functional capacity of the APS client. This area received significant revision after the passage of Senate Bill 6. The APS caseworker has to conduct the risk assessment, and is obligated to refer the client for guardianship in the event there is diminished mental capacity. There is no indication as to whether Mrs. Gregg's capacity was assessed. It does not appear that referral for the appointment of a guardian was

considered in the service plan for her. Guardianship referral is referenced in Section 4700 of the APS Handbook.

As part of the APS investigation, the Department will determine whether any services will be offered and/or delivered to the alleged victim. This process, which can include everything from delivery of food to clean up of a home is outlined in Section 3000 of the APS Handbook.

### 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 exploitation of an elderly person or an adult with a disability

**Designated perpetrator:** A person who has been determined in a validated finding to have abused, neglected, or exploited an elderly person or an adult with a disability

**Sustained perpetrator:** A person for whom at least one validated finding of abuse, neglect, or exploitation of an elderly person or an adult with a disability has been sustained by an administrative review or a release hearing.

It was not until recently that APS began notifying an alleged perpetrator that he or she was being investigated by APS or that an adverse finding was rendered. Recent cases have surfaced where, for example, the Department of Aging and Disabilities Services attempted to terminate contracts with state-licensed adult foster providers based on APS validations of exploitation against the foster provider. The foster providers were aware that there had been APS investigations years ago, but did not know they were the alleged perpetrators or that allegations against them 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 exploitation of an elderly or disabled adult and an entity such as a

provider agency, home health agency, senior center or other employer allows the perpetrator to have access to elderly or disabled adults. The perpetrator must be given prior written notification (except in emergencies) and an opportunity to appeal. *See* 40 TAC Section 705.4101 and Section 5400, “Due Process”, APS Handbook).

### ADMINISTRATIVE DESK REVIEW

Regarding the case of Mrs. Gregg, it would appear that the nephew (let’s call him “Null”) was validated upon for exploitation of Mrs. Gregg and her daughter, and quite possibly for abusing and neglecting both of them as well. Null is now a “designated perpetrator.”

Beginning about two 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 hearing officer within the local APS office.

This process did not last long. In July, 2010, the APS Handbook was amended to incorporate Section 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.”

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 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).

As a designated perpetrator, Null does not have the right to be present during the administrative desk review, but “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.”

So, the Null can send in more papers and documentation to try to reverse the caseworker’s findings; however, the Null cannot have a face-to-face interview or hearing to appeal a finding that could cost him his job, a career, and that could possibly be held in abeyance until some later time and then lead to his or her prosecution and imprisonment.

The reviewer will 1) make 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, 2) create an “Administrative Review of Investigation” stage by selecting the “Investigation “ stage in the close case and then the name of the perpetrator being reviewed, and 3) document the review and decision. Section 5331, APS Handbook.

The reviewer then sends the 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, UNLESS APS determines the findings need to be released outside the agency. At that point, the designated perpetrator **“must be offered a release hearing that provides due process.”** Section 5332, APS Handbook.

### RELEASE HEARING

Upon a determination that valid APS findings are to be released outside the Department, pursuant to 40 TAC 4101(c)(1) the Department will send the Null a form letter titled “Notification of Intent to Release” via certified mail. Forms entitled “Request for an Administrative Review” and “Request for Records” are provided to the Designated Perpetrator, who is given 30 days to return the documentation to the Department. (Sections 5421-5422).

The Designated Perpetrator can appear in person at the administrative review and may be accompanied by a representative and can submit written material that is relevant to the case (this is the process that had previously been used at the initial appeal level before the “Administrative Desk Review” was implemented. Rules of Evidence do not apply. The review makes a determination within 45 days of the administrative review session. Section 5422.1, APS Handbook).

### RELEASE HEARING

If the Designated Perpetrator loses the administrative review, the Designated Perpetrator can request a release hearing at the State Office of Administrative Hearings (SOAH). APS is represented by counsel appointed by the Office of General Counsel for the Department of Family and Protective Services. Using a preponderance of the evidence burden of proof, the Administrative Law Judge will decide the fate of the Designated Perpetrator. (Section 5423, APS Handbook). The process for notification and release of findings is outlined in Section 5424 of the APS Handbook.

At this time it is taking 3-4 years for a case to be heard by SOAH.

### CONCLUSION

The \$34,000,000.00 that Senate Bill 6 infused into the Texas Adult Protective Services System has hopefully improved the agency’s ability to properly investigate abuse, neglect and exploitation. However, the presence of independent legal counsel at any stage of the APS investigation process will surely provide safeguards that may otherwise be lacking. The earlier independent legal counsel becomes involved in the investigation process, the better. The adjudication process established within the APS Handbook appears afford “due process” only at the very last stage of the process.

In the event that you, as an attorney licensed in the State of Texas, go through this process and end up being a “Sustained Perpetrator,” check out Section 5412.44, “Release of APS Findings to State Bar of Texas”, to find out how APS will notify the State Bar of findings against you.