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Elder Fraud: Challenges in Prosecution

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Introduction:

Common factors in elder exploitation are mental impairment and loneliness. These common factors find their way into well-used schemes that are highly successful at taking advantage of elderly individuals. A 2009 study revealed that close to 50% of people with dementia experience some kind of abuse.¹ Reporting episodes of financial exploitation, according to another study, occurs at a rate of 41 per 1,000 surveyed.² The definition of "elder abuse" differs widely in the available body of research. The definition is no easier pinned down by laws and regulations governing criminal prosecutions versus regulatory service agencies, which differ on whether an alleged perpetrator must have an ongoing relationship with victim.³ As such, for purposes of this paper, the definition of elder fraud means the improper and illegal use of property or resources belonging to an individual over age 65 for personal gain. This definition includes using an elderly person's resources without their effective consent.⁴ There is a great disparity in prosecution rates of elder fraud due to many challenges faced by prosecutors; even for those prosecutors who are solely dedicated to the prosecution of elder fraud.

Victims' Emotional Challenges

Family members are the most common perpetrator of financial exploitation in the current caseload in Tarrant County, followed by caregivers. Sweetheart swindlers, the third most common offender, are constantly prowling for their next victim and tend to be serial exploiters. Finally, we are seeing contractor/worker scams. Of these, familial exploitation and sweetheart swindlers seem to be the most emotionally devastating scams to the elderly victim.

¹ Quinn, K., & Benson, W. (2012). The States' Elder Abuse Victim Services: A System in Search of Support. *Generations* 36(3), 66–71.

² Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University, & New York City Department for the Aging. (2011). *Under the Radar: New York State Elder Abuse Prevalence Study*.

³ See 40 TAC 705.1011 versus TEX. PENAL CODE §32.53.

⁴ Effective consent and lack of effective consent are defined in the Texas Penal Code §31.01(3).

While everyone is very familiar with familial and caregiver scams, sweetheart swindlers are regenerating with vigor. They are organized, well-trained, and targeting vulnerable elderly individuals. These swindlers are well-versed in their prey's habits and financial situation. These experienced manipulators work quickly to ingratiate themselves into their victim's life, become their victim's sole concern, and begin the process of social isolation. Once a victim is isolated and emotionally attached to their new sweetheart, the swindler begins to have crises for the victim to solve. These crises always involve the victim's money. These crises can take the form of sick children, need for business capital, or surgeries for cancer. These sweetheart swindlers go out searching in places that the elderly commonly go or can even meet their prey in online forums. No matter how they meet, the scheme is always the same.

It is very difficult to convince a victim of a sweetheart swindle that they are being swindled because they are clinging to the scammer, who is providing them much needed purpose and intimacy. Many times, the victims are hostile to the idea, and some may even threaten suicide if the deception is revealed. The sweetheart swindler will manipulate their victim to cut off communication with their own children, especially if they are not supportive of the relationship. Unfortunately, these schemes often end with the swindler putting the victim in the poor house or the grave. The swindler does not care which.

Diminished Capacity v. Incapacity Standards in a Consent Context:

As with every other area of elder law, the mental status of the victim is crucial to determining if a crime has occurred and if that crime can be prosecuted. The ability to rely on statements made by, what is most times, the only eye witness to the crime is lacking in so many of the cases that are presented for prosecution due to mental impairment. Because of the legal definition of "effective consent" and this term's use in so many of the offenses, the issue of consent becomes a major issue in every criminal prosecution of elder crime either as an element of the offense or a potential defense lodged.⁵ Effective consent embodies three different concepts that assist in proving many forms of elder fraud: lack of actual consent, lack of effective consent due to mental impairment (including by reason of age, mental disease or defect,

⁵ Offenses with "effective consent" include Burglary. TEX. PENAL CODE § 30.02; Theft TEX. PENAL CODE § 31.03; Credit/Debit Card Abuse TEX. PENAL CODE § 32.31; Criminal Trespass TEX. PENAL CODE § 30.05; Aggravated Robbery TEX. PENAL CODE § 29.03; and others.

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