

The White-Collar Abuser

by Loren Barr

Elder Abuse. Attorneys, as well as the public in general, have increasingly become aware that most financial elder abuse is committed by children of the victim or the victim's caregivers. It is less well known, however, that these crimes are also often committed by individuals who can aptly be described as semi-professional con artists or white-collar abusers, sharing several common characteristics. And if they are sued, they typically employ a predictable defense strategy. This article identifies some of the characteristics of these predators and describes what practitioners and their clients should expect if litigation becomes necessary.

All attorneys (and particularly those practicing estate planning or elder law) should be on the lookout for trustees, money managers, financial planners, or insurance agents who fit the following profile:

Prior law suits. Very often, the white-collar abuser has previously been sued, typically for fraud, elder abuse, or breach of trust. It goes without saying that clients should be wary of a trustee or investment advisor who has frequently been sued by his clients.

Nothing in their names. Not surprisingly, many of these individuals do not own anything. Again, clients should be concerned if the person who wants to handle their money does not appear to have any resources of his/her own. Accordingly, the practitioner should perform an asset search if s/he suspects a client could be involved with a professional predator.

Dubious job description. This type of predator does not usually have a 9 to 5 job. Rather, s/he is self employed as a financial advisor, professional trustee, or real estate investor. While these are all legitimate occupations, the white-collar abuser is not employed with an established company or organiza-

tion such as a bank or full-service broker. Instead, s/he typically has a "home office" and will do anything to get close to the client's money. Often the victim will meet the white-collar abuser at a financial or estate planning seminar.

Religious affiliation. Sadly, another common place victims meet professional predators is within churches and other religious organizations. Church members tend to let their guard down within the community and are less likely to ask for qualifications or references from someone they meet within an organization they trust.

If the predator already has the client's money and refuses to give it back, litigation is often the only recourse. Before filing the case, counsel should advise their clients of what they may be up against.

Manipulation of the system. The most common characteristic of the white-collar abuser is a familiarity with the legal system and the collections process. Most people are frightened at the thought of depositions, trial, and judgment, but the white-collar abuser is not. S/he has been through it all before and is aware that the consequences of abusing the legal system are often not severe. Above all, the white-collar abuser

is aware of the enormous financial and emotional cost of litigation and the victim's (legitimate) fear — even if successful at trial, the client may still be unable to collect his/her judgment. Knowing this, the white-collar abuser aims to make the lawsuit as long and as expensive as possible, making the abuser judgment proof.

Switching attorneys and going pro per. Switching attorneys allows the white-collar abuser to prolong the litigation. The new attorney, after all, must be given time to "get up to speed." It also allows the abuser to blame any misconduct on the attorney. Conversely, the pro per abuser can blame the misconduct on his/her own ignorance.

Prevalence of perjury. The lies told by professional predators are many and large, and are often presented to the court under penalty of perjury with a boldness that beggars description. While the possibility of a perjury charge might terrify the average litigant, it's just another day at the (home) office for the professional predator. However, experience teaches that judges tend to react negatively when counsel accuses an opposing party of "lying" to the court. Counsel might consider pur-

chasing a thesaurus and studying the various synonyms for the word “lie” so as not to offend the court or those who steal money from old people. (“Fabrication” and “prevarication,” perhaps because they have multiple syllables, have been used with some success.)

Not afraid of judgment. One might think that a defendant facing punitive damages and attorney fees would be eager to settle. This is not the case with the professional predator, who knows that the judgment only signals the end of the first half of the game, and that the second half — the collections process — is where s/he truly excels.

No fear of criminal charges. Since elder abuse is a crime, many wonder why these cases are not handled by the district attorney. The professional predator is aware that prosecutors are overworked and underfunded and often do not have the resources to pursue financially complex cases that may be resolved in civil court. Hence the practitioner should not expect that a criminal case is likely to bring the client any relief.

An example illustrates the difficulties of litigating a case against the professional predator who has mastered the playbook listed above. The author was involved in a case against a defendant who held himself out as a professional trustee. He placed the victim’s assets in an irrevocable “constitutional trust” purportedly governed by the laws of the Turks and Caicos Islands. A private investigator hired to locate the defendant declined the job due to a conflict of interest: in an effort to make himself invisible to future creditors, the defendant had previously hired the investigator to discover as much about the defendant as possible.

Not surprisingly, this defendant avoided service of process. He then filed a motion to quash, followed by two demurrers. He took the Fifth Amendment in response to written discovery and in response to a court-ordered ▶

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accounting. He failed to appear for deposition. He lost three motions to compel. He was found guilty of contempt, but the court suspended sentencing. Prior to sentencing, his attorney substituted out of the case and he substituted *pro per*, whereupon he immediately filed a notice of removal to federal court, depriving the state court of jurisdiction. When the case was remanded, the federal judge noted that removal was untimely (by several months) and there was no basis for federal jurisdiction. A new attorney — from out of state — substituted into the case and promptly filed another notice of removal to federal court. The case was again remanded and the defendant was enjoined from filing any further removal actions. Not lacking energy, this new attorney filed a federal lawsuit against the 87-year-old victim (alleging money laundering) and a federal interpleader action. Both were dismissed. The second attorney then withdrew, but not before communicating various threats purportedly made by the defendant against plaintiff's counsel. On the eve of a hearing for terminating sanctions, the defendant (again acting *pro per*) filed for bankruptcy protection, requiring the plaintiff to obtain relief from the automatic stay. In his bankruptcy schedule, the defendant claimed that he had never been issued a social security number.

In the end, the court issued terminating sanctions and the plaintiff got her money back, but only because an investigator located real estate that the defendant owned in a fictitious name.

Attorneys can better protect their clients from professional predators if they are familiar with these common warning signs. If litigation becomes necessary, counsel should advise clients of what they are facing and prepare them for particularly long and frustrating litigation. ♦

— *Loren Barr is an estate planning, trust & probate certified specialist with Barr & Barr Attorneys in Danville. The firm specializes in elder abuse litigation and estate and trust litigation.*

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