

Financial Abuse of the Elderly: Risk Factors, Screening Techniques, and Remedies

By Lori A. Stiegel

Elderly victims of financial abuse are often unable or reluctant to tell anyone that they are being exploited or to seek help. In some cases, a disability may preclude the victim from being aware of or reporting the abuse. In other instances, the victim may be dependent on the perpetrator—for care, love, companionship, or shelter. The victim may fear retaliation. They may also fear that others' knowledge about the financial abuse will lead to the loss of independence through the appointment of a guardian or conservator or placement in a long-term care facility.

Lawyers who have a basic understanding of the risk factors and indicators of financial abuse, and adopt the practice of screening all clients for that problem, will be better able to recognize those being victimized. There are myriad opportunities for lawyers to become involved in efforts to prevent financial abuse and enhance the response to the elderly victims.

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What Is Financial Abuse?

Financial abuse of the elderly covers an expansive array of issues. These include misuse of durable powers of attorney and bank accounts and the misuse or neglect of authority by a guardian or conservator. They embrace the failure to provide reasonable consideration for the transfer of real estate, failure to provide or excessive charges for goods or services for which one is paid, and using fraud or undue influence to gain control of or obtain money or property. To many people, the definition of financial abuse also applies to predatory

lending, telemarketing fraud, sweepstakes fraud, and other scams that are targeted toward older persons.

Financial abuse, in general, does not occur in isolation; oftentimes victims are also experiencing physical abuse or neglect.

Numerous laws, both state and federal, may govern the problem, yet victims often find that beneficial remedies are few.

Extent of the Problem

The dearth of research and data on elder abuse makes it challenging to proffer statements on the extent of the problem. There are, however, a few sources of somewhat reliable information.

Reports to State Adult Protective Services

The number of reports of suspected domestic elder abuse (that which occurs in the home, as compared to a long-term care facility) made to state adult protective services (APS) programs has increased steadily since 1986, according to the

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Lori A. Stiegel is associate staff director of the ABA Commission on Legal Problems of the Elderly.

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National Center on Elder Abuse. In 1986, the number of reports made to APS programs totaled 117,000; in 2000 that figure was 470,709. In 2000, financial abuse cases made up 10.5 percent of the total number of substantiated reports investigated by APS.¹

National Elder Abuse Incidence Study

The National Elder Abuse Incidence Study (NEAIS), conducted in 1996 with funding from the U.S. Administration on Aging and Administration on Children and Families, provides a snapshot of the number of new elder abuse cases that occurred in 1996. Some of the general findings from the NEAIS indicate that:

- Persons age 80 and older are abused and neglected at a rate two to three times higher than their percentage in the general population.

- Female elders are abused at a higher rate than males.
- Of those older persons about whom reports of abuse or neglect were substantiated by APS, almost half were not physically able to care for themselves.
- In almost nine out of ten incidents of domestic elder abuse and neglect, the perpetrator is a family member; adult children are responsible for almost half of elder abuse and neglect cases.
- Reported cases represent “the tip of the iceberg,” with between four and five times as many incidents of abuse and neglect going unreported as are reported to APS.²

In the communities studied for the NEAIS, reports to APS about “financial/material exploitation” accounted for 30.2 percent of all the substantiated reports. Friends/neighbors, hospitals, and family members were the most frequent reporters. Financial abuse was substantiated in 44.5 percent of the investigations conducted by APS.³

The NEAIS findings revealed that the likelihood of becoming a victim of financial abuse increases with age. Almost half (48 percent) of the victims of financial abuse were age 80 or older, with another 28.7 percent between the ages of 75 and 79. The percentages dropped to 10.8 percent for victims between age 70 and 74, 9.4 percent for those between age 65 to 69, and 3.1 percent for those between age 60 and 64.⁴

An interesting and, to some, surprising finding is that the likelihood of financial abuse does not increase with higher levels of income. In the cases where APS workers were able to estimate or determine the victim’s income, 46 percent had incomes between \$5,000 and \$9,999; 29.8 percent had incomes between \$10,000 and \$14,999; and 22.4 percent had incomes of \$15,000 or more.⁵

The study indicated that females are especially vulnerable to financial abuse. Females were victimized at a rate “somewhat more” than their proportion of the older population (63 percent vs. 57.6 percent). Males were financially abused in 37 percent of the cases.⁶

Another interesting finding was that perpetrators of financial abuse were more likely to be young. Approximately 45 percent of the perpetrators were age 40 or younger, 39.5 percent of them were between the ages of 41 and 59, 3.5 percent were between ages 60 and 69, and 1.6 percent were between the ages of 70 and 79. Surprisingly, 10.4 percent of the perpetrators were older than 80.⁷

Finally, the study concluded that perpetrators of financial abuse were most likely to be the adult children (60.4 percent)

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Commission Expands Reach

“Spring’s an expansive time,” observed Christina Georgina Rossetti as recently as 1857, and there is still no better description of the season as experienced by the ABA Commission in 2002.

Staff have welcomed two legal interns, the Borchard Foundation Law and Aging Legal Intern **R. Harbour Partesotti**, a third-year law student from the University of North Carolina at Chapel Hill, who is also working on a Masters Degree in Public Health, and **Julia Calvo**, a fourth-year law student from Washington, D.C.’s American University.

Nancy M. Coleman, staff director of the ABA Commission, was named to the AARP National Legislative Council. Ms. Coleman will join the distinguished panel of nationally recognized experts from the elder law and policy arena to advise the association on a range of legislative issues.

Stephanie Edelstein, associate staff director of the ABA Commission, was honored as a “champion and mentor” for her years-long efforts and support of the establishment of a National Elder Law Section of the Canadian Bar Association. The recommendation for establishing the new section was approved by the Canadian Bar in February 2002.

Also noteworthy is the work of the Commission’s Medicare Advocacy Project Attorney/Associate Staff Director **Leslie B. Fried**, which has resulted in a significant achievement that will benefit thousands of older citizens with a diagnosis of dementia and who will now be able to receive physical and occupational therapy.

Since 1998, the Commission has received funding from the Alzheimer’s Association to establish a Medicare Advocacy Project Attorney to address Medicare coverage issues for people with Alzheimer’s disease and to respond to Alzheimer-related Medicare inquiries from local Alzheimer’s Association chapters throughout the country.

Ms. Fried became aware that significant therapy benefits were being denied to persons with a diagnosis of dementia, including Alzheimer’s disease, on the basis that these people had lessened cognitive thinking and that they would, therefore, not benefit from rehabilitative therapies.

Ms. Fried, in cooperation with others, mounted a strenuous campaign within the U.S. Department of Health and Human Services to reverse this decision and provide Medicare and Medicaid benefits for such persons. As a result of her efforts, the Centers for Medicaid and Medicare Services (CMS, formerly HCFA) published a “Program Memorandum for Intermediaries/Carriers on Medical

Review of Services for Patients with Dementia.” This memorandum clarifies that medically necessary services cannot be denied to individuals with dementia solely because of their diagnosis, and will have a significant impact on Alzheimer’s beneficiaries in assuring that they receive necessary services.

Ms. Fried’s efforts were detailed in a front-page article in *The New York Times*, resulting in hundreds of telephone calls

to her from media, caregivers, and families of affected patients. The

Fact Sheet for Consumers **Program Memorandum**, as well as the latest **Fact Sheet About Recent Changes Affecting Medicare Coverage**, are posted on the Commission’s Web page at <http://www.abanet.org/elderly>.

In a further development, Ms. Fried discovered that, while under the Medicare Program patients denied benefits have a right of appeal—the appeal forms were unavailable. Ms. Fried tried Social Security offices and was told they did not stock them. Again, addressing the U.S. Department of Health and Human Services, Ms. Fried persuaded the Medicare Program to post the appeal forms on their Web site where they could be readily downloaded by anyone with access to the Internet. The availability of these forms greatly facilitates the appeals process for those persons desiring to exercise their rights under the law.

Also new to the Commission’s Web site is an **Online “Tool Kit” to Help Consumers with Health Care Advance Planning**. The *Consumer’s Tool Kit* contains a variety of self-help worksheets, suggestions, and resources to help people who are thinking of making a health care advance direc-

Online “Tool Kit” for Consumers tive (such as a Living Will or Durable Power of Attorney for Health Care), or may have already signed one.

Rather than creating a formal advance directive, the *Consumer’s Tool Kit* helps consumers with the much more difficult task of discovering, clarifying, and communicating what is important to them in the face of serious illness. The ten tools include:

- How to Select Your Health Care Agent or Proxy
- Are Some Conditions Worse Than Death?
- How Do You Weigh Odds of Survival?

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Inside the Commission

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- Personal Priorities and Spiritual Values Important to Your Medical Decisions
- After-Death Decisions to Think About Now
- Conversation “Scripts”: Getting Past the Resistance
- “Proxy IQ Test” for Family and Physician
- What to Do After Signing Your Health Care Advance Directive
- Guide for Health Care Proxies
- Resources: Advanced Planning for Health Care

Consumers can access the *Tool Kit* from the Commission’s Web site at <http://www.abanet.org/elderly>.

Available in a print version is the *Lawyer’s Tool Kit*, intended for lawyers in estate planning, elder law, or general practice who know the technical requirements for drafting health care advance directives but who lack the time and training to help their clients prepare for the important decisions to be made. The *Lawyer’s Tool Kit* can be ordered from the Commission’s Web site for \$29 (shipping and handling is included in the price).

Newly released from the AARP Public Policy Institute is “**Termination and Closure of Poor Quality Nursing Homes: What Are the Options?**” by **Erica F. Wood**, associate staff director of the ABA Commission. This publication examines the involuntary termination of nursing homes from participation in Medicare and Medicaid programs, the use of intermediate sanctions, facility closure, and resident relocation. It includes case studies of seven nursing homes. The publication also makes recommendations based on key findings of the study. For more information, or to obtain a copy, visit the AARP Public Policy Institute’s Web site at <http://research.aarp.org/new> or contact Vanessa Woodard by phone at (202) 434-3860.

The Commission has launched a new **project to improve investigations and help prevent deaths attributed to elder abuse and neglect**. The project—funded by a grant from the U.S. Department of Justice’s Office for Victims of Crime—will fund four demonstration projects and produce specific materials, including “promis-

ing practices” that are intended to improve the response of APS, law enforcement, victim services providers, and health care providers and help them identify patterns and mechanisms of elder abuse in order to prevent their unchecked recurrence.

The Commission has also initiated a **project to develop recommendations on medical forensic issues related to elder abuse and neglect**. The Commission, with funding from the National Institute of Justice at the U.S. Department of Justice, will develop recommendations **New Projects on Elder Abuse** directed toward professionals in the elder abuse, health care, and justice fields who serve victims of abuse and neglect.

The project will build on the findings of an October 2000 Department of Justice-sponsored roundtable in considering issues such as:

- the need to determine whether there are medical and non-medical conditions, as well as patterns of health care usage or non-usage, that should trigger suspicions of abuse or neglect;
- the importance of educating health care professionals about elder abuse, including the need for universal screening and adequate documentation;
- the need for training of law enforcement personnel and prosecutors about elder abuse;
- the need to develop forensic expertise and to consider developing forensic centers, as has been done in the child abuse field;
- the importance of understanding the differences in resource availability in urban and rural communities; and
- the need to assess whether there are viable options under government health insurance programs for paying physicians who testify in elder abuse and neglect cases.

The Commission, working with the University of California at Irvine Medical Center and an advisory committee, will prioritize these and other ideas and consider ways to implement them.

For the most current information on the research, other projects, and publications of the Commission, see the “Semiannual Report” in “About the Commission” on the Web at <http://www.abanet.org/elderly>.

With Growth, Comes Responsibility

Elder Law Section of the Florida Bar

By Lauchlin Tench Waldoch

The Elder Law Section of the Florida Bar is just eleven years old, but has more than 1,740 members and affiliate members. The section hosts five major events each year: annual meeting, retreat, winter conference, certification review, and a public benefits seminar. The foundation of the section lies in the substantive committees, of which there are fourteen. Committee work is instrumental in the section's legislative efforts, as well as membership education. The section offers a wonderful opportunity to members who want to become active in virtually any aspect of elder law.

Over the last several years the section's public persona has grown, particularly in the legislative arena. Aging issues strike to the core of public policy and funding decisions. Elder law attorneys deal with the practical ramifications of these decisions on a daily basis. The section actively promotes its members as bringing a different perspective to the debate than other attorneys and professionals. It is not unusual for section members to be called upon to give testimony or help draft laws related to such issues as abuse and exploitation, advance directives, home and community care, guardianship, and public benefits.

The continuing legal education programs the section sponsors consistently receive accolades for excellence—both for the written materials and the quality of the presenters. The high standards set by the founders and previous leaders of the section are taken very seriously. As elder law becomes a “hot” area in which to practice, these programs become even more critical, and, frankly, even more fun. With growth comes responsibility, and the section's CLE programming is constantly being reviewed, revised, and updated.

One of the most enduring and rewarding of the section's efforts is the lawyer mentor program, which is now more than six years old and going strong. Practitioners new to the field are able to work directly with experienced elder law attorneys from across the state. Any section member can be a

mentee, but only those with five years of experience—three of those in elder law—qualify as mentors. The program has evolved as section membership has grown. At first, individual mentors and mentees were paired for the year. Now, a mentor panel is established by designating mentors in specific substantive areas. Individual mentees are provided a list of mentors from which to choose within those areas and in various geographic areas of the state. Advice and counsel on practice management, ethics, and professionalism is strongly encouraged. The section has developed guidelines that describe the role of each party and the boundaries of the mentor relationship. Care is taken to preserve client confidentiality and avoid conflicts of interest. Particularly in an area as fraught with nuance and ethical quandary as elder law, this one-on-one contact has proven invaluable.

Particularly in an area as fraught with nuance and ethical quandary as elder law, [the section's mentor program] has proven invaluable.

The section works closely with other organizations and designates representatives for the National Academy of Elder Law Attorneys, the Academy of Florida Elder Law Attorneys, and the Florida State Guardianship Association, to name a few. These collaborative efforts enhance the ability to network with other elder care professionals in the state and nationally. The breadth of the practice of elder law requires the practitioner to be knowledgeable in many areas that fall outside the traditional practice of law. These associations, and the section's affiliate members, provide that input.

Without exception, the most pervasive comment received after any function, program, or meeting of this section is that this is a group of lawyers like no other. The integrity, knowledge, enthusiasm, and caring of the membership is consistent, apparent, and ongoing, and the section is determined to keep that sentiment alive.

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of the victims. The victims' "other relative[s]," "grand-child[ren]," and "friends/neighbors" were almost equally as likely to be perpetrators (9.7 percent, 9.2 percent, and 8.7 percent respectively).⁸

Victim Inability or Reluctance to Seek Help

There are several reasons why a victim might be reluctant to turn to anyone, even a trusted lawyer, for help. Many victims:

- have a disability that renders them physically or mentally incapable of reporting the abuse;
- do not recognize that they have been financially abused, or they do not recognize it for some time and think that it is "too late" to do anything about it;
- fear that they will not be believed;
- believe that there is a stigma to being labeled as a "victim";
- are dependent on the perpetrator for something (care, love, shelter, etc.) and fear the loss of that relationship;
- do not want to get the perpetrator "in trouble" (they simply want the abuse to stop);
- fear retaliation from the perpetrator;
- fear that others' knowledge about the financial abuse will lead to the loss of independence through the appointment of a guardian or conservator; or
- fear that others' knowledge about the financial abuse will lead to the loss of independence through placement in a long-term care facility.

Risk Factors and Screening

The inability or reluctance of a victim to turn to a lawyer, other professionals, or family and friends for help underscores the need for lawyers to understand the risk factors for financial abuse, indicators that exploitation is occurring, and the benefits and techniques of screening all clients.

Risk Factors for Financial Exploitation

Although the current generation of older people has control of a disproportionately high share of the nation's assets, the NEAIS results indicate that wealth is not a risk factor for financial abuse. Instead, research and anecdotal data demon-

strate that the following characteristics or situations may be risk factors:

- abuser dependency on elder;
- elder dependency on abuser;
- elder's frailty, disability, or impairment;
- social isolation; and
- substance abuse or mental pathology of either the elder or the abuser.⁹

Indicators of Financial Exploitation

An understanding of characteristics or situations that may pose a risk for financial exploitation is useful because it may help to trigger a helping professional's concern and questions. Nevertheless, it is important to note that the risk factors listed previously are very generalized and not every situation in which a risk factor is present will be abusive. Although the NEAIS statistics portray some broad characteristics of victims and abusers, it is very difficult to predict who is likely to be a victim or an abuser. Therefore, it is important for practitioners to have an understanding of the myriad indicators of financial exploitation. Following are some of the signs that may pose cause for suspicion:

- A confused older person executes a power of attorney.
- Bank activity that is erratic, unusual, or uncharacteristic of the older person, such as unusual withdrawals.
- Bank activity that is inconsistent with the older person's ability (e.g., the ATM card has been used when the older person is housebound).
- Changes in the older person's property titles, will, or other documents, particularly if the person is confused and/or the documents favor new acquaintances.
- Forged or suspicious signature on documents.
- Lack of necessities or amenities when the older person can afford them.
- Recent, new acquaintances, particularly those who take up residence with the older person.
- Suspicious activity on credit card accounts or other financial accounts.
- The older person brings strangers with her to meetings or while she is conducting financial transactions.
- The older person doesn't receive services for which payment has been made.
- The older person exhibits hoarding behavior, such as by carrying all her papers in large bags all the time.

- The older person is accompanied by a stranger, family member, or other person who seems to coerce her into making decisions or transactions.
- The older person is being evicted or utilities are being disconnected.
- The older person is concerned or confused about “missing funds” in her accounts.
- The older person is fearful that she will be evicted, or institutionalized, if money is not given to her caregiver.
- The older person is giving implausible explanations about what she is doing with her money.
- The older person is missing documents such as those related to pensions, stock, government payments, etc.
- The older person is not allowed to speak for herself or to make decisions.
- The older person is not aware of, or does not understand, recently completed financial transactions.
- The older person is not cared for or the residence is unkempt when arrangements have been made for providing personal care or home maintenance services.
- The older person seems paranoid, e.g., accuses employees of taking or mismanaging her money.
- The older person’s mail has been redirected to a different address.¹⁰

Benefits and Techniques of Universal Screening

The reluctance of victims to seek help from others, combined with the difficulty of determining through observation that someone is being victimized, supports the need for universal screening of clients about financial abuse.

“Universal screening” refers to the practice of asking all clients, patients, or customers whether they are experiencing a certain problem. For example, the American Medical Association has promulgated guidelines stating that doctors should screen older people for elder abuse.¹¹ There are three ideas behind universal screening in the context of abuse and exploitation:

- Victims often will not disclose their situation voluntarily, but they will do so if asked .
- Establishing the practice of asking all clients reduces the stigma felt by the victim and helps the professional feel more comfortable about asking sensitive questions.
- Asking questions about and indicating an awareness of the issue indicates to clients that they can turn to you in the future for discussion and help.

Elder law practitioners may want to consider asking all clients questions about financial (as well as physical) abuse as part of their initial interview/intake process. Before screening your clients, some preliminary steps must be taken:

- Determine who is your client, if it is not immediately obvious.
- Interview your client alone.
- Explain that you routinely ask all clients these questions because you need to know about the issues that impact their case in order to represent them effectively.

If you practice in a state that mandates lawyers to report suspected financial abuse, you need to assess your ethical and legal responsibilities and describe their implications to your client.

Screening questions should be direct, but not conclusive. Asking a client if she has been a victim of financial abuse or exploitation is not useful if the client does not understand the meaning of those terms or does not relate her experiences to those terms. Instead, use the list of indicators provided above to develop some questions that inquire whether your client has encountered exploitation. Examples might include:

- Who manages your money and property?
- How do you obtain cash when you need it?
- Does anyone else have authority to access your bank account? If so, has that person been withdrawing your money?
- Have you noticed any suspicious or unusual items on your bills (for utilities, credit cards, etc.)?
- Have you noticed that any funds are missing from your bank accounts?
- Have you noticed that any checks are missing from your checkbook?
- Have you noticed that any of your belongings are missing from your home?
- Has anyone encouraged or forced you to sign any documents that you didn’t understand or didn’t want to sign?
- If you have a power of attorney, does your agent do things that you don’t want him or her to do?
- Does your paid caregiver demand that you pay him or her extra for things that are supposed to be provided anyway?
- Did you want to bring that person with you to this appointment? Did he or she insist on accompanying you? Did that person insist that you come see me?

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- (If appropriate) Why do you carry all your documents around with you in a paper bag?
- Do you live with anyone? (If appropriate) When did he/she/they move in? Whose name is on the title or lease? Do they pay their share of the mortgage or rent and household expenses?

A caveat applies if you are interviewing or representing older people from minority cultures. It will help you and your client if you understand that members of minority cultural groups may have different perspectives on financial abuse than do members of the majority cultural group. Protective and legal interventions that consider the relevance of culture may be appropriate and necessary.¹²

The Elder Abuse Listserve

provides professionals working in fields related to elder abuse with a free forum for raising questions, discussing issues, and sharing information and best practices related to elder abuse. The goal of the listserv is to enhance:

- ❖ efforts to prevent elder abuse;
- ❖ the delivery of adult protective services; and
- ❖ the response of the justice and social services systems to victims of elder abuse.

The following professionals working in elder abuse or allied fields are eligible to subscribe to the listserv: adult protective services practitioners and administrators, aging services providers and administrators, educators, health professionals, judges, lawyers, law enforcement officers, prosecutors, policymakers, and researchers.

To subscribe, send an e-mail to the list manager, Lori Stiegel, at lstiegel@staff.abanet.org. A request to subscribe must come from the individual who wishes to subscribe; no one will be subscribed at the request of another person. Your request must include all the following information in the body of the message: your e-mail address (even if it will appear in the "from" line of your e-mail), your name, your profession, a statement of your interest/expertise in adult protective services/elder abuse, the name of the organization for which you work (if applicable) and its address, and your phone number so that you can be contacted in the event of an e-mail problem.

A Framework for Recognizing Financial Abuse

After screening and interviewing clients, lawyers will have to determine whether those clients are victims of or at risk for financial exploitation. Practitioners will have to "differentiate between situations that involve misappropriation and those that involve acceptable exchange."¹³ Wilber and Reynolds suggest the following four-part framework to aid in making that distinction:

- I. The characteristics of the older person that suggest vulnerability to abuse.
 - Cognitive, physical, or sensory impairments that limit one's ability to understand and to make reasoned decisions.
 - Socio-emotional vulnerabilities that increase one's dependence on others.
- II. The nature of the relationship between the older person and the suspected perpetrator.
 - Nature and purpose of relationship.
 - History of relationship.
 - Perceptions of the basis for exchange.
 - Expectations for reciprocity.
 - What cultural norms or legal standards apply?
- III. The reasonableness and comparative costs and benefits of the transaction(s) to the older person and the suspected perpetrator.
 - Whose interests were actually served?
 - How are or were the older person's funds or assets used?
 - Are the older person's basic needs being met?
 - Has the older person's quality of life been diminished?
- IV. The nature of the influence used to obtain the older person's participation in the transaction(s).
 - Has the influence been benign, i.e., is the transaction legitimate "because the individual has not been tricked or forced into doing something (s)he did not wish to do or would not have done prior to incapacity"?
 - Is the transaction or decision a result of coercion or undue influence?
 - Is the transaction or decision a result of fraud?
 - Alternatively, has a theft occurred (Wilber and Reynolds do not consider outright theft to be financial abuse)?¹⁴

As financial abuse is a "subtle, insidious crime that is much more likely to consist of a pattern of behavior than a single episode,"¹⁵ Wilber and Reynolds emphasize that practitioners must examine the interrelationships between these four criteria. To illustrate, a person with diminished

decision-making capacity is more vulnerable to undue influence than someone with full capacity.

Capacity Issues

The older person's capacity to enter into an attorney-client relationship or to make financial decisions will be an issue in many cases of financial abuse. A practitioner who is assisting a client in planning for incapacity will need to determine that the client has the capacity to make and execute documents. A civil litigator who seeks to void a transaction may need to prove that the client's lack of capacity rendered him or her vulnerable to fraud or undue influence. A prosecutor may need to address a victim's capacity to respond to the alleged perpetrator's claim that the money provided by the victim "was a gift."

The type and level of capacity assessment necessary will depend on the client's circumstances and the nature of the case. For the second and third scenarios provided above, full medical and psychological assessment and testimony by expert witnesses may be essential. But such steps are not called for in most instances where older persons wish to retain counsel for help in planning for incapacity or other matters. In those situations, a lawyer must make an informal assessment in order to determine whether to proceed with the client. (See Charles P. Sabatino, "Assessing Clients with Diminished Capacity," BIFOCAL, Vol. 22, No. 4, Summer 2001, at 1, 2.)

Legislative and Policy Trends

The growing problem of financial abuse of the elderly has led to the enactment of new statutes and the development of innovative policies and practices in several states.

As elder abuse cases have grown in number and complexity, protective services and other professionals have recognized that victims often face myriad needs. These needs include: protection from further abuse, aging and social services, civil legal services, restitution or compensation through the criminal justice system, victim services, mental health services, public guardianship services, ombudsman services, housing, medical services, and more. Accordingly, formal and informal "multidisciplinary teams" (MDTs, also called M-Teams or task forces) have developed in numerous jurisdictions. These MDTs usually have two goals: (1) to discuss and address comprehensively the difficult cases in which victims have multiple needs and problems, and (2) to propose and seek improvements in the systemic responses to the problem of elder abuse.

A more recent trend has been the development of specialized MDTs focusing on financial abuse victims. In

California, Los Angeles County implemented a "Fiduciary Abuse Specialist Team" (FAST) several years ago. The FAST brings together law enforcement officers, prosecutors, investigators, protective services workers, accountants, bank personnel, aging and social services providers, civil lawyers, and others (the L.A. FAST includes a retired probate judge) to analyze and respond to complex cases. Several other communities in California and elsewhere have established a FAST.

The federal government has adopted a version of the MDT concept in its establishment of "elder fraud task forces" in several jurisdictions through the local U.S. Attorney's Office. These task forces address issues such as telemarketing fraud, securities and investment fraud, and other federal financial crimes.

Enhancing the Role of Bank Personnel in Reporting Suspected Financial Abuse

In response to concerns that bank personnel were seeing evidence of customer exploitation but not recognizing it or aware of what to do about it, the Massachusetts Department of Elder Affairs developed a "bank reporting" project. The project was designed to educate bank personnel about the indicators of financial exploitation, their reporting responsibilities, and the role of APS and law enforcement in protecting the customer from further abuse and in seeking restitution.¹⁶ The community of Louisville, Kentucky replicated the Massachusetts project, with funding from the ABA Commission on Legal Problems of the Elderly through the Marie Walsh Sharpe Endowment. But the big breakthrough came when the U.S. Department of Justice Office for Victims of Crime funded the Oregon Senior & Disabled Services Division and Oregon Bankers Association to jointly develop a similar project and disseminate a national replication guide in 1999.¹⁷ More than 1,500 copies of that guide have been distributed (nationally and internationally), and now many other communities are instituting their own "bank reporting" project.

Treating Financial Abuse As a Criminal Matter

The 1990s brought a "significant change" in the response of the criminal justice system to elder abuse.¹⁸ Efforts to enhance the role of law enforcement officials and prosecutors in elder abuse cases have been meaningful and productive.

Training of law enforcement officials and prosecutors about the problem has increased. California now mandates a

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training course on elder abuse for certain law enforcement officers. Florida, South Carolina, and other states have developed training guides or teach elder abuse as part of law enforcement academy courses on other issues such as domestic violence. In many other states, elder abuse conferences routinely include opportunities for training law enforcement officials. The National College of District Attorneys and the American Prosecutors Research Institute have offered educational programs on elder abuse, as have the National Association of Attorney Generals and the National Association of Medicaid Fraud Control Units.

Legislation treating elder abuse as a crime has been enacted in several states. These laws generally create a crime of “elder abuse” that supplements existing laws governing crimes such as theft, fraud, assault and battery, homicide, rape, etc., which also encompass elder abuse.

Some states have enacted laws enhancing penalties for physical and financial crimes against older people. Other states have increased existing penalties for elder abuse.

Specialized units have been developed in law enforcement agencies and prosecutors’ offices in several communities. Staff members in these units are specially trained and usually have no other case responsibilities (or other responsibilities are limited). Some communities have adopted the practice of “vertical prosecution” in elder abuse cases; this means that one prosecutor handles one victim’s case from intake through trial. Some communities are using the multidisciplinary team approach to investigate and build cases for criminal prosecution.

Another area of change, through legislation or revision of rules, is in court procedures. Recognizing that testifying may be quite onerous for an older person or that an older victim may lose capacity or die before a trial, some states and communities are changing procedures to allow preservation of testimony by videotape or deposition or to expedite hearings on the court calendar.

Finally, law enforcement officials and prosecutors are learning how to build and present cases without relying on the testimony of the victim.

Enacting Laws Supporting Civil Litigation in Elder Abuse Cases

Common law civil and equitable remedies such as restitution, constructive trusts, and compensatory damages have always been available to older victims of financial abuse. Victims could bring lawsuits for:

- assault and battery;

- breach of fiduciary duty;
- conversion; or
- fraud.

Additionally, other traditional civil actions, such as petitions for guardianship or conservatorship, divorce, or legal separation, may be used as tools to prevent further abuse. Such actions, however, will not result in recovery of a victim’s losses.¹⁹

Pursuit of common law civil and equitable remedies can be challenging to victims and their lawyers for several reasons.

- The slow pace and customary delays of the legal process are particularly onerous to older persons in general and to those who have been abused in particular. There is always a risk that the victim will die or lose capacity prior to trial.
- Elder abuse cases may be difficult to prove. Physical evidence may be unavailable due to delay or failure in recognizing the cause of the victim’s problem. Witnesses may be unavailable as well. The victim’s capacity to testify may be in question, either because the capacity was lacking at the time of the act(s) in question or because it has diminished or been lost in the intervening period. Many financial cases raise the complex issue of undue influence. Qualified expert witnesses may be difficult to find.
- Pursuit of elder abuse cases may not be financially viable for many victims or their lawyers. Compensatory damages may be low given a victim’s life expectancy, or physical, mental, or employment status. Attorney’s fees may not be available pursuant to state law. Punitive damages may not be awarded if the facts of the case do not support their prerequisites or compensatory damages.
- The perpetrator may not have the resources to satisfy a judgment. Collection of a judgment may be more likely if the abuse was committed in an institutional setting or by a fiduciary.²⁰

New statutes may help lawyers and their clients overcome these challenges. In some states, assets that were exploited from an older victim may be frozen to prevent dissipation. In California, the bank accounts of a vulnerable older person may be frozen by law enforcement under certain circumstances to prevent loss of assets.²¹

Consumer protection laws may provide a cause of action against individuals or companies that financially exploit older persons. Nursing homes have been subject to such claims for failure to provide the care that they advertised and contracted to offer.

Several states have enacted special elder abuse statutes that are proving useful to victims and their lawyers.

Probably the most well known of these is the California Elder and Dependent Adult Civil Protection Act (EADACPA).²² Its intent is to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.²³ The law does this by establishing a civil remedy for physical abuse, neglect, and fiduciary abuse; authorizing the award of attorney's fees and costs and punitive damages under certain circumstances; and allowing a cause of action to survive if the victim dies.²⁴

Arizona's APS statute includes a civil remedy and authorizes actual, consequential, and punitive damages; attorney's fees and costs; and divestiture.²⁵

Illinois law authorizes treble damages for losses incurred by an "elderly or disabled person" as a result of financial exploitation when an exploiter is criminally charged and fails or refuses to return the victim's property following demand by the victim or the victim's legal representative.²⁶ Attorney's fees and court costs are also authorized.

Maine's "Improvident Transfers of Title" statute creates a presumption that a "transfer of real estate or major transfer of personal property or money for less than full consideration by an elderly person who is dependent on others to a person with whom the elderly dependent person has a confidential or fiduciary relationship" was the result of undue influence unless the grantor was represented by an independent counsel for the transaction.²⁷ It also authorizes a civil action for relief.

Conclusion

The environment of elder abuse in general, and financial abuse of the elderly in particular, is changing dramatically. In the 1990s there was a shift in our society's response to financial abuse: from a social services and civil problem to an issue that also has criminal law implications. This trend is continuing and expanding in the new millennium.

Elder law practitioners should treat financial abuse as the crime that it is. The benefits of criminal justice system involvement in these cases are that it may (1) prevent further abuse, (2) result in a perpetrator—often a family member with a mental health or substance abuse problem—getting needed treatment, and (3) result in restitution that a civil judgment would not provide.

Notes

1. NATIONAL CENTER ON ELDER ABUSE, 2000 SURVEY OF STATES (FORTHCOMING 2002).
2. NATIONAL CENTER ON ELDER ABUSE, THE NATIONAL ELDER ABUSE INCIDENCE STUDY 1-9 (1998).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Rosalie S. Wolf, *Understanding Elder Abuse and Neglect*, AGING, Issue No. 367, at 4, 6.
10. A. Paul Blunt, *Financial Exploitation of the Incapacitated: Investigation and Remedies*, JOURNAL OF ELDER ABUSE AND NEGLECT, Vol. 5, No. 1, 1993, at 19, 22; OREGON DEPARTMENT OF HUMAN RESOURCES SENIOR & DISABLED SERVICES DIVISION AND OREGON BANKERS ASSOCIATION, PREVENTING ELDER FINANCIAL EXPLOITATION: HOW BANKS CAN HELP – HOW BANK EMPLOYEES CAN RECOGNIZE AND REPORT, IV-1, 2 (1999).
11. AMERICAN MEDICAL ASSOCIATION, DIAGNOSTIC AND TREATMENT GUIDELINES ON ELDER ABUSE AND NEGLECT (1993).
12. Yolanda M. Sanchez, *Distinguishing Cultural Expectations in Assessment of Financial Exploitation*, JOURNAL OF ELDER ABUSE AND NEGLECT, Vol. 8, No. 2, 1996, at 49.
13. Kathleen H. Wilber & Sandra L. Reynolds, *Introducing a Framework for Defining Financial Abuse of the Elderly*, JOURNAL OF ELDER ABUSE AND NEGLECT, Vol. 8, No. 2, 1996, at 61, 64.
14. *Id.*
15. *Id.*
16. Gillian Price & Craig Fox, *The Massachusetts Bank Reporting Project: An Edge Against Elder Financial Exploitation*, JOURNAL OF ELDER ABUSE AND NEGLECT, Vol. 8, No. 4, 1997, at 59.
17. OREGON DEPARTMENT OF HUMAN RESOURCES SENIOR & DISABLED SERVICES DIVISION AND OREGON BANKERS ASSOCIATION, *supra* note 12.
18. Candace J. Heisler, *Elder Abuse and the Criminal Justice System: New Awareness, New Responses*, GENERATIONS, Vol. XXIV, No. 2, Summer 2000, at 52.
19. Lori Stiegel, *The Changing Role of the Courts in Elder Abuse Cases*, GENERATIONS, Vol. XXIV, No. 2, Summer 2000, at 59, 61.
20. *Id.*
21. CAL. PROBATE CODE §2950 *et seq.* (West 2000).
22. CAL. WELF. & INST. CODE §15600 *et seq.*
23. CAL. WELF. & INST. CODE §15600(j).
24. CAL. WELF. & INST. CODE §15657 - 15657.3.
25. ARIZ. REV. STAT. §46-455.
26. 720 ILL. COMP. STAT. ANN. 5/16-1.3.
27. ME. REV. STAT. ANN. tit. 33, §1022-102.

In Conference

Elder Law Experts Convene to Draft Recommendations on Guardianship, Medicare, and Discuss Elder Rights

Blueprint for Guardianship Reform

By Erica F. Wood

In November 2001, more than 80 national experts gathered at Stetson Law School in St. Petersburg, Florida to take a hard look at the adult guardianship system in America. How is it working? What are its strengths and weaknesses? Is it serving the at-risk incapacitated population well? What changes are needed in law, policy, and practice?

The experts were convened at "Wingspan," the Second National Guardianship Conference. Wingspan aimed to look back on recommendations from the first national guardianship conference in 1988, known as "Wingspread," and to examine what progress has been made in the interim and what steps should be taken to meet future needs.

Wingspan conferees were appointed by several collaborating groups, including the National Academy of Elder Law Attorneys, the Borchard Foundation Center on Law and Aging, Stetson University College of Law, the ABA Commission on Legal Problems of the Elderly, the ABA Section on Real Property, Probate and Trust Law, the American College of Trust and Estate Counsel, the National College of Probate Judges, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, AARP, and the Academy of Florida Elder Law Attorneys.

Six commissioned papers and accompanying issue briefs provided an analytical starting point and framework for discussions, each addressing different aspects of guardianship reform and current practice across America.

Working in intensive small group sessions and a voting plenary, the participants approved 68 recommendations in six broad areas: overarching needs; diversion and mediation; due process; agency guardianship and guardianship standards; monitoring and accountability; and lawyers as fiduciaries or counsel to fiduciaries. The recommendations identify three primary requirements for guardianship reform:

- education and training for all actors, including judges, court personnel, attorneys, other professionals, guardians, families and the public;
- data collection and research to determine who the guardianship system is serving and how it is working; and
- funding for assessments, public guardianship, monitoring, research, and other facets of successful reform.

The recommendations currently are being considered for adoption by national groups interested in guardianship reform. The recommendations are intended to help pave the way for a guardianship system in the twenty-first century that safeguards the rights and provides for the needs of the rising number of persons with diminished decisional capacity.

The Wingspan recommendations and background papers will be published in a special issue of the *Stetson Law Review*. "Wingspan—The National Guardianship Symposium," *Stetson Law Review*, Volume 31, Number 3 (2002), may be ordered for \$25 from the Stetson College of Law Web site at <http://www.law.stetson.edu> (select "Student Publications Page" and follow the directions from there) or by contacting Beth Curnow at the *Stetson Law Review*, 1401 61st St., S., St. Petersburg, FL 33707, phone (727) 562-7800 ext. 7956.

Collaborate Listserve

The ABA Commission sponsors the "Collaborate" listserv on aging, disability, and dispute resolution. The listserv includes more than 185 mediators, lawyers, long-term care ombudsmen, aging and disability advocates, service providers, and academics.

The objective is to promote the use of creative dispute resolution mechanisms in the aging and disability communities.

The listserv is low-key, and offers a useful way to exchange information, updates, and announcements. To sign up, e-mail to ericawood@staff.abanet.org.

Erica F. Wood is associate staff director of the ABA Commission on Legal Problems of the Elderly.

Recommendations for a Coordinated Care Benefit in the Traditional Medicare Program

By Judith A. Stein

At a Washington, D.C. conference convened by the Center for Medicare Advocacy, Inc., and supported by the Commonwealth Fund, a group of fifty care-providers, policy-makers, researchers, and advocates came together to discuss and formulate recommendations for a Coordinated Care Benefit to be incorporated into the traditional Medicare program. The March 2002 conference was designed and administered by the staff of the Center for Medicare Advocacy.

The conference included leading professionals from the fields of gerontology, health law, health policy, health economics and finance, medicine, and care management for older persons and persons with disabilities. Participants met over a two-day period to discuss, frame, and refine comprehensive recommendations for a Medicare Coordinated Care Benefit.

Conferees focused on building a broader, more comprehensive definition and understanding of the function and funding of care coordination, leading to a consensus on the nature and scope of care coordination as a traditional Medicare benefit, access to the benefit, payment methodologies, and costs to beneficiaries.

The deliberations of the conferees were anchored by four background papers commissioned for the conference. The papers discussed the issues raised by the four major disciplines represented at the conference, including:

- the economic incentives for service provider participation, and benefit financing;
- the medical/clinical needs to be addressed through care coordination;
- the scope and nature of care management services, including medical and non-medical services; and
- the manner in which the benefit should be framed in the Medicare Act, as well as the necessary legal protections to be provided to beneficiaries.

Judith A. Stein is the executive director of the Center for Medicare Advocacy, Inc., a private, non-profit organization that provides education, advocacy, and legal assistance to help elders and people with disabilities obtain necessary healthcare. The Center focuses on the needs of Medicare beneficiaries, people with chronic conditions, and those in need of long-term care. For more information about the Center for Medicare Advocacy, Inc., see its Web site at <http://www.medicareadvocacy.org>.

The need for a Coordinated Care Benefit in the traditional Medicare program is gaining increased attention. Recent examples include the Medicare Reform Act of 2001 (S1135), which would establish a coordinated care program and a separate provision that allows the secretary of Health and Human Services (HSS) to implement disease management services. Another bill, the Medicare Modernization and Solvency Act (H.R. 803) would establish similar services. In addition, the secretary has funded a series of case management and disease management demonstration projects. Requests for proposals for additional demonstrations have recently been circulated.

The conferences' recommendations, commissioned papers, proceedings, and consensus statements will be compiled for publication and distribution. It is hoped that this work will serve as a valuable resource and springboard for further discussions about the future of the Medicare program.

Highlights of the conference recommendations include:

1. The primary, over-arching goal of a Medicare Coordinated Care Benefit is to improve care.
2. Savings should not be the goal of a Medicare Coordinated Care Benefit. If savings are to be considered they must be thought of more globally than, and recognized beyond, savings only to the Medicare program.
5. The Benefit will assist beneficiaries with the greatest need who are not served well by the traditional Medicare program and who would benefit from a coordinated care benefit.
6. Eligibility shall be based on having five chronic conditions (to be determined taking into consideration multiple providers, high costs, and high use of services), OR a combination of clinically complex chronic conditions which would be amenable to coordinated care, OR two or more chronic conditions and functional impairments which limit the ability of the individual to manage those chronic conditions.
9. There shall be no means testing for this Benefit.
12. The Coordinated Care Benefit consists of two areas of coordination:
 - among the beneficiary's doctors about clinical/medical components of care, performed by medical personnel under the supervision of a physician; and
 - of related health and social services, performed by a care coordinator.

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Coordinated Care Benefit

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15. The Care Coordination Service must involve facilitating access to, and coordination of, all presently offered Medicare services and coordination of other needed and wanted services.
18. A hybrid payment system should be utilized for the Coordinated Care Benefit and should encompass three reimbursable functions:
 - initial and periodic, comprehensive, multidisciplinary assessments, reimbursed on a fee-for-service basis;
 - coordination of services, reimbursed on a prospective payment basis; and
 - ongoing monitoring, reimbursed on a prospective payment basis.
19. There should be a prospectively determined, “per beneficiary/per month” payment for the Coordinated Benefit, paid to the care coordinator, with the possibility of having some sort of complexity or acuity adjustment in the future.
20. There should be no cost sharing to the beneficiary for a Medicare Coordinated Care Benefit.
21. Reimbursement should include financial incentives to doctors to participate in the Coordinated Care Benefit.
24. Payments must be adequate regardless of the payment methodology.
27. There should be a monitoring and evaluation component of the new Benefit that would include data regarding access to services.
28. Legal safeguards shall include:
 - individual appeal rights, including the right to an expedited appeal;
 - quality review;

- voluntary/involuntary disenrollment rules; and
- disclosure requirements.

To view the complete recommendations, visit the Center’s Web page at <http://www.medicareadvocacy.org>.

Statewide Virginia Elder Rights Conference: Coming of Age

By Erica F. Wood

More than 100 participants at the second statewide Virginia Elder Rights Conference, held April 30 through May 2, 2002, heard remarks from Virginia’s lieutenant governor, secretary of human resources, and attorney general.

Paul McNulty, U.S. Attorney for the Eastern District of Virginia, told the conference that federal prosecutors are aggressively going after fraud and abuse in Virginia nursing homes. Other speakers highlighted current issues in elder abuse prevention, legal ethics of attorneys in serving older clients, assisted living residents rights, and Medicare. A closing plenary panel focused on legal and judicial access for older Virginians.

The second Elder Rights Award went to Betty Booker, a reporter for the *Richmond Times-Dispatch* who regularly covers elder rights stories. The conference was sponsored by the Virginia Elder Rights Coalition; co-sponsors included both the Virginia State Bar and the Virginia Bar Association.

Erica F. Wood is associate staff director of the ABA Commission on Legal Problems of the Elderly.



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The conference will be held at the Hilton Crystal City in Arlington, Virginia – only 15 minutes from the Nation's Capital.

This year's conference offers you the opportunity to share your expertise with colleagues! NALC 2002 will include workshops planned and conducted by advocates in the field. Watch for more information and a Request for Proposals to present a workshop at this year's NALC!

For information on topics, registration, and reservations, contact

Ada Albright
601 E Street, N.W.
Washington, DC 20049
E-mail: Aalbright@AARP.org
Phone: 202/434-2197

Watch for details and a registration form coming soon!

Get Connected to Elderbar

Join Elderbar, the listserv that brings together public sector law and aging advocates and the private bar. Elderbar is for you if you are a:

- ◆ Title IIIB legal services provider, legal services developer, long-term care ombudsman, or other Older Americans Act funded elder rights advocate;
- ◆ Legal Services Corporation, other non-profit, or public sector legal advocate;
- ◆ Law school elder law or clinical staff;
- ◆ Bar association elder law section or committee leader; or
- ◆ National law and aging advocate.

Elderbar will give you the opportunity to communicate across the boundaries of the law and aging networks and the public and private sectors. You will be able to share ideas and information about bar sections and committee structures and activities, and to learn what others are doing in the face of funding shortages and practice restrictions to meet the legal needs of older people.

Elderbar is a project of the ABA Commission's National Legal Assistance Support Center. It is a closed list; messages can only be posted and read by members.

To subscribe, please send your name, e-mail address, and professional affiliation to Stephanie Edelstein at sedelstein@staff.abanet.org.

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