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Do You know the

Effects of

Violence

on your clients?

Beyond Granny Bashing : Elder Abuse in the 1990s

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Mr. C.'s physical disabilities limit his mobility so that he has difficulty leaving his home. His grandchildren use his cash and his credit cards when they shop for his groceries and other necessities; however, they also use his cash and credit cards to make large purchases for themselves. Mr. C's credit card bills have now become so large that he can no longer pay them. Creditors are calling him, and he fears that he will lose his house.

Adult protective service workers, responding to a complaint by neighbors, visit the house where Mrs. R. lives with her son, who is also the guardian of her person and property. The house is run-down and in disrepair. Mrs. R. is confined to her bed and covered with dirt, bruises, and bed sores. A medical examination shows she is dehydrated and malnourished.

Mrs. H. is a 92-year-old woman who lives alone. The door to her apartment is always wide open so that anyone can walk in. There is no food in the refrigerator; the empty cupboards are roach infested. Mrs. H. is very confused as to time and place. However, she insists that she is fine and refuses "meals on wheels," homemaking, and other services.

I. Introduction

As the above case examples show, the term "elder abuse" encompasses more than the physical abuse or "granny bashing" that made headlines during the 1970s. /1/ Elder abuse can also take the form of emotional abuse, sexual abuse, neglect by a care giver, self-neglect, or financial exploitation. Physical abuse of older persons is most analogous to the violence experienced by other subpopulations. It includes both violent conduct by family members or care givers in the person's home (domestic abuse) and violent conduct by caregivers in an institutional setting, such as a nursing facility (institutional abuse). Emotional or psychological abuse is also akin to that experienced by some younger women. It often occurs when a care giver intimidates or isolates an older person, or threatens to place her in an institution or to do bodily harm. Sexual abuse is a growing concern, both for older persons living at home and those living in an institutional setting.

/2/

Abuse through neglect is more prevalent among older persons and persons with disabilities. Neglect occurs when a care giver either intentionally or negligently fails to provide for the older person's basic needs. If the individual fails to provide for her own food, shelter, clothing, and health needs, then the problem is characterized as one of self-neglect. While self-neglect often arises when someone lacks the capacity to care for oneself, it can also result from drug or alcohol abuse, or an alternate life-style chosen by a competent individual.

Financial exploitation has traditionally been considered theft or conversion of an older person's money or property, often by a relative or care giver.

II. Victims, Victimizers, and the Incidence of Abuse

As with domestic violence in general, older women are more likely than older men to be victims of elder abuse. The greater incidence of abuse against women can be explained in part by women's longevity; the typical elder abuse victim is at least 75 years old, and women generally live longer than men. The typical victim is also likely to be frail due to physical or mental impairments, to have low to modest income, and to be living with family members or other relatives. /3/

The most common abuser is the victim's son or daughter who is acting as the victim's care giver. In fact, care-giver stress is often cited as a leading cause of abuse. Family dynamics also plays a role. Abuse is more likely to occur in families that are socially isolated. No friends or outsiders are available to observe the abuse or to provide needed support and assistance to the care giver. Some abusers were victims of abuse themselves or grew up in an abusive household. The abusive behavior they now display toward the older person may be in retaliation for abuse experienced as a child. /4/

Many abusers are also experiencing individual problems. Marital difficulties can be exacerbated by care-giving responsibilities; financial problems can be intensified by emotional or financial dependency on the victim. The perpetrator's alcoholism, drug addiction, or health problems may trigger the abusive behavior.

The American Public Welfare Association (APWA), through its grants with the Administration on Aging, has conducted significant research on elder abuse. Its surveys indicate that between 1986 and 1991 the incidence of abuse in noninstitutional settings increased by 94 percent. APWA estimates that, in 1991 alone, 1.57 million older persons were victims of physical abuse, neglect, and exploitation.

Despite a push toward mandatory reporting of elder abuse cases, the exact number of older people, nationally, who fall within the broad definition of abuse is unknown. First, as with abuse generally, not all elder abuse cases are reported. Older people are even less likely to report the abuse than other victims. In 1990, the Subcommittee on Health and Long-Term Care of the House Select Committee on Aging found that, "while 1 out of 3 child abuse cases is reported, only 1 out of every 8 cases of elder abuse is reported." /5/

Second, variations in state law definitions of abuse affect the number of cases reported. For example, not all states include self-neglect in their definition of abuse. /6/ States also have different age cutoffs for consideration as "elderly." Most states use age 60, although some use age 65. Third, state data collection practices also may influence the number of cases reported. States may not keep separate data on institutional and noninstitutional abuse, on elderly and other adult abuse victims, or on substantiated and unsubstantiated reports of abuse. /7/

III. Addressing the Problem

A. *The Child Abuse Model*

The focus on elder abuse arose shortly after Congress enacted the Federal Child Abuse Prevention and Treatment Act of 1974 (FCAPTA). /8/ This statute provided financial incentives to states to house in one agency the responsibility for both prevention and treatment of child abuse and established a national data bank on child abuse statistics and research. Because it was seen, in its early stages, as effective, aging advocates patterned their response to elder abuse after what was being done in the area of child abuse. Their efforts have been most effective on the state level; federal legislation similar to the FCAPTA has not been enacted to protect older abuse victims.

1. The Adult Protective Services System

Because no federal legislation establishes a national adult protective services (APS) system to investigate allegations of abuse and to assist older people who live in noninstitutional settings, each state must enact its own laws, allocate its own resources, and develop its own scheme to protect older people at risk. While federal incentives may have encouraged the development of some programs, /9/ states, by and large, have been left on their own to struggle with a cost-effective approach to the problems of abuse. Thus, some states use one agency to handle both institutional and domestic abuse, while others use separate agencies. Most states combine adult protective services with child protective services. Louisiana discontinued all APS services in August 1988 because of budget shortfalls /10/ and did not resume its programs until 1993.

In addition to receiving reports of abuse, most APS agencies investigate allegations of abuse and coordinate services to victims living in noninstitutional settings. These services can be for evaluation purposes, such as medical or psychiatric examinations to determine an individual's physical condition or mental capacity. They can also be supportive, such as homemaking and health aid services, meals programs, money management, transportation, and friendly visitors. Where necessary, APS programs provide protective placements for elder abuse victims, often following the foster care model used for victims of child abuse.

Services are sometimes available for the care giver, on the theory that alleviating care-giver stress may help alleviate abuse. The most common kind of assistance, respite care services, provides an alternate care giver for a limited time period to give the primary care giver a break from his or her responsibilities. Some APS programs provide other counseling services, including job and

psychological counseling, to help the care giver cope with problems caused by care giving or other life situations.

2. The Reporting Dilemma

In 1980, when legislation which would have required mandatory reporting of elder abuse was first introduced, /11/ only 16 states had laws which required reporting of elder abuse. /12/ Ten years later, forty-two states and the District of Columbia had mandatory elder abuse reporting laws. The remaining eight states made reporting voluntary. /13/

The dramatic increase during the 1980s in the number of states with obligatory abuse reporting laws reflects the early thinking about elder abuse. The elder abuse reporting requirement is patterned after the mandatory reporting of child abuse. Advocates of mandatory reporting argue that those who are required to report become more aware of the problem, that more cases are reported and investigated, and that more victims therefore receive needed assistance. They also claim that reporting particularly benefits homebound individuals who are physically, emotionally, or financially dependent upon their abuser, and who are too fearful of reprisals to seek help themselves. /14/

It is not clear, however, that mandatory reporting laws increase the data available about elder abuse. As noted earlier, state laws vary concerning the type of abuse that must be reported, who is required to report abuse, and to whom the report is made. /15/ These variations make national data collection and analysis difficult. /16/ At least one study found that, while mandatory reporting increased the number of clients referred for assistance, many of the clients were referred inappropriately. /17/

Mandatory reporting laws are also not a high priority for those who handle abuse cases directly. Forty state officials from aging and protective service agencies who responded to a survey by the General Accounting Office (GAO) determined that mandatory reporting is not the most effective means of identifying, preventing, and treating elder abuse. Respondents considered public and professional awareness of elder abuse to be the most effective way to identify incidents of abuse. The availability and use of in-home services were found to be of greatest assistance in both prevention and treatment. /18/ Based on its survey, the GAO concluded that elder abuse programs would improve more if public awareness, interagency coordination, and in-home services and respite care were increased than if reporting of specific information about allegations of abuse were required. /19/

Mandatory reporting also raises ethical considerations. /20/ First, how can the reporting of suspected abuse be reconciled with American concerns about autonomy and self-determination? Unlike children, adults are presumed competent to make decisions about their own life-style and to be able to seek help if necessary. Because of this competency presumption, no mandatory reporting of suspected spousal abuse of a younger woman is required. Yet if the woman is over age 60, the presumption of competency and self-determination is suddenly reversed. Suspected abuse may be required to be reported on the assumption that the older woman is incapable of seeking help herself.

Second, how does reporting fit with the notion of confidentiality? The patient-doctor privilege is recognized nationwide. Yet states with mandatory reporting laws require that this privilege be broken when abuse is suspected. /21/ Knowledge that any confidences about an abusive situation will be turned over to the authorities may frighten an older person from talking about the abuse or cause the perpetrator to deny the victim necessary medical care. /22/

3. Relationship with the Guardianship System

Guardianship may be the only remedy available to APS programs that need to intervene and provide support to victims who either lack the capacity, or refuse, to consent to services. In some states, such as Maryland, the APS program will initiate the guardianship proceeding and may even serve as guardian if no one else is available. /23/

Although guardianship may be warranted in some situations, its use by APS programs as a standard remedy for abuse is questionable. In addition to the array of problems associated with guardianship in general, /24/ other problems stem from the nature of the abuse cases. First, APS programs frequently rely on a state's emergency guardianship procedure when they perceive the abusive situation to be life threatening. Yet, in some states, these procedures do not contain the due process protections available in standard guardianship proceedings. /25/ Second, behavior that is viewed as eccentric in a younger person might be considered self-neglect by an older person. If the APS program files a guardianship proceeding to impose services on the reluctant "victim," then she must engage in a court battle to prove her capacity and to retain her autonomy, with no guarantee of success. Finally, despite revisions in state guardianship laws to provide for limited guardianships, /26/ most guardians are awarded complete control over the lives of their wards. Thus, the guardian may have more authority than is needed to address and treat the abusive situation. In addition, many older people are removed from their homes and placed in nursing facilities after guardianships are imposed. This may be as traumatic as the actual abuse, especially if the perpetrator intimidated the older person by threatening to place her in a nursing facility.

B. The Older Americans Act

1. The Ombudsman Program

The long-term care ombudsman program established pursuant to the Older Americans Act (OAA) /27/ is another important component of the elder abuse regulatory system. Because it is charged with investigating and resolving complaints made by or on behalf of residents in nursing facilities, it is responsible in most states for responding to allegations of institutional abuse. Although the OAA was amended in 1981 to include board and care facilities within the purview of the ombudsman program, many state programs lack sufficient funds to provide substantial assistance to residents in those facilities. Other states, however, have expanded their ombudsman services to include hospitals and home health care agencies. /28/

Another federal law, the Nursing Home Reform Law of the Omnibus Budget Reconciliation Act of 1987 (OBRA 87), /29/ promotes and protects residents' rights and forms the framework for the

ombudsman program's investigations of abuse complaints. The OBRA 87 protects the right to be free from physical or mental abuse, including verbal and sexual abuse and the use of physical or chemical restraints for discipline or convenience, and the right to have funds managed by a facility protected from financial abuse. /30/ The ombudsman program works directly with residents who have filed complaints of alleged violations of their rights or who have had complaints filed on their behalf. Another program, the state nursing home surveyors, monitors facilities' compliance with the residents' rights protections of the OBRA 87.

The ombudsman program comes into conflict with state elder abuse laws over the issue of mandatory reporting of abuse. The OAA requires ombudsman programs to establish procedures that ensure the confidentiality of communications with clients, /31/ while some state mandatory reporting laws include ombudsmen among those who must relate allegations of known or suspected abuse. Problems arise when the resident confides in the ombudsman but refuses to report the incident or to give the ombudsman permission to make a report.

At a recent symposium on coordination between the APS and ombudsman programs, the participants agreed that keeping residents' confidences was essential for ombudsmen to maintain a relationship of trust with them. Because the federal requirement of confidentiality supersedes the state obligations to report alleged abuse, ombudsmen should not disclose information about abuse without the resident's permission. The participants also agreed that the ombudsman could take action to support a resident who refuses to report abuse and to protect the safety of other residents. /32/

2. Title VII of the Older Americans Act

The 1992 reauthorization of the OAA created a new Title VII to protect the rights of vulnerable older adults. /33/ It brings together under one title four programs, including the ombudsman program and programs for prevention of elder abuse, neglect, and exploitation; programs for elder rights and legal assistance development; and programs for outreach, counseling for insurance, and public benefits.

The abuse prevention provisions of Title VII set forth activities to assist states. These include public education, coordination of services between APS programs and OAA-funded area agencies on aging, data collection, and training. /34/ The new title does not authorize states to establish a protective services system under the OAA but requires state units on aging to work with the existing system to improve the delivery of services and protections to vulnerable older adults.

Coordination between the OAA and APS programs is crucial to enhance services to victims of elder abuse. Though ombudsmen and APS workers act as advocates for their clients, there are distinctions between the programs that need to be recognized. For example, because the APS programs are based on a *parens patriae* legal philosophy, they act in the best interest of the individual. The ombudsman programs, on the other hand, serve as agents of and advocates for residents. APS respects client autonomy as long as the client retains decisional capacity and will intervene when the client does not. Ombudsmen work toward empowerment of residents. Although the ombudsman program works with some of the most frail and vulnerable older persons, ombudsmen will not intervene on behalf of a resident unless the resident wants assistance. /35/

Coordination is important for a more practical reason. As of 1992, 22 state agencies on aging funded under the OAA also administered the APS program in their state. /36/ Limited funding has caused some states to combine the APS and ombudsman roles. At its worst, this combination of roles results in a conflict of interest stemming from the different approaches to the ombudsman and protective service jobs. In all cases, the combined position means that one function will be favored more than the other and that clients lose services and representation available when APS and ombudsman services are each carrying out their interlocking roles. /37/

3. Funding

Although Congress authorized expenditures under the OAA for elder abuse prevention in 1987, it did not actually appropriate money until FY 1991. The \$4.339 million appropriated for FY 1993 was far below the \$15 million authorized for elder abuse prevention by Congress. The money appropriated, however, represents the only federal program to address elder abuse specifically. Since 1988, the AoA has also funded specific resource centers to conduct research and demonstration and training projects. /38/

C. Judicial Interventions

1. State Domestic Violence Laws

State domestic violence programs take a different approach from child protection statutes and hence form a third model upon which an elder abuse system can be based. Reporting the abuse is no longer the focal point. Programs are aimed at education for victims and law enforcement personnel, judicial remedies to protect the victim, and alternative placements for those most in danger.

State domestic violence laws recognize both the autonomy of the victim and the need to ensure her safety. Unlike APS programs, no one intervenes on behalf of a reluctant victim who does not want assistance. Nor is a victim likely to be taken from her home unless she voluntarily chooses to go to a shelter for battered women. In many situations, it is the perpetrator, and not the victim, who is removed from the home through judicial intervention.

State domestic violence laws are not as effective a remedy for older victims of physical abuse as they are for younger abused spouses, however. First, in some states, the laws protect only abused spouses or former spouses. They are not applicable when the abuser is a child or other relative. Second, in other states, a protection order pursuant to a domestic violence statute will not be issued unless a petition for separation or divorce has also been filed. /39/ Again, this provides no relief when the abuser is not a spouse. It also limits relief in all cases to those abused spouses who are willing to take steps to dissolve the marriage. Third, most states require that the petition for a protection order be filed by the victim. /40/ While this requirement creates a barrier for victims of all ages who are too intimidated by their abusers to seek judicial intervention, it creates additional barriers for older victims who lack the understanding or capacity to complete the process of obtaining a protective order.

State domestic violence laws create another dilemma for older victims of abuse. Most protective orders restrain the abuser from any contact with the victim or from residing in the household of the victim. This protects the older victim from experiencing the trauma of being removed from her home, often against her will. Yet many abusers are the primary or sole care giver of the abused older person. If the perpetrators of the abuse are required to stay away, frail victims may have no one else to provide for their needs and may face imminent danger to their health and well-being. Unfortunately, there may be nothing in the domestic violence statute to address the problem by authorizing a judge to order that emergency care-giving services be provided.

In May 1994, the Senate Special Committee on Aging, in conjunction with the Older Women's League, sponsored a roundtable on violence against midlife and older women. A consensus was reached that the use of the term "violence" to describe elder abuse would catch the attention of the American public and put the problem within the context of the current policy debates on crime. Some participants cautioned, however, that the term "violence" was too limiting and might center attention on physical abuse and away from abuse caused by neglect and financial exploitation. The current scheme for approaching domestic violence is proof that the cautionary note is well taken. With the focus on remedying sexual and physical violence, current domestic violence laws may not be broad enough to provide remedies to victims of emotional abuse, neglect, self-neglect, and financial exploitation. /41/

2. Criminal Prosecution

Certain physical and financial abuse can be classified as either common-law felonies or misdemeanors in all jurisdictions. Specific instances of physical abuse may constitute assault, battery, or attempted murder. Situations involving financial abuse may be considered theft, blackmail, extortion, fraud, or forgery. Some states have imposed stiffer penalties for crimes against older people or have created specific crimes that address elder abuse. For example, the penalty in Washington, D.C., for robbery, theft, extortion, or fraud perpetrated against someone who is aged 60 or older is up to one and a half times the regular penalty. /42/ Both Indiana and Illinois make a care giver's neglect of an older person a crime. /43/

Many older people are as reluctant to seek assistance from the criminal justice system as they are to seek assistance under domestic violence statutes. They do not want to press criminal charges against family members, or to testify about embarrassing or traumatic abusive situations. They may fear reprisals from abusive care givers. This reluctance is evidenced by the fact that, in 1991, only 4.3 percent of reports of domestic elder abuse were made by law enforcement personnel. /44/ Unfortunately, the criminal justice system is often reluctant to prosecute alleged elder abuse cases. Many law enforcement personnel do not understand the nature of either the crime or the victim. They are often unwilling to go forward where the victim is unable or unwilling to participate as a witness. States such as Delaware that make the act of abuse itself a crime, without a need to establish actual harm to the victim, are much more likely to prosecute allegations of abuse successfully. /45/

D. Financial Abuse and Exploitation

1. Judicial Intervention

Financial abuse and exploitation lend itself more to the judicial model of intervention than to the agency model of programs and services. As noted above, many forms of financial abuse are crimes subject to state prosecution.

Traditional common-law civil remedies are also effective tools for redressing mismanagement of property, fraud, and theft. For example, advocates may file a petition for an accounting to determine how funds are being managed and spent. They may also seek to recover property through suits for conversion or for replevin, or through rescission of loans and reformation of deeds.

States are also enacting legislation that specifically targets abuse against older persons. Maine law creates a presumption of undue influence when a dependent older person transfers property for less than fair market value to someone with whom she has a confidential or fiduciary relationship. /46/ California's Elder Abuse and Dependent Adult Civil Protection Act (Act) provides additional remedies for older people and people with disabilities, including awards for pain and suffering, even if the victim dies before the case is resolved, and attorney fees. Jurisdiction for cases under the Act is placed in the probate court, which has jurisdiction over guardianships in California. /47/

2. Durable Powers of Attorney

The durable power is usually used to avoid appointment of a guardian of the property in the event of the maker's incapacity. It can also be used to protect an older person who is being financially exploited. The delegation of property management power to a trusted agent may make it more difficult for the older person to succumb to coercion and transfer property to the abuser. Of course, durable powers of attorney can be executed only by an individual who retains the capacity to understand the authority she is conferring to the agent.

Unfortunately, agents appointed pursuant to a power of attorney sometimes use the older person's resources in an unauthorized manner. A recent study concerning misuse of durable powers of attorney found that the overwhelming majority of respondents, 94 percent, believed that durable-power-of-attorney abuse occurs at least occasionally and that 66 percent had encountered actual abuse. /48/ The study recommended changes to protect the maker without restricting the usefulness of the durable power of attorney as an advanced planning device. These include greater education about the need to appoint a trusted agent and the fiduciary responsibilities of the agent, cautionary statements on all preprinted forms, more formal execution requirements, and mandatory recording of the durable powers of attorney. /49/

3. Representative Payment

The most common form of financial abuse seen by legal services programs is misuse by a relative or care giver of an older person's social security or SSI check. Appointment of a representative payee /50/ who receives and manages the social security or SSI payment is one way to ensure that the older person's benefits are used for her personal needs. /51/

Unfortunately, the representative payee is often the person who is misusing the social security or SSI benefits. The Social Security Act was amended in 1990 to provide greater protections to

beneficiaries. /52/ The Social Security Administration (SSA) must increase investigation of payee applicants before appointment and improve monitoring afterward. If SSA or a court of competent jurisdiction determines that the payee misused the beneficiary's money, SSA must terminate payment to the payee and make payment directly to the beneficiary or to another payee. The amendments also established, for the first time, a restitution provision in the Social Security Act itself. /53/ SSA must repay the beneficiary money misused if the misuse results from SSA's "negligent failure" to investigate or monitor a payee. /54/

4. Consumer Scams and Fraud as Elder Abuse

A growing number of legal services advocates are beginning to treat traditional consumer scams and consumer fraud against the elderly as financial abuse cases. This can provide additional remedies and stronger penalties in states that have special laws addressing financial abuse. For example, in Illinois, treble damages and attorney fees are available in a civil action which establishes that property has been converted from an older person or person with a disability through threat or deception. /55/

IV. A New Approach for the 1990s

Although many systems are in place to assist older victims of elder abuse, none addresses the problem adequately. Adult protective service programs rely too heavily on child abuse systems. The emphasis on the "best interests" of the victim ignores the autonomy and presumed competence of older adults and sometimes allows unwanted intervention into their lives. Moreover, APS programs have spent too much energy on the debate over mandatory versus voluntary reporting of suspected abuse and the need to collect additional data. This has drawn attention away from the real problem: the lack of funds for adequate services to prevent and treat abuse.

The other systems are not without their problems. The domestic violence model relies on an autonomous victim capable of coming forward to seek help and often is not designed to help victims of elder abuse who are not mentally or physically capable of asserting their rights. The long-term care ombudsman program, although successful, has limited authority over domestic abuse in most jurisdictions.

The ideal approach is to combine and emphasize the best elements of ongoing programs. The mandate under Title VII of the OAA is a good first step for coordinating the work of the APS and ombudsman programs. These programs also need to work with programs aimed at preventing and treating domestic violence in order to complete the picture. For example:

- The remedies available under adult protective service laws need to be expanded to include remedies available under domestic violence statutes.
- The domestic violence system needs to coordinate with APS and aging programs to provide respite care and other in-home services when an abuser who is also a care giver is denied access to the victim's home.

-- Domestic violence and APS programs should combine their training of law enforcement and court personnel about the special problems faced by victims of violence.

-- APS, ombudsmen, and domestic violence programs should work with prosecutors to ensure that perpetrators of abuse are prosecuted fully and subject to all criminal penalties available under state law.

Coordination of effort will enhance remedies in financial-abuse cases as well. Advocates need to consider traditional remedies, remedies available under consumer protection laws, and remedies available under special statutes addressing elder abuse. Prosecutors and consumer protection offices should work together to combine criminal and civil penalties when available.

Elder abuse has moved beyond granny bashing. It is time to move beyond reporting and guardianship in efforts both to prevent abuse and to protect those who are being abused.

Solution to Mr. C.'s Problems

Mr. C. was helped through a combination of adult protective and aging services, consumer protection laws, and laws against financial exploitation. First, protective services and aging programs provided Mr. C. with homemaking and chore services to do his shopping and cleaning. They set him up in a money management program that assisted him with bill payments and established a payment schedule for his large credit-card bills. Mr. C. was also able to limit his liability for some of the more recent purchases made by his grandchildren since he had never authorized the purchases. Through negotiations and the threat of both civil and criminal prosecution, Mr. C. received restitution of some of the funds misappropriated by his grandchildren.

Footnotes

/1/ In the 1970s, the focus was on physical abuse of older people by their families or by other care givers, hence the term "granny bashing." The term "elder abuse" arose out of the first Congressional hearing on the issue, which was convened in 1978 in Boston, Massachusetts, by the House Select Committee on Aging. The now-defunct Committee attributes the phrase "elder abuse" to the late Claude Pepper (D. Florida), then chairperson of the Aging Committee. Another source states that Legal Research and Services for the Elderly in Boston coined the term because of its "news media appeal." Compare Subcomm. on Health and Long-Term Care, House Select Comm. on Aging, *Elder Abuse: A Decade of Shame and Inaction*, Comm. Pub. No. 752 at ix, 101st Cong., 2d Sess. (Apr. 1990) [hereinafter *Elder Abuse: A Decade of Shame*]; Subcomm. on Human Servs., House Select Comm. on Aging, *Elder Abuse: What Can Be Done?*, Comm. Pub. No. 808, at 101 -- 2, 102d Cong., 1st Sess. (May 1991) [hereinafter *What Can Be Done?*] (statement of James Bergman).

/2/ Holly Ramsey-Klawnsnik, *Interviewing Elders for Suspected Sexual Abuse: Guidelines and Techniques*, 5 *J. Elder Abuse & Neglect* 5, 6 (1993). Ms. Ramsey-Klawnsnik notes that there is little research, literature or training on the issue of suspected sexual abuse of older persons.

/3/ Elder Abuse: A Decade of Shame, *supra* note 1, at xii; Senate Special Comm. on Aging, *An Advocate's Guide to Laws and Programs Addressing Elder Abuse*, 102d Cong., 1st Sess. 4, 5 (Comm. Print 1991) [hereinafter *An Advocate's Guide*].

/4/ *Id.*

/5/ Elder Abuse: A Decade of Shame, *supra* note 1, at xi, 42.

/6/ States that include self-neglect in their definition of abuse report a much higher incidence of abuse; self-neglect cases may account for 50 percent of the caseload of the agency charged with investigation of abuse. Gen. Accounting Office, *Elder Abuse: Effectiveness of Reporting Laws and Other Factors* 4 (GAO/HRD 91-74, Apr. 1991). See also Marcia Libes Simon, *An Exploratory Study of Adult Protective Services Programs' Repeat Elder Abuse Clients* 1 (AARP 1992) (citing "self-neglect" as "the single largest source of repeat cases among victims of elder abuse").

/7/ *Id.*

/8/ Elder Abuse: A Decade of Shame, *supra* note 1, at ix -- x.

/9/ Federal money received from the Title XX Social Service Block Grant Program, 42 U.S.C. Secs. 1397-1397e, initially supported many state APS programs. However, as the amount of block grant funding decreased during the 1980s, fewer states used that money to support APS programs. House Comm. on Ways & Means, *Green Book: Background material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*, 103d Cong., 1st Sess. 876 (1993). See also *An Advocate's Guide*, *supra* note 3, at 16.

/10/ Elder Abuse: A Decade of Shame, *supra* note 1, at 38 -- 40.

/11/ Legislation which would require states to have a mandatory elder abuse reporting law in order to receive federal funding targeted toward abuse has been introduced in virtually every Congress since 1980. None of the bills has been passed. Gen. Accounting Office, *supra* note 6, at 3.

/12/ *What Can Be Done?*, *supra* note 1, at 23 (statement of Cong. Mary Rose Oakar).

/13/ Gen. Accounting Office, *supra* note 6, at 2.

/14/ *What Can Be Done?*, *supra* note 1, at 23.

/15/ Most states require doctors, nurses, social workers, law enforcement personnel, and clergy members to report instances of suspected abuse, and generally grant immunity to those who make a good faith report. Other states place the burden on anyone who knows or has reason to suspect that abuse has occurred. Reports are generally made to state or local departments of social services, although some states place the duty to investigate reports with law enforcement offices. The long-term care ombudsman's office may be charged with investigating reports of abuse in institutional settings and, in some jurisdictions, may be required to investigate allegations of domestic abuse, as well. *An Advocate's Guide*, *supra* note 3, at 13.

/16/ The National Aging Resource Center on Elder Abuse issued guidelines for states to follow in collecting data on elder abuse in noninstitutional settings. Nat'l Aging Resource Ctr. on Elder Abuse, Suggested State Guidelines for Gathering and Reporting Domestic Elder Abuse Statistics for Compiling National Data (Washington, D.C. 1990).

/17/ An Advocate's Guide, *supra* note 3, at 13, 14.

/18/ Gen. Accounting Office, *supra* note 6, at 5.

/19/ *Id.* at 11.

/20/ What Can Be Done?, *supra* note 1, at 82 (statement of John Regan).

/21/ The American Medical Association has issued guidelines to doctors for handling cases of suspected elder abuse. Am. Medical Ass'n, Diagnostic and Treatment Guidelines on Elder Abuse and Neglect (1991).

/22/ What Can Be Done?, *supra* note 1, at 82.

/23/ Md. Code Ann., Est. & Trusts Secs. 13-705, 13-707(a)(10) (1991). The Office on Aging or its designee files the petition and acts as guardian for individuals over age 65.

/24/ See, e.g., Vicki Gottlich, Guardianship and Their Alternatives: Legal Services and the Role of the Advocate, Representing Older Persons (1990).

/25/ See, e.g., *Grant v. Johnson*, 757 F. Supp. 1127 (D. Or. 1991).

/26/ Texas's new guardianship law defines all guardianships as limited. Tex. Rev. Civ. Stat. Ann., Prob. Code Secs. 692, 694 (West Supp. 1994).

/27/ 42 U.S.C. Sec. 3058f.

/28/ An Advocate's Guide, *supra* note 3, at 22 -- 23.

/29/ Nursing Home Reform Law, 42 U.S.C. Secs. 1395i-3, 1396r (1987).

/30/ 42 C.F.R. Sec. 483.10(c).

/31/ 42 U.S.C. Sec. 3058g(d).

/32/ Admin. on Aging, Coordination Between Long-Term Care Ombudsman and Adult Protective Services Programs and Related Issues (1994).

/33/ 42 U.S.C. Sec. 3058a et seq.

/34/ 42 U.S.C. Sec. 3058i.

/35/ Admin. on Aging, *supra* note 32, at 4.

/36/ *Id.* at 1.

/37/ *Id.* at 8.

/38/ Nat'l Ctr. on Elder Abuse, *Elder Abuse: Questions and Answers* 11 -- 13 (1994).

/39/ *An Advocate's Guide*, *supra* note 3, at 31.

/40/ The Illinois Domestic Violence statute allows a petition to be filed by someone acting on behalf of an "adult with disabilities." Ill. Ann. Stat. ch. 750, para 60/201(b) (Smith-Hurd 1993).

/41/ Joan Zorza, *Using the Law to Protect Battered Women and Their Children*, 27 *Clearinghouse Rev.* 1437 (Apr. 1994).

/42/ D.C. Code Ann. Sec. 22-3901 (Michie 1989).

/43/ Ind. Code Sec. 35-46-1-12 (1994); Ill. Ann. Stat. ch. 720, para. 5/12-21 (Smith-Hurd 1993).

/44/ Toshio Tatara, *Understanding the Nature and Scope of Domestic Elder Abuse with the Use of State Aggregate Data: Summaries of the Key Findings of a National Survey of State APS and Aging Agencies*, 5 *J. Elder Abuse & Neglect* 35, 42 (1993).

/45/ Thomas Carluccio, *Testimony at the Roundtable on Violence Against Midlife and Older Women*, before the Senate Special Committee on Aging (May 4, 1994).

/46/ Me. Rev. Stat. Ann. tit. 33, Secs. 1021 -- 25 (West Supp.1993).

/47/ Cal. Welf. & Inst. Code Secs. 1567, 1567.2, 1567.3 (Deering Supp. 1993). The law also applies to cases involving physical abuse and neglect.

/48/ Jonathan L. Federman & Meg Reed, *Abuse and the Durable Power of Attorney: Options for Reform* 2 (1994). The 270 incidents of abuse described by respondents were committed mainly by an immediate family member (64 percent) or other relative (19 percent). Victims were more likely to seek civil redress (85 civil suits) than criminal penalties (48 cases were being prosecuted). *Id.* at 40.

/49/ *Id.* at 2 -- 3.

/50/ The Social Security Administration will pay social security and SSI benefits to a representative payee when it determines that payment would be in the best interests of the beneficiary. 42 U.S.C. Secs. 405(j), 1383(a)(2). Representative payment is mandatory for individuals found legally incompetent, minors, and SSI beneficiaries who receive disability benefits because of drug

addiction or alcoholism. Payment may be made to a payee for beneficiaries who are mentally or physically incapable of managing their benefits. 20 C.F.R. Secs. 404.2010(a), 416.610(a). See also 38 U.S.C. Sec. 5502 for an explanation of the fiduciary program under the Department of Veterans Affairs.

/51/ Some jurisdictions have established programs that provide volunteer representative payees for individuals who have no one else to assist them. For further information about the availability of these programs in your community, contact Legal Counsel for the Elderly, (202) 434-2120.

/52/ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, Sec. 5105, 104 Stat. 1388 (1990).

/53/ Holt v. Bowen, 712 F. Supp. 813 (D. Colo. 1989) (Clearinghouse No. 44,479), held the SSA liable to a beneficiary for money misused by a representative payee appointed without a proper investigation.

/54/ 42 U.S.C. Secs. 405(j)(5), 1383(a)(2)(E). See also proposed rules defining "negligent failure" as the failure to investigate or monitor a payee or an investigation or monitoring effort which is carried out negligently. 59 Fed. Reg. 11949 (1994). If SSA is not liable, then the payee remains liable to restore the misused benefits, and SSA "will always seek restitution."

/55/ Ill. Rev. Stat. ch. 38, Sec. 16-1.3 (1989). The civil penalties were enacted as part of a statute which established the crime of "financial exploitation of an elderly or disabled person." They are available regardless of the outcome of any criminal proceeding.

ABA Commission Undertakes Elder Abuse Project

In September 1993 the American Bar Association (ABA) Commission on Legal Problems of the Elderly began a ground-breaking 18-month project, funded by the State Justice Institute and the ABA Fund for Justice and Education, to develop recommended guidelines for state courts on handling elder abuse cases. The project's goal is to aid courts in (1) providing appropriate judicial solutions that respect the values and wishes of elder abuse victims while protecting their welfare; (2) easing access of appropriate cases to the court system; and (3) enhancing coordination among the court system, state and local agencies, and the aging network.

To meet this goal, the Commission will:

- Conduct a Delphi Study to elicit from selected experts their opinions about the state courts' involvement in elder abuse cases and then, ideally, to reach consensus among the participants about recommendations for change;

- Conduct background research of pertinent statutes, case law, and literature;

-- Present draft recommendations to focus groups at meetings of judicial, protective services, and law and aging organizations to elicit review of the proposals and to enhance support for the final recommendations; and

-- Publish a report with recommendations and disseminate it widely to state courts, national judicial organizations, protective service agencies, and organizations involved in elder abuse research and policy development.

The Commission welcomes your ideas about the project and is particularly interested in learning of your experiences related to the treatment of elder abuse cases in the state courts. If you have any thoughts, questions, or pertinent anecdotes, please contact the project director, Lori Stiegel, associate staff director of the ABA Commission on Legal Problems of the Elderly, 1800 M St. NW, Washington, DC 20008, (202) 331-2638.