

WHITE PAPER ON CIVIL LEGAL SERVICES FOR THE ELDER JUSTICE COORDINATING COUNCIL

Written by **Lori A. Stiegel, Senior Attorney¹**
American Bar Association Commission on Law and Aging

OVERVIEW

The purpose of this white paper is to share ideas on ways the Federal government could enhance and support the role of civil lawyers in addressing elder abuse. Legal aid programs that receive Legal Services Corporation or Older Americans Act funding are central to this paper because (a) so many victims can't afford to pay for a lawyer and (b) that Federal funding provides a means for exerting some influence over program activities. Nonetheless, many civil lawyers in private practice, as well as civil lawyers who work for Federal, State, or local government agencies or for the private sector, also play a critical role in preventing, detecting, or redressing elder abuse, and their needs will be covered by this paper too.

Civil lawyers can be involved in elder abuse efforts to end elder abuse in myriad ways. For example, civil lawyers can:

- Counsel older persons about including provisions in a power of attorney that may help limit the designated agent's opportunity to commit financial exploitation by misusing the authority granted;
- Screen and assess whether an older person might be experiencing abuse in some form;
- Bring lawsuits in civil court to break an abuser's control over the victim, to seek compensation for physical harm caused by a caregiver, to remove an agent or guardian who is exploiting the victim, or to recover misappropriated assets;
- Advise and represent adult protective services programs, long-term care ombudsman programs, law enforcement, or other agencies in fulfilling their responsibilities to elder abuse victims;
- Bring civil lawsuits on behalf of government agencies to stop abusive practices;
- Help the private sector to interpret laws and regulations and to develop policies and protocols to facilitate prevention, detection, and reporting of abuse;
- Participate in multidisciplinary teams and other collaborations; and
- Develop improved laws, regulations, and policies.

This paper presents four major gaps and then provides ideas for short-, medium-, and long-term Federal actions that could help to fill each of those gaps.

GAP #1 – MANY VICTIMS FACE SIGNIFICANT CHALLENGES IN THEIR EFFORTS TO OBTAIN CIVIL JUSTICE AND NEED:

- Information about what civil lawyers can do to prevent elder abuse or to redress it;
- Information about how to find legal help, which necessitates educating the public and also staff of adult protective services and other hotlines, information and referral services,

area agencies on aging, and others about recognizing that elder abuse raises civil legal issues and that victims and family members should be referred to a legal aid program or bar association as well as to protective services, the ombudsman program, or law enforcement;

- Accessible, affordable civil legal services – whether through legal aid programs including those supported by Older Americans Act or Legal Services Corporation funding, pro bono programs, or civil lawyers in private practice; and
- Civil lawyers who are knowledgeable about elder abuse and related issues including decision-making capacity and undue influence.

National studies of unmet legal needs of low-income persons and state-specific studies of unmet legal needs of older persons have demonstrated clearly that Legal Services Corporation- and Older Americans Act-funded civil legal assistance programs are unable to provide representation to a substantial majority of persons who need help.² And these studies were conducted before the devastating “great recession” increased the numbers of persons in need as Federal and State spending on civil legal assistance was slashed, so undoubtedly the need is far greater now.

GAP #2 – WHETHER THEY WORK IN A LEGAL AID PROGRAM OR OTHER NONPROFIT AGENCY, A PRIVATE LAW PRACTICE OR OTHER BUSINESS, OR A GOVERNMENT AGENCY, CIVIL LAWYERS ADDRESSING ELDER ABUSE NEED:

- Training on how to prevent, detect, and redress elder abuse, ideally beginning in law school and then through continuing legal education programs; and
- Technical assistance and other resources to help them provide high-quality, cost-effective civil legal services, including case analyses, brief banks, case consultations, opportunities for communication and networking such as listserves and conferences, information on expert witnesses; and legislative analyses; and
- Research and translational research about the effectiveness of interventions, including adult protective services, ombudsman programs, and shelters; about capacity to make financial decisions and susceptibility to undue influence; and about markers and consequences of neglect. The results of this research must be made accessible to lawyers and judges, as well as investigatory agencies including adult protective services, law enforcement, and—in neglect cases—medical examiners or coroners. The members of those disciplines need to understand the research and its relevance to their work so that they can assess the merits of cases, what evidence is necessary, and what expert witnesses may be required.

Moye and Marson have reviewed nascent research related to decline in financial capacity among persons with Alzheimer’s Disease and called for research on: (1) “undue influence and exploitation of older adults with diminished capacity”; (2) the nature of capacity impairment in older persons with other diseases and impairments, including developmental disabilities; (3) clinician decision-making, including how clinicians from different disciplines “may vary in their capacity assessment approach and outcomes”; and (4) “identifying cognitive and other behavioral markers of diminished capacity.” They urged “continued model building and instrument development in this area” and recommended that future research “address issues of

normative longitudinal change in financial capacity over the life course, the natural history of financial capacity loss in patients with dementia, and cognitive predictors of financial capacity.”³

A review of the “neglect” research listed in the Clearinghouse on Abuse and Neglect of the Elderly indicates that there is a good bit of literature about the concept and definitions of neglect, the need for and challenges of assessing it in clinical practice, and the difficulties of researching it. There appears, however, to be no literature about research on its markers and results. In 2003, the National Research Council’s book *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* stated there were “no published studies of physical markers of elder mistreatment that help distinguish preventable, unavoidable signs from those that are intentional, inflicted, or avoidable” and called for research “to help illuminate the characteristics of common injuries, such as their etiology, natural course, distribution, and severity so that the process of identifying cases of elder mistreatment can become more accurate and reliable.”⁴ There does not seem to have been any of the recommended research on neglect since 2003. The need has not diminished; if anything, the need is increasing as more civil and criminal court cases regarding elder neglect are litigated.

GAP #3 – OTHER PROFESSIONALS, INCLUDING BUT NOT LIMITED TO APS AND LAW ENFORCEMENT, NEED TO:

- Learn about the role of civil lawyers in preventing, detecting, and redressing elder abuse so that they can recognize when a referral to a civil lawyers is appropriate and make that referral in a timely manner; and
- Understand the benefit to victims and to themselves of having civil lawyers participate in multidisciplinary initiatives, educational opportunities, and legislative and policy development activities, and then accordingly ask civil attorneys to participate in those activities.

Over the past decade, substantial progress has been made in educating components of the criminal justice system about elder abuse and in involving prosecutors in educational programs, multidisciplinary teams, and other initiatives, and those efforts have aided victims and other professionals. Nonetheless, as stated during the Elder Justice Coordinating Council meeting and at other times, “we can’t prosecute our way out of this.” Efforts to support prosecution need to be complemented by efforts to support involvement of the civil justice system. Civil lawyers have far greater opportunities to prevent, detect, and remedy elder abuse, and may have critical expertise to share.

GAP #4 – FEDERAL AND STATE LEGISLATORS AND POLICYMAKERS NEED:

- Input from civil lawyers about the impact of laws, regulations, and other policies on efforts to prevent, detect, and redress elder abuse;
- Education about the role that civil lawyers play in preventing, detecting, and redressing elder abuse, and how those efforts can impact budgetary matters such as Medicaid and criminal justice services; and
- Data demonstrating how civil legal actions have benefited victims and also impacted Federal and State budgetary matters.

There are opportunities to collect valuable data from legal aid programs supported by the Legal Services Corporation (LSC) and the Administration on Aging (AoA). In a 2006 white paper prepared for the National Center on Elder Abuse, Wood opined that LSC grantees and AoA-funded senior legal hotlines could become sources of data on incidence and prevalence.⁵ It is unclear whether her recommendations were ever pursued or implemented. Additionally, LSC grantees and AoA-funded legal assistance grantees could be sources of more than incidence and prevalence data if they were required or encouraged to capture and report data that demonstrate the financial costs of elder abuse to victims, their families, businesses, or governments. Examples of such data might be the value of financial accounts or homes that are recovered from an exploiter. My old program, Bay Area Legal Services in Tampa, Florida, used to collect and report this data voluntarily. Recent studies of the costs of financial exploitation conducted by Utah's and Wyoming's adult protective services programs also demonstrate that this can be done.⁶

ACTIONS THE EJCC MEMBER AGENCIES COULD TAKE TO FILL THESE GAPS

Short Term: Use your bully pulpit to galvanize public and professional awareness of the need for:

- Affordable, accessible, high quality civil legal services to meet the needs of victims, prevent victimization of other older persons, and reduce Medicaid and other health care expenditures;
- Civil lawyers to have training, technical assistance, and other resources to meet victims' needs;
- Involving civil lawyers in multidisciplinary initiatives to address elder abuse, as well as Federal and State efforts to develop better laws, regulations, and policies.

Medium Term: Lead efforts to effect change within your agencies even in the absence of significant resources by placing a high priority on:

- Supporting delivery of civil legal services to elder abuse victims in existing Federal agency programming, grant funding, and training. Ways of doing this include funding the "Missing Link" project and ensuring that activities funded by the Office for Victims of Crime "wraparound legal services" initiative include victims of elder abuse, as well as by developing Administration on Aging regulations or guidance to State Units on Aging and Area Agencies on Aging about selecting providers of civil legal assistance who have expertise in preventing, detecting, and redressing elder abuse.
- Reviewing existing laws, regulations, policies, and programs to determine whether they impose barriers to professionals serving elder abuse victims, and taking steps to fix problems identified. An example is the opinion letter about whether banks could lawfully report suspected elder abuse issued by the Federal Reserve, FDIC, FTC, SEC, and other agencies in 2002.⁷
- Examining existing data collection efforts to assess whether there are opportunities to obtain prevalence or incidence data or data about the financial costs of elder abuse,

particularly from civil legal assistance programs funded through the Legal Services Corporation and the Administration on Aging.

Long Term: Broaden and institutionalize these efforts within your agencies by:

- Seeking adequate funding for civil legal services programs;
- Seeking authorization and adequate funding for the myriad resources and activities that would support the civil legal system's response to elder abuse victims;
- Developing laws, regulations, or other forms of guidance to address barriers to services identified; and
- Using Federal agency programming, grant funding, and training to support the development and use of comparable and accurate data collection tools for civil lawyers to contribute to the knowledge base on incidence and prevalence as well as the financial costs of elder abuse.

¹ This white paper presents ideas rather than recommendations, and is based on the author's professional experience. Ms. Stiegel is not a spokesperson for the ABA.

² Legal Services Corporation (2009). *Documenting the Justice Gap in America*. http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf; and Godfrey, D. "In Search of Adequate Funding for Legal Assistance for Low-income Seniors," *Bifocal*, Vol. 32, No. 1 (Sept.-Oct. 2010).

³ Moye, J. and Marson, D. (2007). "Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research." *Journal of Gerontology: Psychological Sciences*, 62B(1), 3-11.

⁴ National Research Council. (2003). *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*. Panel to Review Risk and Prevalence of Elder Abuse and Neglect. Richard J. Bonnie and Robert B. Wallace, Editors. Commission on National Statistics and Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press.

⁵ Wood, E. (2006). "The Availability and Utility of Interdisciplinary Data on Elder Abuse: A White Paper for the National Center on Elder Abuse." Washington, DC: American Bar Association Commission on Law and Aging
http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/WhitePaper060404.pdf

⁶ Gunther, J. (2011). *The 2010 Cost of Utah Financial Exploitation*. Salt Lake City, UT: Utah Division of Aging and Adult Services.

<http://www.dhs.utah.gov/pdf/2010%20Cost%20of%20FE%20-%20May%2024%20with%20LE.pdf>; and Thomas, D. (2012). *The Wyoming Cost of Financial Exploitation 2009-2010*. Cheyenne, WY: Wyoming Department of Family Services.
<https://docs.google.com/a/wyo.gov/viewer?a=v&pid=sites&srcid=d3lvLmdvdxkZnN3ZWJ8Z3g6NTZjMzNhZmQ2Y2Q1NTUxMA&pli=1>

⁷ The opinion letter is available on the elder abuse page of the American Bar Association Commission on Law and Aging Web site,
http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html

DISCLAIMER:

This White Paper reflects the opinions and thoughts of the author as submitted to the Elder Justice Coordinating Council. It does not represent the interests or positions of the Elder Justice Coordinating Council nor any of the federal agencies that are members of the Council. The Council has reviewed this White Paper and has taken its contents under advisement, but does not endorse nor adopt it wholly or in part as representing the policies or positions of the federal government.