

Elder Abuse: Legal Basics

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American Bar Association Commission on Law and Aging

The mission of the American Bar Association Commission on Law and Aging (ABA Commission) is to serve as the collaborative, interdisciplinary leader of the Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons, particularly low-income and vulnerable elders. Since 1979, the ABA Commission has carried out this mission through research, policy development, technical assistance, advocacy, education, and training.

Key Lessons

1. Elder abuse takes many different forms and has many different legal definitions.
2. Elder abuse is prevalent, costly, devastating, and usually unreported.
3. Legal and aging network services can make a significant difference to clients who are vulnerable to or experience elder abuse through prevention, detection, protection, and redress.
4. No single system is fully capable of preventing the problem or meeting the needs of victims. Each has a crucial role to play, and interaction and collaboration among systems is usually necessary.

Section 1: Defining Elder Abuse

Elder abuse takes many different forms and has many legal definitions. Understanding elder abuse can help legal professionals prevent and detect problems.

Who is an "elder"?

The age at which one is defined to be an elder depends on what law one is reading. The Elder Justice Act (EJA) and Older Americans Act (OAA) use age 60. Under state Adult Protective Services (APS) laws, defining "elder" is more complicated. Most APS laws authorize services for both elders and younger adults, but usually have other threshold eligibility criteria that must be met for APS to conduct an investigation or provide other services. In addition to age, these criteria may include: condition (e.g., a disability or illness), functional ability, living situation, receipt of designated services, lack of assistance from others, and the appointment of a guardian or conservator.¹

What is "abuse"?

The National Center on Elder Abuse research in the 1990s found that state APS laws generally contained seven types of abuse, and grouped those types into the three categories listed below.²

- Abuse—may be physical, sexual (which may be a stand-alone category or incorporated into physical abuse)

or psychological/emotional

- Neglect—may include neglect by others, abandonment (which may be a stand-alone category or incorporated into neglect by others), and self-neglect
- Exploitation/Financial Exploitation

These are national, generic categories. Federal and state laws contain myriad definitions, and use different categories within those definitions. For example, the EJA and OAA incorporate neglect into the definition of abuse. Some state APS laws include sexual abuse in the definition of physical abuse, while other state APS laws have separate definitions of sexual abuse. In most state APS laws, the concept of abandonment is included in the definition of neglect, but some states have a distinct definition of abandonment. Self-neglect may be included in the neglect definition, may stand alone, or may not even be deemed to be elder or adult abuse. Moreover, state laws may contain other definitions related to elder abuse, such as in the criminal or consumer fraud laws.

Research and professional anecdotes indicate that elder abuse victims usually experience multiple types of abuse; this may be referred to as “polyvictimization.”

Where does elder abuse occur?

The elder abuse field historically has distinguished between abuse in domestic settings by family, friends, and neighbors, and in institutional settings such as long-term care or residential care facilities by paid caregivers. That bright line has blurred, due to greater availability of in-home services, recognition that non-caregivers may continue to abuse an elder who has moved into a facility, and growing awareness of resident-on-resident abuse. The authority of an agency to intervene may depend upon the settings; for example, some APS programs do not investigate abuse in long-term care facilities.

Who are the abusers?

A perpetrator of elder abuse is usually someone the older adult knows and with whom the older adult has a relationship of trust. The term “relationship of trust” is commonly used to describe the relationship an older adult has with intimate partners, relatives, paid or unpaid caregivers, friends, neighbors, and fiduciaries such as agents under a power of attorney, trustees, guardians, or conservators. Federal and state laws may also include scammers and strangers as perpetrators of elder abuse or they may have narrow definitions of abusers (only caregivers, for example).

Section 2: Elder Abuse is Pervasive, Costly, Devastating, and Underreported

Elder abuse is a prevalent problem throughout our communities. The National Elder Mistreatment Study found that approximately 10% of elders residing at home experience some form of elder abuse each year.³ However, the study methodology excluded three categories of older adults who are highly vulnerable to elder abuse—individuals who lack telephones, lack capacity to participate in the telephone survey, or reside in facilities—so prevalence is likely even higher.

Elder abuse is costly for victims, their family members, businesses, and government programs. Two national studies of victims’ financial losses range from \$2.9 billion annually to \$36.5 billion annually.⁴ The wide disparity in those figures reflects significant differences in study methodology and in defining what constitutes elder financial exploitation. More rigorous research on direct financial losses by victims and indirect costs suffered by businesses and government agencies is underway.

Research demonstrates that elder abuse increases a victim’s risk of hospitalization by three times, nursing home admission by four times, and mortality by three times.⁵ Advocates for older adults know that elder abuse also may

cause impoverishment and the need to rely on government benefit programs (although financial exploitation also may lead to Medicaid penalties), as well as homelessness or involuntary co-housing.

Victims rarely report elder abuse to APS, other agencies, or to helping professionals for many reasons, including lack of awareness, lack of ability, fear that disclosure will lead to nursing home placement or appointment of a guardian, and reluctance to get the abuser in trouble.

Section 3: Elder Abuse Reporting, Prevention, Detection, Protection, and Redress

Reporting

APS laws in every state except New York require mandatory reporting about suspected elder abuse to APS by some professionals and providers in some circumstances. A growing number of APS laws also require reporting to law enforcement or some other agency under more limited circumstances. Lawyers are mandatory reporters in some states, either because they are specifically listed as reporters or because the APS law requires everyone to report. In addition, other federal and state laws may mandate reporting to other agencies.

Professionals need to assess their reporting obligations and ethical duties, and then counsel clients about confidentiality during initial interviews and subsequently if necessary.

Prevention

Lawyers can help prevent elder abuse in multiple ways, before and after problems are detected. Prevention activities include educating older adults and other professionals through presentations and materials; counseling clients about vulnerability; and recommending that clients take steps to minimize abuse and facilitate its detection. Steps to minimize abuse and facilitate detection include: limiting the use of joint bank accounts and including oversight provisions in powers of attorney, supported decision-making agreements, or trusts.

Detection

Screening all older adults for elder abuse during initial interviews (“universal screening”), whether by telephone or in-person, has significant benefits for victims and professionals.

Here are some suggestions for screening detection:

- State that you ask all clients these questions to make the client and you feel more comfortable;
- Ask questions that demonstrate you are knowledgeable and can help in the future if the client isn't ready to disclose problems now; and state that
- The client's answers to the questions will help indicate whether preventive or protective actions are needed.

The screening will raise awareness of a client's circumstances and help enable the provision of competent services. This enhances the safety of the client as well as the professional.

Learning about risk factors and the many indicators for each type of abuse is necessary to screen effectively and provide competent services. It also is crucial for lawyers and other aging network professionals to ask why the presenting problem (e.g., “I got an eviction notice” or “I can't get Medicaid”) is occurring. Elder abuse may be the root cause and may otherwise go undetected.

Protection

Legal tools to protect an elder abuse victim from further harm may include: revoking legal documents; obtaining

a separation or divorce; petitioning for protection orders or injunctions; bringing eviction or other removal proceedings against an abuser; and petitioning for opposing, limiting, or terminating appointment of a guardian or conservator.

Redress

Actions to rectify elder abuse may include seeking accountings; recovering assets; rescinding transfers or voiding documents due to fraud, incapacity, or undue influence; and obtaining damages due to breach of contract, breach of fiduciary duty, conversion, fraud, and physical or psychological harm.

Law and aging network programs need to document their work on behalf of victims; demonstrate its value—financial or otherwise—to victims, their family members, and taxpayers; and help to create a foundation of knowledge for improved public policy and for research on the merits of interventions.

Section 4: Other Ways That Legal and Aging Network Services Can Make a Difference

Numerous systems address elder abuse. These include but are not limited to:

- Adult Protective Services;
- Aging and Disability Services: long-term services and supports, long term care ombudsman program, protection and advocacy programs;
- Civil Justice System: legal aid programs, private practitioners, *pro bono* programs, alternative dispute resolution services, guardians, state Attorneys General;
- Criminal Justice System: law enforcement; crime victim services; prosecutors—local, state (Medicaid Fraud Control Units, Attorneys General), federal (U.S. Attorneys, U.S. Department of Justice); community corrections (pre-trial, probation, parole); coroner/medical examiner;
- Federal Agency Benefit Programs (e.g., Social Security Administration, Veterans Administration);
- Financial Services Industry and Regulators;
- Health Care and Mental Health Care Systems and Regulators;
- Housing;
- Judicial System: traditional courts; problem-solving courts such as elder protection courts or family violence courts; court programs such as elder justice centers or self-help centers; and
- Victim Services: domestic violence, sexual assault, trafficking.

No single system can meet all of a victim's needs. Therefore, in addition to providing direct services to victims, law and aging network providers need to learn more about other systems and educate other professionals about their roles in detecting, preventing, and remedying elder abuse. Cross-training and participating in multidisciplinary teams or task forces leads to more effective client referrals, enhanced collaborations, stronger programs, improved public policy, and better services for victims.

Conclusion

Elder abuse takes many forms, is widespread, and has devastating consequences on victims. It is very costly to victims, their families, businesses, and taxpayers. As victims rarely report elder abuse, law and aging network programs need to screen clients and take other steps to detect elder abuse to competently and safely provide services.

Civil lawyers have multiple tools to prevent elder abuse, protect clients who are experiencing it, and help clients recover from losses. Myriad systems address elder abuse and no single system can meet all of a victim's needs, so law and aging network providers need to learn more about other systems and collaborate with them to improve the response to victims. Finally, law and aging network programs need to document their work on behalf of victims, demonstrate its value, and create a foundation of knowledge for better public policy and research on interventions.

Additional Resources

- Lori Stiegel, lori.stiegel@americanbar.org
- Key Statutes Governing Elder Abuse
 - Elder Justice Act, 42 U.S.C. § 1397j *et seq.* and 42 U.S.C. § 1320b-25
 - Older Americans Act of 1965, as amended, 42 U.S.C. § 3001 *et seq.*
 - State Adult Protective Services Laws
- Key Federal Regulations Related to Elder Abuse
 - Long-Term Care Ombudsman Program Regulations 45 CFR Parts 1321 and 1327
- Key Federal Agencies Addressing Elder Abuse
 - U.S. Administration for Community Living, Department of Health and Human Services www.aocl.gov
 - Consumer Financial Protection Bureau www.consumerfinance.gov/older-americans
 - U.S. Department of Justice
 - Elder Justice Initiative www.justice.gov/elderjustice
 - National Institute of Justice www.nij.gov/topics/crime/elder-abuse/pages/welcome.aspx
 - Office for Victims of Crime www.ojp.usdoj.gov/ovc
 - Office on Violence Against Women www.justice.gov/ovw
- Select National Entities Providing Additional Resources
 - American Bar Association Commission on Law and Aging www.americanbar.org/aging
 - National Center on Elder Abuse www.ncea.acl.gov

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at NCLER@justiceinaging.org.

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Endnotes

- 1 Lori Stiegel and Ellen Klem, “Explanation of the “Threshold Eligibility for Adult Protective Services’ Chart Series,” http://www.americanbar.org/content/dam/aba/administrative/law_aging/Explanation_of_Persons_Protected_by_APS_Chart_Series.authcheckdam.pdf (last visited February 6, 2017).
- 2 National Center on Elder Abuse (2016) “Frequently Asked Questions: Types of Abuse,” <https://ncea.acl.gov/faq/abusetypes.html> (last visited February 6, 2017).
- 3 Marie-Therese Connolly, et al., The Elder Justice Roadmap, A Stakeholder Initiative to Respond to an Emerging Health, Justice, Financial and Social Crisis 3 (2014), https://www.justice.gov/elderjustice/research/resources/EJRP_Roadmap.pdf (last visited February 6, 2017).
- 4 MetLife Mature Market Institute, The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America’s Elders 2 (2011), <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf> (last visited February 6, 2017); and TRUE LINK, THE TRUE LINK REPORT ON ELDER FINANCIAL ABUSE 2015 1, <https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf> (last visited February 6, 2017).
- 5 Connolly, *supra*, at 4.

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