

# Elder Law Attorney

A publication of the Elder Law Section  
of the New York State Bar Association

## Message from the Chair

Although the adage goes that in Springtime a young man’s fancy turns to love, this Spring, the fancy of the Elder Law Section has turned to legislation. As our Section has matured we have begun to look at legislation as a way to improve the lives of our aging, frail and elderly clients. At the beginning of my term as Section Chair, I appointed **Michael Amoruso** Chair of the Legislation Committee and through his efforts and those of the chairs of various committees within the Section and willing members of the Executive Committee we have initiated numerous legislative proposals which if enacted will surely benefit those we counsel.



### Proposal for Living Will Legislation

The Elder Law Section along with the Trusts and Estates Law Section drafted proposed legislation to amend Article 29-C of the Public Health Law which currently allows for the appointment of an agent to make medical decisions for an incapacitated person. Current law does not authorize the living will by statute but does recognize the living will by case law. The proposed legislation would codify existing case law to provide for statutory recognition of the living will. **Amy O’Connor**, a member of the Section’s Executive Committee, moved the living will legislative proposal forward and put an enormous amount of time into shaping the legislation and coordinating the ideas of various parties interested in the issues presented in the proposal.

In drafting the proposed legislation the Section was very mindful of the fact that the Health Care Proxy itself is the “gold standard” in surrogate health care

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decision-making. This is because an individual who has appointed a health care agent can be secure in knowing that he or she has a living, breathing, thinking person with a brain who can make medical decisions in light of the particular medical situation, the wishes of the principal and the medical technology available at the time of medical crisis. Keeping the "gold standard" in mind, the proposal was drafted purposefully in a way to avoid diminishing the power of the health care agent under a health care proxy. The proposed legislation does not endorse the enactment of a form living will. Where an individual has both a health care proxy and a living will the proposed legislation provides that the directions of the health care agent are recognized over the static directions contained in the living will unless the proponent of the living will states otherwise. The execution requirements of the living will are simple and are intended to encourage acknowledgment of the document rather than creating a barrier to its recognition. The proposal in its entirety is posted on the Section's Website which can be found within [www.nysba.org/elderlaw](http://www.nysba.org/elderlaw).

The ideas behind the living will proposal were complicated and in some cases controversial, but after much debate the House of Delegates of the New York State Bar Association approved our proposal and plans are under way to find legislators to sponsor the legislation and hopefully we will see fruit from our efforts this Spring with the enactment of a bill to amend Article 29-C of the Public Health Law as we have envisioned it.

### The Compact Proposal

On another legislative front the Elder Law Section, with the help of Compact Legislation Co-Chairs **Vincent Russo** and **Howard Krooks**, is meeting success in seeking legislative passage of the Compact for Long Term Care. The Compact is an innovative idea which creates a new option for those who need long-term care. As currently envisioned in the Section's proposed legislation, the person in need of long-term care will pledge to privately pay a defined amount for long-term care costs. When the private pledge amount is spent the government will pick up most of the long-term care costs without requiring a further spend down of assets. Compact participants will contribute a portion of their income to defray costs and co-payments for services. The expectation is that the Compact will reduce Medicaid costs and simplify the process of qualifying for government payments for long-term care. The Compact legislation was introduced to the New York State Senate as bill S.116 for the 2007-2008 session and at this writing an Assembly bill is expected shortly. The Compact provides a fresh idea for financing long-term care. For more detailed information about the Compact go to [www.nysbar.com/blogs/nyscompact/](http://www.nysbar.com/blogs/nyscompact/).

### Ideas for Legislation Concerning Annuity Sales

The Elder Law Section is also very concerned about financial abuse of senior citizens. **Timothy Casserly** as Chair of the Financial Planning and Investments Committee along with the Annuity Task Force have drafted a Concept Paper as a prelude to proposing legislation to curb abusive sales of annuities to seniors. The Task Force is in the process of refining their ideas to a point where the actual legislation can be drafted. Members of the New York State Legislature have already expressed interest in sponsoring this legislation so we are hoping once the draft is ready we can put this legislation on the fast track.

### The Elective Share

We are busy on other fronts. **Sharon Kovacs Gruer** and **Ellyn Kravitz** as Co-Chairs of the Estate and Tax Planning Committee have drafted proposed legislation which would permit a supplemental needs trust created for the benefit of a spouse to satisfy the elective share. The Executive Committee reviewed and discussed the draft at the Executive Committee's Winter meeting in January 2007 and offered suggestions to improve what is already a good idea. The discussion highlighted the fact that we needed to have a proposal which will benefit a disabled spouse while at the same time preserve the effectiveness of the elective share for others. Collaborative effort is what our Section is about and the Estate and Tax Planning Committee is currently refining the original proposal with the hope that we will be ready to seek approval of our proposal this Spring.

### Section Programs and Election

As I write this message the Annual Meeting held in New York City has just concluded and was a resounding success thanks to the efforts of **Frances Pantaleo**, Chair of the Annual Meeting Program. The meeting provided an outstanding roster of speakers and much practical advice. Section Officers and District Delegates were elected at the Annual Meeting for a term beginning June 1, 2007. Congratulations to our newly elected officers, **Ami Longstreet** (Chair), **Timothy Casserly** (Chair-Elect), **Michael Amoruso** (Vice-Chair), **Sharon Kovacs Gruer** (Treasurer), and **David Stapleton** (Secretary). Also elected were District Delegates **Alfreida Kenny** (First District), **Amy O'Connor** (Third District), **Marcia Boyd** (Seventh District) and **Richard Weinblatt** (Tenth District). I look forward to working with you all next year as Immediate Past Chair of the Section.

Knowing that my term as Chair ends in June I am planning one last program scheduled for April 12-14, 2007, the Un-Program. Some of you may be familiar with this concept if you have attended the NAELA Un-Programs. **Stephen Silverberg** and **Howard Krooks**

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# Editor's Message

Both professionally and personally the fact that we have reached the point of needing to devote an edition of the *Elder Law Attorney* to Elder Abuse would have been unimaginable to me five or ten years ago. Sadly, Elder Abuse has become a problem of significant prevalence in our society. A week rarely goes by without a news item about a senior who has become the victim of a financial crime or is the victim of physical abuse. The fact that the victims are the most weak and vulnerable members of our society only magnifies the abhorrent nature of these crimes and acts.



As elder law attorneys on occasion we may find ourselves exposed to conduct verging on financial abuse. Those seeking to impose their will on the elderly often seek the services of elder law attorneys to assist them in legally documenting their wishes. As attorneys we need to be sensitive to the potential signs of Elder Abuse by a third party upon our clients. I am confident that this edition of the *Elder Law Attorney* will help shed light on the telltale signs of Elder Abuse.

We are both fortunate and privileged to have a distinguished panel of authors who have contributed their expertise and knowledge of Elder Abuse from varying perspectives for our edification. The Hon. Janet DiFiore and the Hon. Kathleen M. Rice, the District Attorneys respectively for Westchester and Nassau Counties, have written excellent articles sharing their significant prosecutorial experience of

Elder Abuse, and how Elder Abuse can be prevented. District Attorney DiFiore has written about "Prosecuting and Preventing Elder Abuse" and District Attorney Rice has written about "Elder Abuse Today: A Prosecutor's Plan." Additionally, Assistant District Attorney Elizabeth Loewy, of the New York County District Attorney's Office in Charge of Elder Abuse, has written a comprehensive and detailed article about financial crimes against the elderly. Barbara Paris, M.D., Vice Chair of Medicine and Director of Geriatrics at Maimonides Medical Center in Brooklyn and Professor of Medicine and Geriatrics at the Mount Sinai School of Medicine, has written an article of significant interest to elder law practitioners about "Victimization and Vulnerability of the Elderly."

Denise M. Shukoff, the Project Coordinator at Lifespan of Greater Rochester, Inc. has contributed a wonderful piece about "Targeting Elder Abuse in New York." Finally, our own Andrea Lowenthal has written an excellent piece providing us an overview of Elder Abuse. Our goal was to comprehensively review all the varying aspects of Elder Abuse. At the end of the day I am confident our members will have a much better understanding of Elder Abuse, and will be in a much better position to identify the telltale signs.

Finally, I wish to express my deep appreciation and heartfelt thanks to all of our Special Contributors, Associate Editors and Regular Contributing Authors, who worked so hard to bring this important edition to fruition.

**Anthony J. Enea**  
Editor-in-Chief

## Message from the Chair

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serve as Co-Chairs of our Un-Program which has neither speakers nor formal agenda. Instead, substantive and practice-related topics will be suggested by the registrants. During the Un-Program, facilitators will lead topic discussions and attendees will be able to participate in the discussion groups that interest them. This program will enable each participant to both contribute and absorb valuable information and insight. It is an innovative concept that I think the Elder Law Section members will profit from attending the meeting and enjoy it as well.

### Conclusion

It is Spring. I am hoping that this is the season where we will see some of the initiatives and proposals of the Elder Law Section blossom into enacted legislation. If it does not happen I will be disappointed but I know that we will be right out there next year working to change social policy and enact new legislation with the hope of making life better for the clients we serve. We Elder Law Attorneys are a special bunch and that's nice to know.

**Ellen G. Makofsky**

## Prosecuting and Preventing Elder Abuse

By Hon. Janet M. DiFiore

In May of 2001 an 82-year-old Mount Vernon man repeatedly shot his 72-year-old wife in the back, chest and hands with a .38 caliber revolver as he chased her out of the house and through the yard. In August of 2003 the White Plains Police Department responded to the home of a 74-year-old woman on a report that she had been injured in a fall. The police found the woman dead. An investigation determined that she had been brutally murdered by her 42-year-old daughter. In Westchester County in 2006, 94 elderly citizens were reported to be the victims of crimes.



As our population ages, law enforcement faces new challenges in prosecuting crimes that target the elderly. According to the 2005 U.S. Census Bureau, in 2003 there were 35.9 million people over the age of 65 in the United States. This population is expected to reach 86.7 million by 2050.<sup>1</sup> A 2003 study by the National Center on Elder Abuse estimated that between one and two million Americans in this age category have been injured, exploited or mistreated by someone whom they depend upon for care or protection. Victims suffer physical assaults and financial exploitation from perpetrators that range from professional caretakers to drug-addicted and mentally ill adult children. Victims may be homebound or cognitively challenged. Some victims rely upon their abusers for day-to-day assistance with basic necessities. Frequently victims feel plagued by responsibility and loyalty to troubled adult children. Prosecution of elder abuse cases requires concern, compassion and expertise to protect seniors and bring about justice. Elder abuse embraces criminal and non-criminal conduct. For some forms of verbal and emotional abuse or neglect the criminal justice system does not always provide a forum for relief. However, in cases of physical and sexual abuse or financial exploitation, a criminal prosecution can achieve justice for a victim.

The first hurdle in building a successful prosecution is often overcoming a victim's inability or unwillingness to testify and elder abuse prosecutors in the District Attorney's Office approach each case bearing

this obstacle in mind. Conditional exams assist prosecutors in preserving testimonial evidence with infirm victims. CPL § 60.10 provides that a physically ill or incapacitated witness may be examined conditionally under oath so that such testimony may be received into evidence at subsequent proceedings.<sup>2</sup> An application to examine a witness conditionally may be made any time after a defendant has been arraigned upon an accusatory instrument and before an action has been terminated.<sup>3</sup> A court will, upon application of either the People or the defendant, order that a witness be examined conditionally where there is reasonable cause to believe that a witness possesses material information, will not be amenable or responsive to legal process or available as a witness at a time when his or her testimony is sought, is about to leave the state and not return for a substantial period of time, or is physically ill or incapacitated.<sup>4</sup> Such application must contain, *inter alia*, a statement that the aforementioned grounds for the examination exist, together with allegations of fact supporting such statement.<sup>5</sup>

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*"Prosecution of elder abuse cases requires concern, compassion and expertise to protect seniors and bring about justice."*

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Other evidence can be used to corroborate a victim's statement or, in the absence of victim testimony, can be used to build a successful case for prosecution. Prosecutors in domestic violence and elder abuse cases rely upon medical records, photographs, 911 calls and excited utterances to build evidence-based prosecutions in cases where victims fail to appear in court. Although the Supreme Court's decisions in *Crawford v. Washington*<sup>6</sup> and *Davis v. Washington*<sup>7</sup> limited the ability of prosecutors to use out-of-court statements, the New York Court of Appeals' recent decision in *People v. Bradley*<sup>8</sup> held that consistent with *Crawford* and its progeny, a defendant's right of confrontation is not violated in situations where a victim provides information at a scene relating to an emergency. The *Bradley* case permits prosecutors in elder abuse cases to continue using excited utterances made by victims to law enforcement or emergency personnel where memory has faded or the victim does not appear in court.



## ELDER ABUSE

Neglect can be one of the most challenging forms of abuse to prosecute since case law is limited and statutes provide minimal mechanisms for prosecuting offenders in situations of egregious neglect. Although some states criminalize neglect,<sup>9</sup> New York's penal law is limited to cases in which a particularly vulnerable victim is endangered by the conduct of another. For instance, a person is guilty of the Class A misdemeanor of endangering the welfare of an incompetent or physically disabled person when he or she "knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a person who is unable to care for himself or herself because of physical disability, mental disease or defect."<sup>10</sup> Felony prosecution for endangering that leads to physical injury requires, as well, that the defendant must be a caretaker for the victim. Specifically, endangering the welfare of a vulnerable elderly person in the second degree penalizes caregivers who either intentionally or recklessly cause physical injury or subject the vulnerable elderly person to sexual contact without consent,<sup>11</sup> and endangering the welfare of a vulnerable elderly person in the first degree elevates to a D felony intentional and reckless injury by a caregiver.<sup>12</sup> Criminal and civil liability has also been imposed in New York where family members have assumed care for a family member and the defendant's neglect led to harm or even death.<sup>13</sup> This precedent and these statutes increase the ability of prosecutors to convict defendants in cases where the defendant's intent may not be clear or is difficult to prove.

Financial exploitation is the fastest growing form of elder abuse. The District Attorney's office works with educating seniors on the various risks and dangers posed through the internet and on-line banking, and in addition has joined Westchester County's elder abuse coalition in educating the banking community in detecting and reporting abuse such as the unlawful use of ATMs.

Many seniors risk loss of life savings and homes through the overreaching and coercive conduct of caregivers and family members. New York law presently provides minimal protections for the elderly in the transferring of deeds and other assets. For instance, financial exploitation through the misuse of powers of attorney is particularly problematic because state law does not provide any regulatory or statutory provisions to ensure that agents act solely in the best interest of the principal. New York's General Obligations Law governs powers of attorney and sets forth fifteen different categories of transactions that an

agent can conduct on behalf of a principal.<sup>14</sup> Although the statute addresses at length the vast powers that an agent possesses, the statute does not define an agent's fiduciary duties to the principal. Recently, this issue arose before the Court of Appeals, which held in *In re Ferrara* that an agent acting pursuant to the authority of a short form power of attorney must make gifts in the principal's best interest.<sup>15</sup> Presently, New York law requires a warning to principals concerning the vast powers afforded agents through valid powers of attorney.<sup>16</sup> However, this warning falls short of setting out in lay terms the risks to principals and the responsibilities of agents. As part of the District Attorney's Office crime prevention initiatives, our office is developing sample power of attorney forms that will assist seniors in protecting assets when executing this important document.

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For the investigation and prosecution of all crimes against the elderly, the elder abuse bureau of the District Attorney's Office engages in a multi-disciplinary effort. A multi-disciplinary approach combines the efforts of local law enforcement, Adult Protective Services, and mental health and medical professionals. At the Westchester District Attorney's Office, our elder abuse bureau works collaboratively with Westchester's elder abuse coalition, Adult Protective Services and victim advocacy groups to bring the community's resources to bear and to educate first responders on the importance of preserving forensic evidence. These partnerships assist prosecutors in building cases and providing referrals and resources to victims. For instance, the Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale offers specialized training to law enforcement, medical professionals, and home health care aides on identifying and investigating elder abuse.<sup>17</sup> The Westchester District Attorney's Office has combined efforts with the Weinberg Center to target these trainings for local law enforcement and recently designed a curriculum for the Yonkers Police

Department. The training assists law enforcement in understanding the dynamics of abuse to better protect victims and more effectively prosecute cases. Investigating and prosecuting elder abuse cases requires unique skills, and success can bring accountability for the offender and safety for the victim. By engaging in a multi-disciplinary effort, the District Attorney's Office can also engage in targeting early detection and reducing crimes against the elderly.

Protecting seniors and prosecuting elder abuse cases depends upon awareness and the victim's willingness to report. Although New York does not mandate reporting of elder abuse cases,<sup>18</sup> New York Social Services Law § 473-b provides immunity from civil liability to any person who makes a good faith referral to law enforcement, Adult Protective Services or any other agency concerning a person who may be an endangered adult. Social Services Law § 473-e strengthens confidentiality protections afforded sources by permitting social services to withhold information that would identify a person who makes a referral or cooperates in a subsequent investigation if the release of such information would be detrimental to the safety or interests of the person who reported the elder abuse. These provisions are designed to facilitate the investigation of elder abuse cases and, used properly, result in the successful prosecution of elder abuse cases resulting in protecting seniors and offenders' accountability. A multi-disciplinary proactive approach relies upon the community at large. Increased reporting and increased collaboration of elder abuse cases will result in more successful prosecutions throughout New York State.

## Endnotes

1. 2005 U.S. Census Bureau.
2. CPL § 660.10.
3. *Id.*
4. CPL §§ 660.10; 660.20.
5. CPL § 660.40(b).
6. 541 U.S. 36 (2004).
7. 126 S. Ct. 2266 (2006).
8. *People v. Bradley*, 2006 WL 3716030 (N.Y. Dec. 19, 2006).
9. See Fla. Stat. § 825.102; Cal. Penal Code § 368 (statutes that penalize neglect of the elderly).
10. PL § 260.25.
11. PL § 260.32(1)-(4). A vulnerable elderly person includes persons sixty years and older with certain infirmities and caregivers include persons with responsibility for care giving either by court order or payment. PL § 260.30.
12. PL § 260.34(1)-(2).
13. See *People v. Flayhart*, 72 N.Y.2d 737 (1988) (husband and wife guilty of criminal homicide where neglect of mentally retarded brother led to death); *Newton v. Newton*, 1 Misc. 3d 171 (Civ. Ct., Kings County 2003).
14. McKinney's Gen. Oblig. L. §§ 5-1501 *et seq.* These categories include among other things the right to conduct real estate transactions and insurance transactions, and make gifts to specified beneficiaries.
15. *In re Ferrara*, 7 N.Y.3d 244 (2006).
16. N.Y. Gen. Oblig. L. §§ 5-1501(1), and 5-1506(4).
17. The Weinberg Center at the Hebrew Home at Riverdale provides emergency shelter for elder abuse victims and intervention in cases of abuse and neglect.
18. Forty-two states mandate reporting of elder abuse.

**Hon. Janet M. DiFiore is the District Attorney of Westchester County, New York.**

## Elder Abuse Today: A Prosecutor's Plan

By Hon. Kathleen M. Rice



More than 19% of Nassau County's 1.3 million people are 60 years or older.<sup>1</sup> This mirrors national demographic trends showing that our elder population is on the threshold of an explosion. According to U.S. Census Bureau projections, a substantial increase in the number of people over the age of 65 will occur from

2010 to 2030 (the first "Baby Boomers" will turn 65 in 2011). One projection of this trend predicts that the elder population in 2030 will be twice as large as it was in 2000, growing from 35 million to 72 million, which will represent nearly 20% of the total U.S. population.<sup>2</sup>

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*"As the elder population increases, so too will the efforts of those who take advantage of the most vulnerable among us, for personal gain."*

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Pressures brought on by the sudden demographic shifts we have already begun to encounter have been analyzed on many levels. In February 2002, then-New York State Governor George Pataki convened over thirty state agencies, asking each to assess the impact that the aging population will have upon services provided by state government. Policy areas to be affected were to be identified, and priorities for each agency to pursue in preparation for this demographic shift were to be discussed.<sup>3</sup> This exercise in civil self-examination, which was known as *Project 2015*, is a sobering read, detailing a wide spectrum of challenges facing our society as more enter the age of "elderly." Questions studied included: What are the consequences of an aging driver population? Would an older workforce result in more chronic cases of occupational lung diseases? What will be the impact upon people with developmental disabilities living in community-based residential settings, those receiving service coordination and day services, as their parents age and become less a factor in the care provided by the state? As the elder population becomes a more significant segment

of the state's base of service recipients, what government administration changes must be made? *Project 2015* was a remarkable undertaking, underscoring both the enormity of the problem, as well as the need to focus resources to meet the challenges immediately ahead.

The results of this trend have been felt by each and every one of us. Members of our own families may be "getting up in years," requiring more assistance in their activities of daily living. Perhaps a neighbor is "slowing down," due to the effects of aging, and becoming more dependent upon others, for everything from necessities to news. A loved one may be desperately reaching to overcome an increased sense of isolation, caused by a sense of loss of her social or support network, as she witnesses the declining health and passing of her contemporaries. These are just a few very sad—yet very real—examples of factors that can make our elderly vulnerable. As the elder population increases, so too will the efforts of those who take advantage of the most vulnerable among us, for personal gain.

In 2005, while campaigning to become the District Attorney of Nassau County, I was profoundly and personally aware of the difficulties that this phenomenon—which has been referred to as the "aging of America"—has on society. Among my family and friends, I count many loved ones who are health care professionals, facing these issues and challenges each day they arrive to work. When I took my oath of office in January 2006, my mother was unable to attend, as she was struggling with Alzheimer's disease. She passed away less than three months later. Fighting crimes against the elderly and improving the quality of life of the aged of Nassau County has been a cornerstone of my tenure. In my first year, I have taken a comprehensive, "holistic" approach in addressing issues with a direct impact upon the county's senior population. I implemented an elder initiative, wherein the skills, talents and resources of my office have been best utilized to benefit all Nassau residents—the elderly, their families, and loved ones—facing the challenges brought on by the effects of the "aging of Nassau." I believe our office has made tremendous progress as a result of this initiative.

In this article, I will discuss several of the components of that elder initiative.

## Partnerships

My office has aggressively prosecuted crimes against the elderly in Nassau County. I describe some of these cases later in this article. In addition to our prosecutions, we have sought out numerous “partnerships” in both the government and private sectors, in the interest of improving the overall quality of life of our county’s aged. These partnerships have proven to be valuable components of my elder initiative: they complete the overall “holistic” approach of the office in addressing issues we face with a growing elder population. With these partnerships, we have made great strides addressing concerns of our elder constituents, especially as those concerns relate to law enforcement, crimes committed, and quality of care rendered. With each success and challenge we have faced, we have further explored ways in which these partnerships worked, and how they can work better.

In 2006, we worked closely and effectively with federal and state agencies while prosecuting cases with an impact on the elderly. Those agencies include the U.S. Department of Homeland Security/Bureau of Immigration Control and Enforcement; Federal Bureau of Investigation; Office of the Inspector General for Health and Human Services; U.S. Drug Enforcement Administration; U.S. Social Security Administration; N.Y.S. Office for the Aging; N.Y.S. Department of Health; N.Y.S. Department of Education, and the State Attorney General’s Office. In addition, we have forged valuable partnerships within our own county, especially with the County Executive, the Nassau County Police Department, and the Nassau County Departments of Senior Affairs and Social Services. We have also reached out to private groups focusing on seniors, including AARP, associations of health care workers, etc., and have provided information concerning these issues to group members.

## Education-Based Initiatives

Reflecting the demographic shifts described above, our elderly population represents a special—and growing—category of crime victims. All prosecutors’ offices see the recurrent victimization of the elderly in some form or another. Con artists and scammers see seniors as a source of potential income. Telemarketers frequently call with offers “too good to be true.” Unscrupulous contractors start a small job for an elder customer, the task grows exponentially, and is ultimately left unfinished after substantial payments are made. Purported service providers will gladly take a senior citizen’s money, provide no services, and yet claim that they did. A certified nurse aide may think

nothing of transferring a nursing home resident from a chair to bed by himself, rather than seek assistance in transferring the resident, as called for in the resident’s care plan. Elder victims are, again, more vulnerable than others in the “general population” due to their advanced age, infirmities, and status as a resident in a long-term or residential health care facility. Indeed, seniors are also less likely to report crimes for a range of reasons, from embarrassment, to fear of loss of financial independence, to fear of loss of an otherwise capable caregiver or companion. In some cases, physical, mental or emotional considerations affect the senior’s ability to testify in criminal proceedings, posing challenges for successful prosecution.

Through efforts in 2006 aimed at providing extensive educational efforts in these areas, my office believes that the quality of life of Nassau County’s senior citizens has been improved. The benefit of raising the public’s awareness to these issues can neither be quantified nor overstated. In fact, New York State Ombudsman Marty Haase stated, in describing our office’s educational efforts, “I firmly believe you can not put a price tag on the benefits of a program such as this to the elderly, to the caregivers, and to the county as a whole.”<sup>4</sup>

The education-based components of my elder initiative include some of the following programs:

### Nursing Homes

By definition, a prosecutor’s office often “reacts,” taking action after criminal conduct is alleged to have occurred. Having family and friends working in the health care industry, I realized full well that this approach doesn’t work when it comes to protecting our elderly living in long-term care facilities. My office has taken proactive steps, before any crime is alleged to have been committed, to insure that the highest quality of care is delivered to the residents of skilled nursing facilities in Nassau County. During the first weeks of my tenure as District Attorney, I instructed my staff to report to me the feasibility of an educational program geared towards health care workers in our county’s skilled nursing facilities. In May 2006, following that review, I began what I believe to be the most extensive staff in-service educational program implemented by any county district attorney. The targeted audience is staff employed by nursing homes in Nassau County. I asked each of Nassau County’s 35 nursing facilities to join me in this venture, to combine efforts towards improving care of their elder residents. The response to this program, which was referred to as “unprecedented” and “proactive” at the time it was implemented,



was overwhelming.<sup>5</sup> These in-service presentations were to supplement state-mandated education programs that each facility currently provides to its staff. Each of our hour-long presentations discusses abuse, neglect and mistreatment of the elderly and infirm; the roles different agencies play investigating these allegations; and the obligations of staff to report suspected incidents. The in-services are given by an assistant district attorney on my staff with years of experience working and educating in the health and long-term care fields. Each presentation is given in a “live,” in-person format. Usually, six lectures are given per day—two per shift—so that all staff may leave the floors to attend.

A goal of this program is to raise the staff and administration’s awareness of the special needs and consideration of this vulnerable resident population, in the context of applicable criminal laws. The lectures are not an exercise in “*Scared Straight*” tactics. Indeed, the important roles of the facilities’ staff members—whether they are from nursing, dietary, activities, administration, maintenance departments, etc.—are acknowledged. The realistic, matter-of-fact delivery of information underscores the importance of the subject matter at hand. Crimes against seniors are serious crimes and there are similarly serious obligations placed on each staff member under the law to ensure the safety and well-being of their elderly charges and to report suspected incidents immediately. Discussed are “gray area” neglect/abuse/mistreatment situations (care plan violations, inappropriate transfers, inappropriate speech, documentation falsification issues, etc.), along with the more “serious” penal law violations (assaults of a physical/sexual nature, larcenies, etc.).

To date, we have reached literally hundreds of care givers in the majority of our County’s nursing homes.

### **Education of Seniors on Issues of Financial Abuse, Identity Theft, etc.**

We have participated in a number of forums, including “Town Hall” meetings, elder appreciation days, and events sponsored by other Nassau County elected officials wherein we had an opportunity to educate visitors on issues affecting the elderly, and how to avoid pitfalls of the various scams to which seniors are prone. We have discussed our experience in prosecuting these cases, what we have seen as the needs of elders, their caregivers, and health care professionals. While it is impossible to document the extent that preventative measures will halt a problem, raising the

awareness of the potential victims by describing criminal trends has an obvious and important benefit.

### **Education of Faith-Based Organizations**

Often, faith leaders and other members of faith-based organizations are the first stop for help for elder victims of abuse. Indeed, the only other person (other than the abuser) in an elderly victim’s life may be a member from the victim’s worship community. In servicing their ministry to these communities, faith leaders themselves occupy a “front-line” position, to see or learn of things that might otherwise go unnoticed by others involved in elders’ day-to-day activities. After providing community-based educational seminars on elder-related issues—some of those to faith-based organizations—we decided to explore the possibility of providing faith-based training in the area of identifying and reporting financial abuse of the elderly. We are currently creating such a program, wherein these issues will be discussed, so that we might bring our experiences forward and educate, increase awareness, help identify, and just generally explain the problem of elder abuse to faith community leaders. Through this “partnership,” I envision further underscoring the unique and important role that faith communities and their leaders can play assisting elder victims.

### **Case-Related Matters**

A challenge in writing an article like this is to choose the cases to discuss. I will cite a few trends and practices we have seen in just the past year.

A number of arrests were made in Nassau County involving health aides—some employed by agencies, others by long-term care facilities—who were previously deported from the United States, who made it back into the country, and for several hundred dollars were able to purchase a new identity, including Social Security cards and driver’s licenses. The “legitimacy” of these individuals was built upon with their successful application for credit, and establishing the same in the form of bank accounts, credit cards, etc. One such case, *People v. Nigel Peters*, involved a home health aide, a previously deported felon, who came back into the United States with a whole new identity, that of one “Jerome Johnson.” While working, Peters took and removed a credit card from his elderly victim, went to a shopping center, and bought more than \$200 worth of clothes for himself. Peters pleaded guilty to the top count with which he was charged, Forgery in the Second Degree, a class D felony (PL § 170.10). Peters was sentenced to two to four years’ incarceration. At that time, upon considering the pre-sentencing report

and statement of the victim, the judge said the defendant was clearly a “manipulative” individual, one who “preys upon terminally ill patients.” In another case, the defendant worked as a nurse aide, certified by the state of New York; was convicted of a felony; was deported; returned to the United States, illegally; “bought” a new identity; and certified and worked as a nurse aide under her new identity.

Several of these cases were complicated when these defendants were removed from the county’s custody shortly after arrest by the U.S. Department of Homeland Security/Bureau of Immigration Control and Enforcement, for proceedings related to their deportation, or re-deportation. On many of these cases relating to elder victims and health care workers, we have made a determination that it is in the interest of justice to see the local action through to plea or conviction before the individual is deported. We have, therefore, worked closely with the federal government to bring several of these defendants back into Nassau County custody. In the successful prosecutions of cases involving health care workers—and especially those where the defendant is to be deported—we obtain a condition of that disposition that the defendant will not seek any position whatsoever in the health care industry for a period of five years.<sup>6</sup> There are obvious difficulties enforcing this condition when the defendant is deported. We believe that this condition may give convicted felons pause, if they consider applying for health care employment after (sometimes, another) illegal entry into the United States.

In spite of educational efforts through our office, elders are still identified and preyed upon as easy victims by those prone to perfidy. One case involves a local chimney company and its principal salesman, accused of a scam wherein they falsely claimed the senior victims’ home was filled with gas due to blockages in the chimney. The seniors were then sold chimney liners they did not need. In fact, our investigation revealed the liners were installed in such a way that created a dangerous condition. Another case involves a local sewer cleaning company that was called to the home of a senior, to clear a line blockage. Despite an advertisement pricing the service at under \$200, the company charged the homeowner in excess

of about \$4,500 for the work, at least a portion of which was totally unnecessary. Insisting on being paid in cash, the defendants actually drove the elderly victim to the bank, where she could withdraw the funds for payment.

## Conclusion

The cases mentioned above underscore the importance of the “holistic,” multi-faceted, fully integrated approach my office is instituting to combat elder abuse and to improve the lives of this rapidly growing community. Cooperation, by working together with other agencies and entities, insures that at the end of the day justice is served well, and our elderly are protected in the best way possible. More than ever before, there is a remarkable need to meet the challenges of an aging nation and county by more effectively investigating and aggressively prosecuting cases with elder victims. Along with educating their families, their aides and their support networks, a prosecutor’s office has an obligation and an opportunity to improve the quality of life of their community’s most vulnerable residents.

## Endnotes

1. Source: U.S. Census Bureau, 2005 Population Estimates; U.S. Census Bureau, 2005 American Community Survey.
2. He, Wan, Manisha Sengupta, Victoria A. Velkoff, and Kimberly A. DeBarros, U.S. Census Bureau, Current Population Reports, pp. 23-209, 65+ in *the United States: 2005*, U.S. Government Printing Office, Washington, D.C. 2005.
3. <http://aging.state.ny.us/explore/project2015>.
4. <http://www.nassaucountyny.gov/agencies/DA/NewsReleases/2006/05-25-06.html>.
5. <http://www.nassaucountyny.gov/agencies/DA/NewsReleases/2006/05-25-06.html>.
6. Language we have used: “The defendant will not work in a health care facility or in any position in the United States involving direct, indirect, primary or secondary patient/resident/home health care for a period of five (5) years.”

**Hon. Kathleen M. Rice is the District Attorney of Nassau County, New York. Michael C. Clarke, Deputy Bureau Chief of the Government and Consumer Frauds Bureau of the Office of the Nassau County District Attorney, also contributed to this article.**

## Victimization and Vulnerability of the Elderly

By Barbara Paris, M.D.

In 2006, one out of 8 Americans was 65 years or older. As the fastest growing segment of the population is the group over age 85 years, people are living with more chronic illnesses, most commonly, cardiovascular disease, cancer, pulmonary disease, arthritis, dementia and depression. Although over 2 million elderly people are estimated to suffer from some form of neglect or abuse, it is most often not recognized by health care providers nor acknowledged by victims.

The National Center on Elder Abuse defines seven types of abuse which include physical abuse, sexual abuse, emotional abuse, financial/material exploitation, neglect, abandonment and self-neglect. The majority of abusers are family members, many of whom are also acting in a caregiving role for the victim, rendering the situation highly complex in terms of detection and intervention.

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*“Older people, especially with dependency needs, feel that they are a burden to their families and therefore deserve to be neglected or even mistreated.”*

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Health care professionals have inadequate knowledge and training to appropriately question patients to uncover an abusive situation and to consider abuse in their differential diagnoses when assessing a patient's history and physical findings. Abuse can occur either as a continuing pattern throughout life or as a late-onset event. Often, several types of mistreatment occur simultaneously and, over time, escalate in both severity and frequency. The dynamics differ for patients with and without decisional capacity.

Risk factors for abuse have been identified for elderly persons and their family members.<sup>1</sup> Poor physical health and functional impairment limit the elderly person's ability to seek help and defend him or herself. Dementia can be associated with disruptive behaviors that precipitate abuse. Abusive care givers may be substance abusers or mentally ill. Financially dependent caregivers may resort to abuse to obtain resources. Shared living situations provide opportunities for tension and conflict that result in abuse. Stressful life events and financial strain decrease a family's

resistance to abuse. As people age, they tend to have fewer social contacts leading to isolation which reduces the likelihood that abuse will be detected or stopped. A history of violence, particularly among spouses, may predict abuse later in life.

In addition to what Lachs and Pillemer have outlined, elderly victims' feelings of embarrassment or guilt about the abuse can result in denial and under detection. As most abusers are family members, victims may not only minimize the seriousness of the abuse but also display tremendous loyalty to their abuser. For example, a mother is likely to be more concerned about finding a drug rehabilitation program for her abusive daughter than about her own potentially life-threatening living situation. Victims, especially those with dependency needs, worry about retaliation, and consider nursing home placement as an unappealing alternative to the current living situation. Institutional settings are also not a panacea, as low staffing levels and lack of staff training create a milieu for abuse and neglect to occur, particularly with personality disordered and confused patients. Finally, a victim's own ageist attitudes can result in failure to recognize or react to an abusive situation. Older people, especially with dependency needs, feel that they are a burden to their families and therefore deserve to be neglected or even mistreated. For example, a physician learns that an unkempt, disabled, malnourished patient is being cared for by his son who is too busy to visit or help for the past several months. During this interval the patient has tried, unsuccessfully, to manage without any assistance, unable or unwilling to question his son's actions or to ask others for help. Perhaps this situation is more complex due to a history of transgenerational violence and a son with ambivalent feelings about his caregiver obligations.<sup>2</sup>

One recent study examined the association between various characteristics of elderly community dwelling people and the potential for abuse.<sup>3</sup> Diminishing social networks and poor social functioning were identified as key signs of potential abuse. Short-term memory problems, psychiatric illnesses and alcohol abuse were strongly associated with the potential for abuse. Characteristics of poor social functioning included not being at ease interacting with others, openly expressing conflict with family and friends, indicating feeling lonely and signs of a brittle support system.

## ELDER ABUSE

Another study closely examined financial abuse, which accounts for approximately 20% of substantiated cases of all types of abuse.<sup>4</sup> In this situation, perpetrators are often found outside the family and include contractors, salesmen, attorneys, caregivers, insurance agents, clergy, accountants, bookkeepers and friends. Perpetrators tend to exploit the older person's physical and mental vulnerabilities and take advantage of their "irrational trust." Geriatricians can provide expert assessments about an elder person's vulnerability that may be crucial in criminal prosecutions. They can address issues related to mental capacity, impaired judgment and dependency. It may be possible, for example, to temporally relate specific financial transactions to changes in a patient's physical, mental or social situation.

Another study identified factors that specifically predispose to financial exploitation.<sup>5</sup> In addition to the risk factors already reviewed in this article, these authors identified female sex, recent loss of spouse or divorce, taking multiple medications, frailty and middle- or upper-income bracket. The authors described characteristics of male and female perpetrators who exploit the elderly. Male perpetrators tend to have sociopathic or antisocial character disorder, develop a caregiver role, live with the victim, are economically dependent on the victim, and have health problems. Female perpetrators have a care-giving relationship with the victim, instill a sense of helplessness and dependency, isolate the victim, present as a protector, enhance inadequacy and diminished self-worth in the victim, have a history of multiple unstable relationships, falsify credentials or embellish personal power, are opportunistic, psychologically dysfunctional, predatory and methodical in gaining control of assets through deceit, intimidation and psychological abuse.

In addition to emotional and financial abuse, the elderly are vulnerable to both physical and sexual abuse. Indicators of physical abuse include injuries, fractures, bruises, and skin breakdown including pressure ulcers. Indicators of sexual abuse include torn, stained and bloody underclothing, pain, itching, bruising or bleeding in the genital area, difficulty walking or sitting and genital infections. However, all of these findings may also result from age-related changes and multiple chronic diseases that afflict the elderly. An expert clinician will look for clustering of signs and symptoms, injuries not explained by medical findings, inconsistencies in the history, irregularities in medical care, lack of appropriate assistive devices such as canes, hearing aids and eyeglasses that can help a person function independently and prevent falls and changes in a patient's behavior such as becoming

withdrawn, depressed, losing weight and not sleeping well.

One must also consider the possibility of self neglect when presented with many of these same signs and symptoms. Indeed, self neglect is the most prevalent form of abuse reported to The National Center on Elder Abuse in Washington, D.C. Pavlou and Lachs describe these older adults as inattentive to their health and hygiene either from inability or unwillingness to access appropriate services.<sup>6</sup> Medical and psychiatric co-morbidities, especially dementia, can trigger new onset self neglect in old age. As the onset of dementia is characteristically insidious and slowly progressive, self-neglecting adults with dementia are often felt to have decisional capacity until a crisis erupts. For example, a 90-year-old widow, retired teacher, lives independently in a different state from her relatives, who are in touch regularly by phone. A nephew is called by the police who found his aunt wandering in the street in the early hours of the morning in her nightgown. Upon arrival to his aunt's home, he finds unpaid bills, eviction notices, an empty refrigerator and no heat. He is surprised as he recently had a very pleasant conversation with her on the phone and did not detect any problems or confusion. This scenario is not uncommon as people are living longer and dementia increases with age.

Not only can self neglect result in physical harm, but often in loss of property to a trusting and care-giving neighbor, bank teller or contractor. "We have marveled at the actions of seemingly competent elders who have given away major assets under dumbfounding circumstances."<sup>7</sup> Some elders put their trust in strangers, rather than involved and caring family members. This commonly occurs over time, whereby the abuser methodically isolates the elderly victim while forming a trusting bond. For example, an elderly woman with severe arthritis hires a caregiver to assist her with activities of daily living. Initially the caregiver is kind and helpful and even communicates with the patient's daughter in another city. Over time, however the caregiver systematically reduces the victim to a state of helplessness and total dependency by confining her to bed and overmedicating her. The daughter and the victim believe that this is the natural progression of the arthritis. In this vulnerable and weakened state, the patient willingly signs over access to her bank accounts to this caregiver, who she believes has her best interests at heart.

Other studies have identified depression, the most common mood disorder in the elderly, as an important risk factor for self neglect. Depression is also both



untreated and under-detected among the elderly, as it often presents atypically, can be misdiagnosed as dementia or may also complicate dementia. Untreated, these patients can have impaired judgment and poor motivation, resulting in their being a danger to themselves, refusing medical treatment and assistance at home.<sup>8</sup> Studies have identified that individuals with both clinically significant depression and/or cognitive impairment have an enhanced risk of self neglect, even after adjusting for age, gender, race and income.

Advanced age, poor socioeconomic status, defined as low educational level and low income level, reduced social ties, including living alone and unmarried, and a history of hip fracture or stroke are also significant predictors of self neglect.<sup>9</sup> These patients can present dehydrated, malnourished, in poor hygiene, and existing in unsafe living accommodations with no medical care. The challenge for the clinician is to identify those patients who lack the mental capacity to understand the consequences of their actions and find ways to help those victims, balancing dangerous behaviors with patient autonomy. Factors that need to be weighed include the risks of the specific behaviors, the immediacy of danger and the seriousness of the consequences.<sup>10</sup>

For example, a loving couple, married for over 60 years, with no living children, resides in an apartment together. Over the past 2 years they have over 70 visits to the local emergency room, often returning to the emergency room twice within the same 24 hour period. They are frail, have multiple medical problems and are cognitively intact. They are well known to both the social service and medical staff in the emergency room and despite many attempts to initiate services in the home, due to poor insight, they are unwilling to accept interventions. The staff refers the couple to Adult Protective Services (APS). APS reported that the home was immaculate and did not intervene. The husband becomes progressively physically debilitated and bed-bound, complicated by large pressure ulcers. He finally dies in the emergency room from overwhelming sepsis.

It is important to recognize that increased mortality is associated with all forms of abuse and neglect. Even financial abuse, for example, can be devastating. In addition to the actual financial loss, victims suffer from severe emotional distress, depression, lack of resources for food, medications and housing leading to a diminished quality of life and a shorter-than-expected life expectancy.<sup>11</sup> Researchers studied the indepen-

dent contribution of reported elder abuse and neglect to all-cause mortality in community dwelling older adults over a nine or more year period and found it to be associated with shorter survival.<sup>12</sup> Thus, developing strategies to target and assist victims of elder abuse and neglect is a national imperative that requires an interdisciplinary team approach among health care providers and the legal system.

## Endnotes

1. Lachs & Pillemer, "Abuse and Neglect of Elderly Persons," *New England Journal of Medicine*, 1995; 332:437-443.
2. Paris, "Violence Against Elderly People," *The Mount Sinai J. Medicine*, 1996; 63; 97-100.
3. Shugarman, Fries, Wolf, et al., "Identifying Older People at Risk of Abuse During Routine Screening Practices," *J. American Geriatrics Society*, 2003; 51:24-31.
4. Kemp & Mosqueda, "Elder Financial Abuse: An Evaluation Framework and Supporting Evidence," *J. American Geriatrics Society*, 2005; 53:1123-1127.
5. Hall, Hall & Chapman, "Exploitation of the Elderly: Undue Influence as a Form of Elder Abuse," *Clinical Geriatrics*, 2005;13:28-36.
6. Pavlou & Lachs, "Could Self-Neglect in Older Adults be a Geriatric Syndrome?" *J. American Geriatrics Society*, 2006; 54:831-842.
7. Quinn, "Undoing Undue Influence," *Generations*, 2003; 24; 65-69.
8. Dyer, Pavlik, Murphy, et al., "The High Prevalence of Depression and Dementia in Elder Abuse and Neglect," *J. American Geriatrics Society*, 2005; 48: 205-208.
9. Abrams, Lachs, McAvay, et al., "Predictors of Self-Neglect in Community-Dwelling Elders," *Am. J. Psychiatry*, 2002: 159:1724-1728.
10. Watts, Cassel & Howell, "Dangerous Behavior in a Demented Patient," *J. American Geriatrics Society*, 1989;37:658-662.
11. Kemp & Mosqueda, op cit.
12. Lachs, Williams, O'Brien, et al., "The Mortality of Elder Mistreatment," *J. American Medical Association*, 1998;280:428-432.

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## Financial Crimes Involving Older New Yorkers

By Elizabeth Loewy

According to the U.S. Census Bureau, our nation's elderly population increased eleven-fold between 1900 and 1994, while the non-elderly population merely tripled.<sup>1</sup> New York State has the third largest number of elderly citizens in the nation.<sup>2</sup> As New York's population continues to grow, so too will the number of senior citizens who become physically or mentally impaired. While most of these seniors are fortunate enough to have trusted family members or friends living nearby who can assist them in managing their finances and carrying out daily tasks, a significant number do not. They are isolated and vulnerable to abuse and exploitation. And the sad reality is that many of them will become unwitting victims of theft that results in the loss of their life savings in their golden years.

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*"Many older victims are reluctant to come forward. They feel . . . fear, helplessness, anger, confusion, guilt, shame, and even love, if the exploiter is a family member, trusted friend, or employee."*

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The Elder Abuse Program of the New York County District Attorney's Office investigates and prosecutes approximately 500 cases involving victims who are 60 years of age or older each year. And while this figure is disturbing, it only hints at the pervasiveness of the problem and what is to come in the decades ahead. Ten years ago, Domestic Violence was often referred to as the Hidden Crime, and had only recently been uncovered and exposed as an epidemic in the national media. Today, it is Elder Abuse, and especially the financial exploitation of senior citizens, which is hindered by lack of recognition as a crime as well as under-reporting.

The New York State Office for Children and Family Services determined in a study several years ago that financial exploitation is the most prevalent form of adult abuse.<sup>3</sup> Social service professionals who work with elderly clients understand that detection of financial crimes affecting seniors is a key issue that seriously impedes prosecution. In order for us to effectively investigate and prosecute these cases, it is often necessary for law enforcement to work closely with civil

attorneys representing the older victim, medical professionals, Protective Services for Adults, the Department for the Aging, local social service agencies, banks, and many other entities serving seniors throughout the State. Experience has taught us that the more support a victim has with all of these individuals working as a team, the greater the likelihood that they will cooperate in the prosecution of their exploiter. Of course in some cases, the victim is impaired to the extent that he or she will not be able to testify at trial. And in these cases we rely on this network of individuals to assist us in building the case so that we can prove the charges without relying on the victim's testimony.

Who are the victims? They come from all socio-economic groups. What do they have in common? Many older victims are reluctant to come forward. They feel a number of emotions, including fear, helplessness, anger, confusion, guilt, shame, and even love, if the exploiter is a family member, trusted friend, or employee. Many victims are afraid of their exploiter, yet completely reliant on him or her for meals, medication, physical assistance, financial support or, simply put: surviving. Others may be terrified of the prospect or threat of being "sent" to a nursing home, or subjected to the appointment of a guardian who is a complete stranger. One such victim in Manhattan, suffering from dementia, cried and apologized repeatedly to a detective when asked why she had signed a \$30,000 Christmas check to a home aide who had been employed for only a few months. Many of the elderly victims who suffer from age-related mental impairments will be limited in their ability to participate in the prosecution of their abusers, either because they cannot recall the events in question or because they lack the capacity to testify under oath, or both. It is quite likely that this is one of the primary reasons why they were targeted in the first place.

Who are the exploiters? Again, they come in all shapes and sizes. They may be relatives of the victim. The son, whose raging drug habit played a role in his beating up and stealing cash from his older parents instead of helping out at home.<sup>4</sup> A sister, who became power of attorney for her elderly sibling in order to pay the rent on her apartment while she was hospitalized with renal failure. The older victim learned, upon her discharge from the hospital, that her life savings had been gambled away in Atlantic City by her sister-agent while she was hospitalized.<sup>5</sup> Or consider the 101-year-

## ELDER ABUSE

old woman suffering from dementia whose nephew became involved in “managing” her finances. He took responsibility for paying the victim’s home aides, but also withdrew larger and larger sums of cash for himself from his aunt’s accounts at a time when she was confused and unable to consent to these “gifts.”<sup>6</sup>

The exploiters may be home aides. A Holocaust survivor paid her expenses with funds from her reparation account, until her trusted aide obtained a debit card on this account and withdrew thousands of dollars for herself.<sup>7</sup> Another home aide worked for a 98-year-old wheelchair bound woman suffering from dementia on the Upper East Side, but then began forging checks from her account on a regular basis, either making them out to herself or to friends to whom she owed money. When the victim’s adult children reviewed their mother’s bank statements and checkbook, they were shocked to discover that approximately \$30,000 was unaccounted for in the period of only a few months. When they questioned their trusted aide, she explained that the extra checks were for vacation pay. A few days later, she attempted to argue that the 98-year-old impaired and notoriously thrifty victim had “lent” her the money. A few weeks later, she tearfully informed the victim’s daughter that one of her relatives was very ill and that she needed the cash for a family medical emergency. And some time after that, she confessed to one of our elder abuse detectives that she had, in fact, stolen the money without the victim’s knowledge, and forged her name. Sadly, as happens on many of these cases, the victim passed away before the case was resolved. Nonetheless, our Office had investigated and “built” a case without having to rely on her testimony. Even with the knowledge of the victim’s passing, the defendant pleaded guilty to a felony, received a jail sentence, and was ordered to pay back a portion of the stolen funds to the victim’s estate.<sup>8</sup>

Other exploiters prosecuted in New York County are professionals who should be acting as fiduciaries to their elderly clients. A broker from a major New York City bank stole funds from an older client suffering from dementia.<sup>9</sup> A bank teller withdrew over \$100,000 from her 92-year-old victim’s savings account without her knowledge.<sup>10</sup> And this is just the tip of the iceberg.

There are significant obstacles that prosecutors face in pursuing financial crimes against the elderly.

First, unlike the criminal codes in many other states, the language of New York’s Penal Law does not specifically address financial exploitation, such as larceny, against adult victims who are mentally

disabled or mentally incapacitated.<sup>11</sup> Prosecutors are forced to rely on case law that is instructive on the issue of an owner’s mental state in determining whether a theft has occurred. Although New York protects sex crimes victims who are mentally impaired with specific language in the statute,<sup>12</sup> the larceny charge is silent on this issue. Impaired victims of theft are no less deserving of this protection. New York’s Penal Law should clearly instruct that wrongfully depriving a mentally disabled or incapacitated owner of property of his or her assets is a crime. Assembly Bill 306 and Senate Bill 951, prohibiting theft from a mentally impaired person, are a proposed amendment to section 155 of the Penal Law and would be instructive in determining whether a victim was knowingly and voluntarily able to consent to the transfer of his or her assets. It includes language to protect legitimate caretakers, specifically stating that if the benefit received by the rightful owner of assets is commensurate with the value of the assets taken, then a wrongful taking may not have occurred.

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*“The exploiters may be home aides. A Holocaust survivor paid her expenses with funds from her reparation account, until her trusted aide obtained a debit card on this account and withdrew thousands of dollars for herself.”*

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Another area of New York law that is problematic for law enforcement involves the General Obligations Law § 5-1501, which governs the use of a power of attorney. As illustrated in one of the cases I have just described, financial exploitation through the misuse of a “p.o.a.,” especially once the principal has become mentally impaired, is a growing trend in New York. The gravity of this problem is reflected in the decision of the Trusts and Estates Law Section of the New York State Bar Association to devote one of its recent annual meetings to this important topic. Powers of attorney are utilized by unscrupulous agents to facilitate thefts from unknowing elderly clients, with surprising ease. There is relatively widespread access to the power of attorney form, as they are available at local stationery stores and distributed by banks. This form, once executed, gives the agent easy access to the principal’s accounts. Yet in New York State, there are no filing requirements for an agent, no statutes that mandate an accounting, no charge in the Penal Law involving exploitation through the misuse of a power of attorney, and most notably, no language in the General Obligations Law explaining that the agent must act as a “fiduciary” for the principal.

These two areas of the law were the focus of those who participated in the first New York State Summit on Elder Abuse which was convened by Lifespan, a Rochester, New York, organization serving senior citizens, in Albany in 2004. The New York State Elder Abuse Coalition has continued to concentrate on legislative initiatives affecting older crime victims. Although changes in the law would be particularly beneficial to senior citizens, they would also help all vulnerable adult populations within New York. Those who are reliant on others to manage their finances deserve special protection from the state in the form of laws that address the issues facing mentally impaired victims of theft from predatory caretakers. A clear statement in these statutes may prevent the exploitation from happening in the first place. The unprincipled family member, friend, home aide or attorney in fact will be given a specific indication within the statute that criminal charges may be appropriate if they intentionally act in a manner that does not benefit the senior, such as transferring the victim's funds as a "gift" without his or her knowledge or permission.

Elder Abuse is a significant problem, distinct from domestic violence, and worthy of separate resources and attention. Although a number of elder abuse cases may also be characterized as domestic violence, many of the cases involve neither physical violence nor family members. This does not mean that these cases are any less serious—many elderly victims of financial exploitation rapidly deteriorate and are never the same after the thefts are discovered, according to family members. Some victims pass away within months of the discovery of the abuse. If law enforcement, social service agencies, medical professionals, banks, and other entities serving seniors consider establishing a special protocol addressing the specific needs of elderly crime victims, financial exploitation and physical abuse of our senior citizens will be addressed in a more all-encompassing and effective manner.

## Endnotes

1. U.S. Census Bureau, Hobbs, Frank B., "The Elderly Population," [www.census.gov](http://www.census.gov).
2. U.S. Census Bureau Statistical Brief, "Sixty-five Plus in the United States, May 1995, Economics and Statistics Administration, U.S. Department of Commerce.
3. Profile of the Protective Services for Adults Caseload in New York State, Irving Abelman, March 1997; p. 5.
4. *People v. Steven Russo*, Ind. No. 566/2003.
5. *People v. Queen Esther Baskerville*, Ind. No. 5697/1996.
6. *People v. Norman Rosenspan*, Ind. No. 4276/2002.
7. *People v. Madlene Edwards*, Ind. No. 1272/99.
8. *People v. Audrey Harley*, Ind. No. 7000/2003.
9. *People v. David Kippins*, Ind. No. 733/1997.
10. *People v. Fawn McPhee*, Ind. No. 4187/2005.
11. N.Y. Penal Law § 155.05.
12. N.Y. Penal Law § 130.00(5), (6).

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## Targeting Elder Abuse in New York

By Denise M. Shukoff

Elder abuse is a tragic, often hidden epidemic affecting an increasing number of older New Yorkers. It includes physical abuse, emotional abuse, neglect, sexual abuse, and financial exploitation. In 2004, Lifespan of Greater Rochester, Inc.<sup>1</sup> took on the challenge of convening the first comprehensive, statewide Elder Abuse Summit in the nation. As a natural follow-up to the Summit, Lifespan then organized a statewide Coalition on Elder Abuse to help implement the Action Agenda developed by the Summit participants. This article provides general information about the New York State Elder Abuse Summit and the New York State Coalition on Elder Abuse, with an emphasis on three areas of special interest to elder abuse specialists: (1) multidisciplinary approaches to combating elder abuse, (2) financial exploitation of the elderly, including power of attorney abuse, and (3) policy and legislative initiatives.

### The New York State Elder Abuse Summit

#### Preparing for the Summit

In December 2001, Art Mason, Program Director for Lifespan's Elder Abuse Prevention Program (EAPP),<sup>2</sup> attended the National Policy Summit on Elder Abuse held in Washington, D.C. He was one of 90 professionals from around the country invited to help develop a National Elder Abuse Policy Agenda to protect our nation's vulnerable, at-risk elders.<sup>3</sup> The National Center on Elder Abuse (NCEA)<sup>4</sup> convened the Summit with funding from the Administration on Aging<sup>5</sup> and Department of Justice. The American Bar Association (ABA) Commission on Legal Problems of the Elderly<sup>6</sup> is one of NCEA's partner agencies.

As a follow-up to the National Summit, states were encouraged to develop policy recommendations that would address elder abuse issues at the state and local level. It was time for a New York State Elder Abuse Summit, time to bring together experts from across the state to develop an action plan designed specifically for New York. Lifespan took on the responsibility of making sure that the idea of a comprehensive, statewide Elder Abuse Summit would become a reality. Within two years, funding for the Summit was secured and the planning process began.

The Summit was partially funded by a grant from the U.S. Administration on Aging, secured by U.S.

Senator Charles E. Schumer, to develop a coordinated response to elder abuse. Summit co-sponsors included the N.Y.S. Office for the Aging, N.Y.S. Office of Children and Family Services—Bureau of Adult Services,<sup>7</sup> N.Y.S. Division of Criminal Justice Services, Excelsus BlueCross BlueShield and MedAmerica Insurance Company of New York.

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*"Elder abuse is a tragic, often hidden epidemic affecting an increasing number of older New Yorkers. It includes physical abuse, emotional abuse, neglect, sexual abuse, and financial exploitation."*

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A statewide Planning Committee, made up of representatives from the sponsoring agencies and other key elder abuse experts in the state, worked on setting the agenda for the Summit. This group also helped develop a list of potential invitees.

Approximately 100 people, experts or major stakeholders in the field of elder abuse, were invited to attend the three-day Summit. The goal was to involve a cross-section of public and private agencies, representing all regions of the state.

The legal community was well represented at the Summit. Over twenty percent of the participants were attorneys working in government, nonprofit agencies or the private sector, several of them actively involved with the NYSBA Elder Law Section.

#### A Working Summit

In his written message to the Summit participants as they began the important task of creating a New York State Action Agenda on Elder Abuse, Senator Schumer said:

There are few crimes as grievous as abuse of our most frail, most vulnerable citizens. I implore you to make recommendations that will ensure that New York becomes a leader in the recognition, prevention and prosecution of elder abuse.

# ELDER ABUSE

The statewide Summit brought together experts from academia, financial institutions, health care, law enforcement, the legal community, local government, not-for-profit agencies and state government to explore innovative ways to stop the growing problem of elder mistreatment in New York. Based on individual expertise and the desire to have representation from a variety of disciplines in each group, participants were pre-assigned to one of six work groups: Financial Exploitation, Intervention Models, Prosecution and Law Enforcement, Public Awareness and Education, Public Health, and Self-Neglect. Each group was asked to develop three recommendations for presentation during the final plenary session. Participants were also asked to consider the following crosscutting areas as they developed their recommendations: Funding and Resources, Policy and Legislation, Prevention, Program Development, Research and Data.

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*“The statewide Summit brought together experts from academia, financial institutions, health care, law enforcement, the legal community, local government, not-for-profit agencies and state government to explore innovative ways to stop the growing problem of elder mistreatment in New York.”*

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Two consultants served as lead facilitators for the Summit. They created a very structured process for participants to follow while developing a prioritized Action Agenda. Each work group was assigned a facilitator, recorder and content specialist. The consultants prepared and distributed written guidelines for each role and provided training during an orientation session. Participants were asked to consider the following as they drafted their recommendations: statewide applicability, critical need or problem, barriers, key partners and constituencies, critical resources needed, and action steps required to implement the recommendations. The importance of raising public awareness, the need for professional training, the value of multidisciplinary collaborations, the recognition that legislative reform is essential, and the general lack of funding for elder abuse initiatives were all areas of concern touched on in some way by each work group during the discussion process.

Eighteen key recommendations were presented during the plenary session on the last day of the Summit. The recommendations fell into four distinct

categories: Data Collection/Prevalence, Effective Intervention, Focus on Public Awareness and Professional Education, and New York State Laws on Elder Abuse. Participants voted to select six priority recommendations that would be used to create the statewide Elder Abuse Action Agenda. The Final Report, *Target: Elder Abuse, New York Takes Action Against Elder Mistreatment and Neglect*, gives general information about the Summit and details how the work groups developed their key recommendations. In 2005, copies of the report were widely distributed to individuals, government and private organizations in New York and to key state government offices across the country. The report is available online and may be downloaded or printed.<sup>8</sup>

In evaluating the success of the Summit one participant commented, “putting the expertise of so many individuals from throughout New York State together in this format for three days resulted in some innovative and creative ideas about how we can move forward in the state to deal with this often overlooked and underserved population.”

Thus, the groundwork was laid for the next step in the battle against elder mistreatment. Creating a New York State Coalition on Elder Abuse was always considered essential to keep the momentum going statewide and to ensure implementation of the recommendations.

## **The New York State Coalition on Elder Abuse Creating the Coalition**

In July 2004, Lifespan brought together the original Summit Planning Group and others who had expressed a strong willingness to participate in forming a statewide Elder Abuse Coalition. This committee created an organizational structure for the Coalition and formed six subcommittees (Incidence and Prevalence, Intervention Models, Laws, Public Awareness and Education, Resource Center, and Training) based on the priority recommendations developed during the Summit. Results from a needs assessment survey are being used by the subcommittees as they work on addressing the priority recommendations. Individuals from all regions of the state, representing academia, banking, health care, law enforcement, the legal community, not-for-profit agencies, and state and local governments serve on the Coalition’s Advisory Board. The Board oversees implementation of the Action Agenda and keeps the Coalition focused on its mission.

Formed to implement the recommendations developed by the Summit, the New York State Coalition on Elder Abuse is a multidisciplinary, statewide group

of individuals, private organizations and government agencies working together to protect elders from abuse, neglect and financial exploitation. It serves as a catalyst for change, raising awareness about elder abuse and offering solutions for prevention and intervention through education and research.<sup>9</sup> Funding for the Coalition is provided in part by the N.Y.S. Office for the Aging and by a grant from The New York Bar Foundation to increase public understanding of the law.

Focusing on abuse occurring in the community rather than institutional settings, the Coalition is actively involved in statewide outreach efforts, encouraging local, multidisciplinary elder abuse coalitions and public awareness efforts. Periodic electronic *News & Information Bulletins* regarding (1) collaborative initiatives that can be modeled, (2) trainings and conferences, (3) professional best practices, and (4) updated elder abuse information, including changes in the law that will help protect elderly victims, are widely distributed to members throughout the state. Membership in the Coalition is open to anyone interested in targeting elder abuse in New York.

## **Multidisciplinary Approaches to Combating Elder Abuse**

Dedicated professionals working in the field of elder abuse are always trying to improve intervention and prevention strategies to help reduce the prevalence of elder mistreatment, but they often work in isolation. One of the goals of the statewide Coalition is to encourage the creation of multidisciplinary, collaborative approaches to elder abuse. Some groups come together to address general policy issues, some to review specific cases of elder mistreatment, and some take on both challenges. To inspire other communities to form similar groups, the work of existing and newly formed regional elder abuse coalitions or multidisciplinary teams is often highlighted in Coalition *News & Information Bulletins*.

During their discussions, each of the Summit's six work groups touched on the importance of a multidisciplinary approach to elder abuse. Many communities have discovered the value of working together as a team, benefiting from shared expertise. However, collaborative efforts of this magnitude are often difficult to sustain. To be successful, everyone must remain committed, actively involved and accountable. The NCEA website is an excellent resource for information on multidisciplinary, collaborative responses to elder abuse.<sup>10</sup>

New York has a number of successful collaborations, and since the Summit there has been renewed interest in forming new associations. As examples, I would like to briefly mention two of the groups that have been in existence for a number of years and three new ones that were formed in 2006.

## **Lifespan Elder Abuse Consortium**

In 1998, Lifespan's Elder Abuse Prevention Program (EAPP) formed an Elder Abuse Consortium to bring together public and private sector leaders in the area who share EAPP's interest in protecting elders in the community. As with other such collaborations, members come from law enforcement, health care, prosecution, social service agencies, financial institutions, academia, various levels of government, the legal community, and from the community at-large. The Consortium continues to provide EAPP with invaluable guidance and support by helping create a public policy direction and community-wide agenda on elder abuse.

Consortium members recommend policy changes to assist with identification, notification and intervention strategies to prevent elder mistreatment, serve as community-wide spokespersons to raise public awareness, work on continuously improving professional training programs, assist with identifying future funding sources to maintain EAPP's ten-county regional program, and evaluate the effectiveness of the program. Prior to the National Summit in 2001, Consortium members were presented with the idea of a New York State Policy Summit. After considerable discussion, there was enthusiastic support for Lifespan to pursue this idea.

## **Oneida County Elder Abuse Coalition**

The Oneida County Elder Abuse Coalition was formed in 1999 in response to an elder abuse initiative by the New York State Office for the Aging. Members of the Coalition were interested in working together to address a growing number of power of attorney abuse cases, and to promote awareness, recognition and prevention of elder abuse in the area. By working collaboratively and focusing on intervention and prosecution, the Coalition partners (Oneida County Departments of Aging, Health, Mental Health and Social Services, the District Attorney's Office, the Sheriff's Office and the Legal Aid Society of Mid-New York) are continuing to successfully address the needs of all elder abuse victims through advocacy, program development and coordination of services.



Three new collaborative efforts began in 2006. The renewed energy generated by the statewide Summit and Coalition served as the impetus for creating the Finger Lakes Area Elder Abuse Coalition, Lifespan's Fatality Review Team, and the New York City Elder Abuse Network (NYCEAN).

## **Finger Lakes Area Elder Abuse Coalition**

Representatives from not-for-profits, county agencies, banks, law enforcement, health care, and private attorneys in six rural counties (Cayuga, Ontario, Seneca, Schuyler, Wayne and Yates) were invited to join the Finger Lakes Area Elder Abuse Coalition. The group has discussed the possibility of eventually reviewing specific cases, but the current focus is more policy related. The major concern in the area right now is power of attorney abuse.

## **Lifespan Elder Abuse Fatality Review Team**

Lifespan took on the challenge of implementing an Elder Abuse Fatality Review Team even though, unlike some states,<sup>11</sup> New York does not have a law governing review of elder abuse fatalities. However, child abuse fatality review teams were authorized by state law in 1999.<sup>12</sup> The Elder Abuse Team reviews closed cases of suspicious deaths that may have been related to elder mistreatment. This is not an exercise in finger pointing. The goal is to find ways to prevent fatalities in the future by looking at the system response in these cases. This positive collaboration will raise awareness of the seriousness of elder abuse and will improve the protocols governing approaches to elder victims in law enforcement, the courts, Adult Protective Services, and the medical community.

In 2006, NCEA and the ABA Commission on Law and Aging offered small grants and supportive training to help support the development of new elder abuse fatality review teams. In 2005, the ABA Commission, with the assistance of the National Adult Protective Services Association (NAPSA)<sup>13</sup> and others, prepared a replication manual for communities to use as a reference when developing local elder abuse fatality review teams. This free manual is available on the Internet.<sup>14</sup> Hopefully, interest in creating community-based fatality review teams will also generate interest in changing state laws, setting standards and making it easier to establish local fatality review teams.

## **New York City Elder Abuse Network**

In June 2006, the NYC Department for the Aging (DFTA) hosted an all-day strategic planning session for members of the newly formed New York City Elder Abuse Network (NYCEAN). The Jewish Asso-

ciation for Services for the Aged (JASA) and the Carter Burden Center are serving as co-leaders of NYCEAN. Although still in the organizational stages, over thirty-five professional organizations have joined NYCEAN; and two issues have been identified as top priorities for the Network: coordination of services and training on financial exploitation. Under coordination of services, two Elder Abuse Case Coordination and Review Teams have formed. A team in Brooklyn includes representative from the Family Justice Center, District Attorney's Office, Mayor's Office, and social service agencies. The Manhattan team includes representatives from medical, social work and legal organizations.

## **Financial Exploitation of the Elderly, Including Power of Attorney Abuse**

In a September 2000 press release announcing a new training program for employees of financial institutions, former Attorney General Eliot Spitzer noted that financial exploitation is the fastest growing form of elder abuse.<sup>15</sup> Many professionals who work with elderly victims have identified power of attorney abuse as a major factor in financial exploitation cases.

For over ten years, Lifespan's Elder Abuse Prevention Program has been advocating for revisions to the statute governing powers of attorney.<sup>16</sup> In 2004, Summit participants identified power of attorney reform as a top priority; and this issue continues to be a priority for the statewide Coalition. Unfortunately, as New York's elder population increases, the urgency for these reforms becomes even more necessary.

Currently, when there is a power of attorney, prosecutors find it very difficult to prove larceny. It is also very difficult for an elderly victim to successfully recover stolen money or property in civil court. Power of attorney abuse often results in the loss of an elderly person's life savings and/or home. Not only can this have a permanent effect on the victim's financial security, but based on results from a 1998 mortality study, it may also have a negative impact on his or her physical and emotional well-being.<sup>17</sup> Although proposed statutory revisions<sup>18</sup> do not directly affect the penal law, prosecutors agree that changes to the General Obligations Law<sup>19</sup> will make it easier for them to successfully prosecute offenders. This may also serve as an effective deterrent, thereby reducing the prevalence of this devastating form of abuse.

Statutes governing powers of attorney in many other states provide clear guidelines regarding the rights and responsibilities of principal and agent. New York's law currently lacks statutory direction and is



silent on many critical issues. This leaves New York's most vulnerable citizens at risk. The New York State Law Revision Commission has been working on revising New York's law governing powers of attorney for many years. Lifespan and the N.Y.S. Coalition on Elder Abuse have worked closely with the Commission during this process. In 2003, after an extensive study of the issues and numerous meetings with experts from around the state, the Commission issued a detailed report with proposed statutory changes.<sup>20</sup> As more discussion followed, revisions were made to the Commission's original proposal. Legislation was introduced in both houses and amended as needed.<sup>21</sup> The bill passed the Assembly on June 15, 2006 and was referred to the Senate. Unfortunately, the bill did not pass the Senate before the end of the legislative session. Those who have been working on this issue for over a decade are hopeful that any problems with the proposed legislation will be resolved quickly, leading the way to passage of an effective power of attorney reform bill that will help put a stop to financial exploitation of the elderly.

Power of attorney abuse is mentioned anecdotally by service providers, police and prosecutors as the most frustrating factor in financial exploitation cases. Elderly victims are often left destitute, with no hope of ever recovering their life savings.

## Policy and Legislative Initiatives

During the final plenary session of the 2004 Summit, a representative from each work group gave a summary and presented the group's recommendations. Summit participants were then asked to select six priority recommendations out of the eighteen that were introduced. Based on the voting, it was very clear that this group of experienced professionals felt that legislative reform was the top priority, essential to achieve the goal of protecting New York's growing elderly population from abuse, neglect and financial exploitation.

As referenced in notes from the Prosecution and Law Enforcement Work Group discussion, "if we do not change the laws, it does not matter how hard we work as a team to reduce the prevalence of elder abuse in the state." The statute governing powers of attorney was identified as one area that needs reform. Other recommendations included support for the District Attorneys Association bill amending the larceny statute<sup>22</sup> and the need to broaden the definitions of "caregiver" and "vulnerable elderly person."<sup>23</sup> Members of this work group included bankers, law enforcement personnel, prosecutors, social workers, and victim ad-

vocates, many of them all too familiar with the increasing number of financial exploitation cases that involve power of attorney abuse.

## Continuing the Fight Against Elder Mistreatment

Members of the New York State Coalition on Elder Abuse, individually and collectively, will continue working to protect our elders from abuse, neglect and exploitation by ensuring that all regions of the state are on the forefront of combating this often hidden tragedy that affects so many elder victims with all its devastating physical, emotional, social and economic consequences.

If you are interested in targeting elder mistreatment in New York and would like to join the growing number of people associated with the statewide Coalition, please contact Denise Shukoff at [dshukoff@lifespan-roch.org](mailto:dshukoff@lifespan-roch.org), (585) 244-8400 ext. 186 or fill out an online membership form.<sup>24</sup> Coalition membership is free. You will receive periodic *News & Information Bulletins*, usually no more than one or two a month. Joining the Coalition will not overload your e-mail inbox.

## Endnotes

1. Lifespan of Greater Rochester, Inc., founded in 1971, is a non-profit agency dedicated to enhancing the quality of life of older adults. Lifespan has over 30 programs and services that help adults take on both the challenges and the opportunities of the second half of life. <http://www.lifespan-roch.org>
2. EAPP covers ten counties in Western New York, providing direct casework intervention to help victims of elder mistreatment. Caseworkers provide a coordinated response to abuse situations by working closely with APS, law enforcement, courts, DA's offices, health care providers, and other social agencies to prevent repeat victimization. EAPP staff also offer education and training programs for community members and professionals both locally and throughout the state.
3. Nat. Center on Elder Abuse, National Policy Summit on Elder Abuse: Proceedings (2002) (on file with author), available at <http://www.elderabusecenter.org/pdf/whatnew/proceedings.pdf>; National Action Agenda 2002 (2002) (on file with author), available at <http://www.elderabusecenter.org/pdf/agenda/agenda2002.pdf>; Summit Preparation Materials (2001) (on file with author), available at <http://www.elderabusecenter.org/pdf/agenda/background.pdf>.
4. See generally <http://www.elderabusecenter.org>, as an excellent resource for elder abuse information.
5. [http://www.aoa.gov/eldfam/Elder\\_Rights/Elder\\_Abuse.asp](http://www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse.asp).
6. <http://www.abanet.org/aging>.
7. <http://www.ocfs.state.ny.us/main/psa>.
8. <http://www.lifespan-roch.org/pdf/TargetElderAbuseReport.pdf>.
9. Mission and strategy of the New York State Coalition on Elder Abuse.

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10. See generally CANE Bibliog., Multidisciplinary and Collaborative Approaches in Responding to Elder Abuse, [http://www.elderabusecenter.org/default.cfm?p=CANE\\_Multidisciplinary/AndCollaborativeApproaches.cfm](http://www.elderabusecenter.org/default.cfm?p=CANE_Multidisciplinary/AndCollaborativeApproaches.cfm).
11. Cal. Penal Code §§ 11174.4-9 (West); Tex. Health and Safety Code Ann. §§ 672.001-0013 (Vernon).
12. N.Y. Social Service Law § 422-b (McKinney).
13. <http://www.apsnetwork.org>.
14. Lori A. Stiegel, Elder Abuse Fatality Review Teams: A Replication Manual, ABA Commission on Law and Aging (2005), <http://www.abanet.org/aging/publications/docs/fatalitymanual.pdf>.
15. Press Release, Office of NY Att'y Gen. Eliot Spitzer, Financial Abuse of Elderly Targeted: Bank Employees to Receive Training to Combat Exploitation (Sept. 21, 2000), available at [http://www.oag.state.ny.us/press/2000/sep/sep21b\\_00.html](http://www.oag.state.ny.us/press/2000/sep/sep21b_00.html).
16. N.Y. General Obligations Law § 5-1501-5-1602 (McKinney).
17. Mark S. Lachs et al., *The Mortality of Elder Mistreatment*, 280 JAMA 428-432 (1998).
18. A.8558-B and S.5151-A, 229th N.Y. Leg. Sess.
19. N.Y. GOL §§ 5-1501-5-1602 (McKinney).
20. N.Y. Law Revision Comm'n, Report on Proposed Revisions to the General Obligations Law in Relation to Powers of Attorney (on file with author), available at <http://www.lawrevision.state.ny.us/reports/2003reportonproposedrevisionstothehol.pdf>.
21. A.8558-B and S.5151-A, 229th N.Y. Leg. Sess.
22. A.306 and S.951, 230th Leg. Sess., amending N.Y. Penal Law §§ 155.00, 155.05, 155.15 (McKinney).
23. N.Y. Penal Law § 260.30 (McKinney).
24. [http://www.lifespan-roch.org/NYS\\_elder\\_abuse\\_coalition.htm](http://www.lifespan-roch.org/NYS_elder_abuse_coalition.htm).

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## Elder Abuse and Diversity: An Overview

By Andrea Lowenthal

Elder abuse is proliferating at an alarming rate, and is yet still drastically under-reported. Recognizing elder abuse is not always a matter of "I know it when I see it." Definitions and descriptions of the general categories of abuse vary among states, across research on the incidence of elder abuse, and in the literature generally. Elder abuse may be intentional physical, sexual, or psychological abuse; or it may be self-neglect, or neglect by a caregiver. Financial abuse, whether by "insiders," such as family members or appointed agents, or mass-exploiters, through broad-based schemes, is another form of elder abuse. While there are more similarities than differences, identifying an overt act or failure to act as abusive or neglectful also depends upon the experience of the individual perpetrator and victim.



There are many U.S. studies over the past four decades on the implications of race, ethnicity, culture and social orientation on elder abuse.<sup>1</sup> Researchers have attempted to identify and classify the effect of race and ethnicity of the elders and their caretakers on the incidence of elder abuse, reporting, and response. However, many variables, such as the locale and community in which the elders live, will cause variations even within members of any sub-group.<sup>2</sup> The effect of sexual or gender orientation has been explored, but not researched. Because elder abuse is also a global problem, the available research includes many international studies from which a better understanding of diverse American elders can also be obtained.<sup>3</sup>

Researchers are aiming at a moving target. The elders of one generation may not have had the same perceptions and understanding as their children and caretakers. Regardless of their background, the elders and their progeny will have been influenced by their different opportunities for education, employment, and mobility, by their community and their social acceptance. Racial, ethnic, and other cultural identifications may be fluid, and so too must be the approach to understanding elder abuse. However, the research to date provides a starting point.

### Defining Elder Abuse

There are neither national nor universal definitions of types of elder abuse, and some authors use the word "maltreatment" or "mistreatment" instead to encompass both abuse and neglect as distinct conditions.<sup>4</sup> For that matter, how old is an "elder"? In a 1998 report, *The National Elder Abuse Incidence Study*,<sup>5</sup> the authors attribute the difficulty in collecting data to inconsistent definitions of abuse, neglect and exploitation resulting not only from 50 different U.S. state and territory law systems, but also from disagreement among experts. Based on their review of these laws, on roundtable discussions, a consensus meeting in Washington, D.C., and pilot testing in local Adult Protective Services agencies, they proposed a set of "standard" definitions, and list some of the most important signs or symptoms of each.

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*"Recognizing elder abuse is not always a matter of 'I know it when I see it.'"*

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Briefly, these include seven categories of abuse: physical abuse (the use of force as well as restraint through drugs or otherwise); sexual abuse (nonconsensual, unwanted touching and coerced nudity or exposure to photographing); emotional or psychological abuse (infliction of anguish, emotional pain or distress, including isolating the elder from persons or activities); neglect (refusal or failure to fulfill obligations or duties to the elder, directly or indirectly); abandonment (desertion); financial or material exploitation (illegal or improper use of funds or other property); and self-neglect (to the extent health or safety are threatened, but excluding competent and voluntary choices).<sup>6</sup> In 2001, the National Center on Elder Abuse defined elder abuse as five of these (omitting abandonment and self-neglect),<sup>7</sup> these five presumably encompassing all the foregoing acts or forms of neglect, and in 2003 the National Research Council defined abuse to include intentional acts causing or creating a serious risk of harm or failing to satisfy an elder's basic needs or protect them.<sup>8</sup>

### Implications of Culture and Orientation

The value of any particular study is necessarily limited by the methodology and scope of the research

conducted, by reliance upon information extrapolated from statistical studies, and, as importantly, by the inherent fluidity of the subjects studied, as discussed above. In "Multiethnic Perspectives on Elder Mistreatment,"<sup>9</sup> the authors concluded from their focus group study that interpretations of elder abuse are affected by "social expectations" (gender role, filial obligations, marital fidelity, and ageism), "caregiver expectations" (skilled professionals versus unskilled, lay providers), "victim characteristics" and the "characteristics of the interactions." They did not find "different levels of tolerance across cultures," but did observe "nuances" among members of these groups "when discussing both the severity and the factors determining abuse."<sup>10</sup> The perception and understanding of elder abuse held by a particular group, and by such group in relation to others, is affected by many factors particular to the group, the time, the community and other variables. There may be a closer identification between members of one community regardless of their race or ethnicity than among members of the same racial or ethnic group in another community.<sup>11</sup> There are quite a few studies of certain groups—African Americans, Koreans, etc.—while others have not been studied as extensively; in many cases, later research on any of these has found fault with the cultural misapprehensions of prior researchers.<sup>12</sup> The following overview is therefore offered with the caveat that no one study defines the attributes of any particular group, but merely contributes to our understanding generally.

Among the many sources on diversity is *Understanding Elder Abuse in Minority Populations*, edited by Toshio Tataru, Ph.D. (including contributions from twenty-one others).<sup>13</sup> The contributors to *Understanding Elder Abuse* focus on four groups: Black/African American, Hispanic American, Asian American, and American Indian. The rate of growth of the elder population (60 years and older) indicates that approximately 25% of the U.S. population will be 60 years of age or older by 2030, an increase of 99% from 1997. As baby boomers age, and opportunities for better health and longevity increase, 70 may become "the new 60," but the numbers are increasing.<sup>14</sup> Of the overall rate of increase, White elders will increase almost 73.7%. The Black elders will increase 131.1%, Hispanic elders 350.3%, Asian/Pacific Islander elders by 334%, and American Indian elders by 141.7%, with these ethnic groups representing 26.8% of the total U.S. elder population by 2030.<sup>15</sup>

Tataru notes that the collection of data on race and ethnicity among the elderly is improving so that earlier conclusions about differences among these groups

can be better studied. In a study of data reported from 31 states, it was found that 32% of the victims were in a minority group despite such groups representing only 16.2% of the nation's overall population in 1997. If this trend continues, the abused elders from these groups will constitute more than 26.8% of the total U.S. elder population by 2030. With an increase in the rate of incidence reporting, data collection becomes more refined, so that these numbers will become more reliable.<sup>16</sup>

In her article, "Abuse of Black Elders in Rhode Island," Joyce Hall relates case studies of specific victims.<sup>17</sup> She writes that abuse within the Black community is hidden to protect the community's public image, and that Black elders are more likely than others "to hide or deny any notion of abuse or maltreatment occurring within their community, whether the elder is in a group or meeting privately with a caseworker."<sup>18</sup> Deference to the elder, particularly a matriarch, is diminishing, while the number of Black households with multi-generational residents is increasing, many of whom are being financially supported and otherwise cared for by the eldest among them.<sup>19</sup> Neighbors may become aware that a drug-abusing daughter is taking her mother's Social Security checks and leaving her mother with little to sustain herself and to care for the grandchild, and yet be reluctant to report the situation to mistrusted authorities. Turning to local religious leaders may be comforting, but it may not lead to getting publicly available services.

Linner Ward Griffen makes similar points in her article, "Elder Maltreatment in the African American Community: You Just Don't Hit Your Momma!!!"<sup>20</sup> Griffen identifies ten themes from her study of Southeastern Black elders and families, among them that physical and sexual abuse of elders was considered unacceptable, that social conditioning may lead to unrecognized financial abuse and neglect, and that dependent, mutually beneficial relationships may result in neither party viewing the use of the elder's financial resources as abuse despite the deprivations the elder may suffer as a consequence. Other "themes" include the incidence of nontraditional families, geographic isolation, minimizing or neutralizing abusive behavior, psychological demoralization, and resistance to institutional help.

The studies of the Hispanic elders in *Understanding Elder Abuse* highlight the importance of religion, the centrality of the family and ties to the community, and pride and its obverse, shame. In "Elder Mistreatment in Mexican American Communities: The Nevada and Michigan Experiences," Yolanda Sanchez observes that



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the Detroit subjects identified themselves much more strongly with the local Mexican American community than did the Nevada subjects, perhaps, she surmises, because more of the latter were native born or of longer residence in the U.S. Among her observations is that the extended family system (*la familia*) has positive implications for family care of the elderly, but may lead to the protection of intra-family perpetrators and a reluctance to contact authorities. A sense of shame would make reporting unlikely except in extreme circumstances.<sup>21</sup>

In "Issues in the Provision of Adult-Protective Services to Mexican American Elders in Texas," it was observed that while the younger generation seemed somewhat more likely to seek and accept help in caring for elders, the cultural norm of keeping the elders at home meant a greater number of cases of neglect, whether because of poverty or other factors limiting the family's ability to provide care.<sup>22</sup> After citing similar findings, the author of "Elder Abuse in the Puerto Rican Context" notes the importance of incorporating the family into services for maintaining and treating the elderly to prevent and address issues of neglect, especially when so many of them are sharing households and limited resources.<sup>23</sup>

Asian Americans are a very diverse group, and this is reflected in the way the different ethnic sub-groups recognize and experience elder abuse. In "Elder Abuse and Neglect Among the Korean Elderly in the United States," Ailee Moon notes that the significant numbers of Korean immigrants in the later decades of the twentieth century was typified by the immigration of adult children, followed by their parents. By virtue of their age and difficulty in assimilating, these older Koreans became dependent upon the younger members of the family, resulting in their diminished status and greater vulnerability to abuse. Filial piety may have been the traditional belief and practice in Korea historically, but is becoming less so there and in the United States. The historical entitlement of sons to family inheritance, while changed under law in Korea in 1989, continues by tradition in some cases.<sup>24</sup> Financial exploitation was revealed to be the most frequent form of elder abuse among Korean Americans, particularly among those who immigrated here. Financial dependency to the detriment of the parent's needs was not necessarily viewed as abusive by the elders. However, psychological abuse, generally identified with acts that suggest a lack of respect for the elder, was more readily understood as abusive, and must be understood in relation to traditional expectations of treatment of elders by the children and in-laws.

These elders and their family members are not likely to seek outside help at the risk of causing disharmony in the family, as well because of language and other barriers faced by the elders themselves.<sup>25</sup> It is unclear whether the low rate of reporting results from a lack of awareness of community services (by comparison to Caucasians in the same community), or from the cultural expectations of the elders in dealing with their family and with others, or perhaps from service organizations inappropriately equipped to serve these elders.<sup>26</sup>

In "Exploration of Elder Mistreatment Among the Japanese," Susan Tomita designed the study to determine the "cultural and structural factors [that] encourage the Japanese to seek help or keep the Japanese from seeking help for interpersonal conflict," and whether there was any difference between younger and older Japanese.<sup>27</sup> Elder mistreatment was studied in the context of interpersonal conflict generally. "Group above self" was the category that was determined to encompass sub-categories of behaviors: Never Complain, Endure, Hold Back Desires, Silence, Don't Retaliate, Accept Fate, etc.<sup>28</sup> Adding to the complexity are the cultural notions of multiple selves (e.g., inside/outside) and the tendency to hide problems to avoid dishonor. Generational perceptions did vary; for example, the younger generation articulated negative views of the multiplicity of self (e.g., "two-faced"). Among elders, females described aggression, alcoholism, male dominance and unaccountability, and other behaviors that they were taught to tolerate but clearly resented. If certain behaviors are expected to be tolerated, and responsibility for them denied, then addressing abuse must focus on the family dynamic rather than on directly exposing the abuser and victim by assigning blame and empowering the individual to respond.<sup>29</sup>

Understanding elder abuse in the Native American family, discussed by Arnold S. Brown in "Patterns of Abuse Among Native American Elderly," first requires an understanding that there are hundreds of different tribes, widely varying environmental living conditions, and sometimes difficult relations among tribes.<sup>30</sup> Yet there is also the importance of many general cultural similarities: spirituality, religious foundations that emphasize the connection of people to the earth, and valuing cooperation of the group and harmony among the tribe.<sup>31</sup> Many negative forces work against the idealized tribal support system, including poverty, drugs and alcohol abuse, mental and physical illness, and insufficient services to address these significant problems. While "mutual sharing" is a traditional value, it appears that the dependence of multiple family mem-

bers upon the pension or Social Security benefit of the elder leads to financial abuse or exploitation as it does in other multi-generational households. Consequently, neglect of the elder, whether because of insufficient financial resources, or simply because of the burden upon caretakers (typically a widowed or single-mother daughter), was perceived to be more of a problem than overt physical abuse. In "Dilemmas Surrounding Elder Abuse and Neglect in Native American Communities," specific recommendations for addressing these problems focus on changes to the health and human services systems of the reservations, including increased federal funding, as well as greater leadership within the tribes themselves to increase accountability and coordination of community services.<sup>32</sup>

Sexual preference and gender identity are also parameters for defining a group for purposes of understanding elder abuse. "Lesbian, Gay Male, Bisexual and Transgendered Elders: Elder Abuse and Neglect Issues" by Loree Cook-Daniels, MS is among the very limited explorations of this topic.<sup>33</sup> Cook-Daniels sought to examine how an "elder's need for, and willingness to accept assistance from, adult protective services" would be affected by such elder's identification.<sup>34</sup> As she notes, first it is important to understand that sexual orientation and gender identity are "wholly separate characteristics, like age and race" so that it is possible for an elder to face prejudice because of one or both of these.<sup>35</sup>

Cook-Daniels posits that abuse of lesbian and gay elders arises because of homophobia, and this condition may be manifested in numerous ways. It might be neglectful care by a personal care worker, domestic violence within a couple and the victim's tolerance of it because of low self-esteem, a reluctance to seek outside help, a fear of authorities, or the barriers to leaving a long term relationship with the same rights that are available to legally married couples. Today's lesbian and gay elders include those who may have endured even more significant family and public condemnation of their personal choices than later generations. "Transgendered" elders, whom Cook-Daniels defines to include transsexuals (born one sex but living, post-operative or otherwise, as the opposite), transvestites (cross-dressers), and intersexuals (hermaphrodites), typically face even greater societal prejudice.<sup>36</sup>

Lesbian, gay, and transgender elders may be more vulnerable because of self-protective efforts to keep their lifestyle private—adaptations that may prevent them from seeking help—or may have their discomfort used against them by manipulative abusers. These

elders are thus also more vulnerable to self neglect; they also become isolated socially because of the death of trusted friends or the necessity of becoming institutionalized with others very unlike themselves.<sup>37</sup> Even if they seek help, these elders may face misapprehensions that interfere with receiving the services they need.

Cook-Daniels makes a number of suggestions for adult protective services providers, which are applicable to anyone interacting with an elder. These include, among others: do not focus on the gay/lesbian/transgender status (a private matter), but on the person and issues; do not assume the other member of the household is in an intimate relationship with the elder, but determine if they may be a caretaker or concerned partner; remain aware of the lack of legal rights between partners; try to find appropriate services but avoid isolating the elder from his or her community simply because it seems uncomfortable to the observer; and recognize that as in any heterosexual relationship, the bonds and dependencies may lead to the appearance of exploitation, but also may be acceptable to the elder, provided neglect of that elder's needs is not a result.<sup>38</sup>

## Conclusion

The great diversity of elders, and the significant increases in the population of minority elders in particular, means that understanding and addressing elder abuse must take this diversity into account. The effect of assimilation, the changes in society's tolerance for diversity, and numerous other factors, will continue to challenge our ability to understand and address elder abuse. The research conducted over the last several decades reveals that the differences among these groups does not necessarily require changes in the applicable laws, but rather in the public and private services available to educate and assist elders, their caretakers, and the health and social institutions upon which they will increasingly rely.

## Endnotes

1. For an extensive bibliography of articles on elder abuse and diversity, see the Clearinghouse on Abuse and Neglect of the Elderly (CANE) <http://db.rdms.udel.edu:8080/CANE>, and the National Center on Elder Abuse at <http://elderabusecenter.org>.
2. For an overview of 12 studies from 1989 to 2000 by widely cited researchers, see Bonnie Brandl, M.S.W., and Loree Cook-Daniels, "Domestic Abuse in Later Life: Cultural Considerations," available at <http://www.elderabusecenter.org/pdf/research/culture.pdf> (herein "Domestic Abuse in Later Life").
3. Jordan I. Kosberg, Ph.D., et al., "Study of Elder Abuse Within Diverse Cultures," *Journal of Elder Abuse & Neglect*, Vol. 15(3/4), 2003, pp. 71-89.

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4. See, for example, Charles P. Mouton, M.D., M.S., et al., "Multiethnic Perspectives on Elder Mistreatment," *Journal of Elder Abuse & Neglect*, Vol. 17(2), 2005, pp. 21-44 (herein "Multiethnic Perspectives"), and *Attitudes Toward Elder Mistreatment and Reporting: A Multicultural Study*, February 1998, by Ailee Moon, Ph.D., et al., submitted to the National Center on Elder Abuse, available through the Clearinghouse on Abuse and Neglect of the Elderly (<http://db.rdm.s.udel.edu:8080/CANE>).
5. *The National Elder Abuse Incidence Study, Final Report*, September 1998, by the National Center on Elder Abuse prepared for The Administration for Children and Families and the Administration on Aging in The U.S. Dept. of Health and Human Services (herein "The Elder Abuse Incidence Study 1998"). See [http://.aoa.gov/eldfam/elder\\_rights/elder\\_abuse/abuserreport\\_full.pdf](http://.aoa.gov/eldfam/elder_rights/elder_abuse/abuserreport_full.pdf). See also Jeanette M. Daly, RN, Ph.D. and Gerald Jogerst, M.D., "Statute Definitions of Elder Abuse," *Journal of Elder Abuse & Neglect*, Vol. 12(4) 2001, pp. 39-57, reviewing state statutes, the Older Americans Act (2002) and the National Center for Elder Abuse definitions.
6. The Elder Abuse Incidence Study 1998, pp. 3-1 to 3-7.
7. Charles P. Mouton, M.D., M.S., et al., "Multiethnic Perspectives on Elder Mistreatment," *Journal of Elder Abuse & Neglect*, Vol. 17(2), 2005, p. 23 (identifying these five as physical, psychological, sexual, financial/material, and neglect).
8. *Id.*
9. *Id.*, p. 42. The authors conducted focus groups with three ethnically homogenous groups (and moderators) and a group of elder care professionals in San Antonio, Texas.
10. *Id.*, p. 42.
11. See "Domestic Abuse in Later Life" cited in note 2 above for studies.
12. Ailee Moon, "Perceptions of Elder Abuse Among Various Cultural Groups: Similarities and Differences," *Generations*, Summer 2000, Vol. 24 (2) pp. 75-81, 76.
13. Taylor & Francis Group, 1999.
14. Tatara, *Understanding Elder Abuse*, Chapter 1, pp. 2-3 (citing statistics from Day, *Population Projections of the United States by Age, Sex, Race and Hispanic Origin: 1995 to 2050*, 1996).
15. Tatara, *Understanding Elder Abuse*, pp. 2-3.
16. Tatara, *Understanding Elder Abuse*, pp. 5-6. Domestic elder abuse reports between 1986 and 1996 increased by 150.4%, and yet were considered widely underreported. (Referencing 1988 study by K. Pillemer & D. Finkelhor, *The Gerontologist*, Vol. 28, pp. 52-57).
17. *Understanding Elder Abuse*, Chap. 2, pp. 13-25.
18. *Id.*, p. 15.
19. *Id.*, pp. 16-18.
20. *Understanding Elder Abuse*, Chap. 3, pp. 27-48.
21. Yolanda M. Sanchez, "Elder Mistreatment in Mexican American Communities: The Nevada and Michigan Experiences," *Understanding Elder Abuse*, Chap. 5, pp. 67-77. This was a 1996 study of 62 elderly attending various senior centers in these communities, a statistically small group. A more extensive discussion of the characteristics common to the many different cultures that comprise the American "Hispanic" segment—Mexican, Cuban, Central and South American, and Puerto Rican—that both support the family and undermine efforts to identify and combat elder abuse, is also covered by Victor Montoya, M.A., M.S.W., in "Understanding and Combating Elder Abuse in Hispanic Communities," *Journal of Elder Abuse & Neglect*, Vol. 9(2) 1997, 5-17.
22. Bettye M. Mitchell, et al., "Issues in the Provision of Adult-Protective Services to Mexican American Elders in Texas," *Understanding Elder Abuse*, Chap. 6, 79-92.
23. Carmen D. Sanchez, "Elder Abuse in the Puerto Rican Context," *Understanding Elder Abuse*, Chap. 7, pp. 93-105.
24. Ailee Moon, "Elder Abuse and Neglect Among the Korean Elderly in the United States," *Understanding Elder Abuse*, Chap. 8, pp. 109-118.
25. *Id.*
26. See Ailee Moon, Ph.D. and Teresa Evans-Campbell, M.S.W., "Awareness of Formal and Informal Sources of Help for Victims of Elder Abuse Among Korean American and Caucasian Elders in Los Angeles," *Journal of Abuse & Neglect*, Vol. 11(3), 1999, pp. 1-23, and Ailee Moon, Ph.D. et al., "Awareness and Utilization of Community Long-Term Care Services by Elderly Korean and Non-Hispanic White Americans," *The Gerontologist*, Vol. 38(3), 309-316, and a response by Pill Jay Cho, Ph.D., "Awareness and Utilization: A Comment," *The Gerontologist*, Vol. 38(3), pp. 317-319.
27. *Understanding Elder Abuse*, Chap 9, pp. 119-139, 122.
28. *Id.*, p. 126.
29. *Id.*, p. 137.
30. *Understanding Elder Abuse*, Chap 10, pp. 143-159.
31. *Id.*, p. 150.
32. David K. Carson and Carol Hand, "Dilemmas Surrounding Elder Abuse and Neglect in Native American Communities," *Understanding Elder Abuse*, Chap. 11, pp. 161-184.
33. *Journal of Elder Abuse & Neglect*, Vol. 9(2) 1997, pp. 35-49; also appearing at <http://www.forge-forward.org/handouts/tgelderabuse-neglect.html>, which says this article may still be the only one to address this issue in a professional journal or context.
34. *Id.*, p. 36.
35. *Id.*, p. 37.
36. *Id.*, pp. 41-42.
37. *Id.*, pp. 38-39.
38. *Id.*, pp. 43-45.

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## An Overview of Single Premium Deferred Annuities and Suitability Considerations

By Timothy E. Casserly

At a past Elder Law Section meeting, there was a panel discussion on the topic of “elder abuse” which was moderated by Joseph Greenman, Esq. Among the panel members were Paul R. Barry, Esq., with the Onondaga County District Attorney’s office and Michael Jones, Esq., with the New York State Attorney General’s Office



Investment Protection Bureau who, as part of a case study, discussed the scenario wherein an elderly person goes to her bank to tend to a maturing CD. During the course of her conversation with the bank teller, it is suggested that she instead look to reinvesting her CD into something better. At that point, she is directed to an “investment advisor” to have the options explained to her. Ultimately, the recommended investment is an annuity. Sometime after re-investing her CD proceeds into an annuity product, either the senior or a family member comes to realize that the funds are not readily available or they might be available if significant surrender charges are paid to the annuity company. It is telling that this type of abuse exists, based on the panel members receiving complaints as to these investments being unsuitable and not properly explained. However, what is even more telling is the audience reaction when the moderator asks the audience whether this is something we see in our practices.

Of the approximately 150 attorneys attending the presentation, more than three-quarters of the attendees raised their hands. Since time constraints did not allow the panelists to explore the stories that went with each raised hand, the consensus clearly indicated that many seniors are steered into investments that are simply inappropriate and not suitable for their circumstances.

However, from our standpoint as Elder Law attorneys, we typically do not see our clients until they have already changed a CD into an annuity, and because of the lapse of time, it is difficult for us to have the contract terminated without penalty. In other cases, there are avenues to pursue in having our clients’

money returned to them, but our clients do not want to “cause any problems with their bank.”

Consequently, at the Elder Law Section 2006 Summer Meeting, Ellen Makofsky asked me to chair an Annuity Task Force that she was forming. The purpose of the Task Force would be to examine annuity abuses and make recommendations that our Section might use in furthering discussions among New York State legislators in the hopes that steps might be taken by them to introduce some legislative proposals for greater disclosures and/or suitability standards in the sale of annuities. Then, in connection with Michael Amoruso as Chair of the Legislation Committee, our Task Force of Ann Carrozza, Laurie Menzies, Marcia Boyd and myself began our review of the issue which led to our drafting a Concept Paper which has been approved by the Executive Committee at the January 2007 Executive Committee meeting as the basis for discussions with legislators in exploring this issue.

Notwithstanding the opening paragraphs of this article, there are times, however, where our clients come to us to ask us our advice with respect to the suitability of an annuity and how that may fit into their overall estate plan. With this in mind, this article will focus on two courses of action—one being on how we may better understand annuities to help our clients decide when annuities may or may not be appropriate for their situation. The second course being the effort by our Section to examine legislative options for New York State to give seniors greater protection against unsuitable annuity sales and broaden disclosures when considering their investment options.

### Annuity Overview

There are many types of annuities, including fixed annuities, variable annuities, immediate annuities and deferred annuities. Regardless of its type, an annuity is a contract between your client and, typically, an insurance company. Under the terms of the annuity contract, your client gives money to the insurance company in a lump sum or over a period of years. These contributions to the annuity are known and referred to as “premiums.” The insurance company invests the premiums



(typically, in mutual fund-like portfolios of investments) and makes regular payments to your client for a certain period of time.

The amount of each annuity payment depends on the terms of the underlying annuity contract and whether the annuity is classified as a fixed or variable annuity. A fixed annuity pays a guaranteed amount, regardless of the market performance of the securities into which the insurance company invests the premiums. Since the insurance company takes on this obligation to pay out a certain amount, a fixed annuity typically has a lower rate of return than its counterpart, the variable annuity.

As its name implies, the payout amount of a variable annuity fluctuates, depending on the performance of the mutual fund-like investments into which the premiums are invested. Better market performance of the mutual fund-like investments leads to higher annuity payments. Conversely, poor market performance leads to lower annuity payments.

The annuity contract also governs when the payments start and how long they last. When the annuity payments start nearly immediately after the initial premium payment, the annuity is referred to as an "immediate annuity." Typically, the payments last for either: (a) a certain term of years (e.g., ten years (10) years—known as "term certain"); (b) for the duration of one's life (known as "life income"); or (c) for the duration of two persons' lives (known as a "joint and survivor"). Some annuity contracts may combine two or more payout options. As a general rule, the longer the distribution period, the smaller each individual payment will be.

When the annuity payments commence at a later time, this is known as a "deferred annuity." Deferred annuities are chock-full of complexities, but it is important to note the hallmark of a deferred annuity contract: tax deferred growth. That is, all of the monies inside a deferred annuity grow free of income tax until distributed to your client. However, another important attribute of deferred annuities is expenses. These expenses may arise in various forms such as commissions, surrender charges, and/or investment costs. It is because these can add up in some circumstances that these products may be unsuitable for many of our clients.

As mentioned at the outset of this article, financial institutions are marketing annuities that look like more traditional investment products, such as insurance, certificates of deposit and mutual funds. Yet,

there may be significant differences in the manner that the investment is taxed and/or administered that can have serious financial consequences. While some states are taking action, it remains to be seen whether more stringent requirements will be imposed on the marketing of annuities.

The question of whether annuities are suitable investments for our clients remains a fact-specific inquiry requiring the expertise of the client's lawyer, financial planning professional and accounting professional. In every case, however, there are many expenses and charges to analyze when making that inquiry.

## Variable Annuity Charges

Since there are several charges associated with variable annuities, it is important for our clients to understand before investing. Naturally, these charges will reduce the value of the account and the return on investment. Often, such charges will include the following:

**Surrender Charges**—If your client withdraws money from a variable annuity within a certain period after a purchase payment (typically within six (6) to eight (8) years, but sometimes as long as ten (10) years), the insurance company usually will assess a "surrender" charge, which is a type of sales charge. This charge is used to pay the financial professional a commission for selling the variable annuity. Generally, the surrender charge is a percentage of the amount withdrawn, and declines gradually over a period of several years, known as the "surrender period." For example, a seven (7%) percent charge might apply in the first year after a purchase payment, six (6%) percent in the second year, five (5%) percent in the third year, and so on until the eighth year, when the surrender charge no longer applies. Often, contracts will allow you to withdraw part of the account value each year—10% or 15% of the account value, for example—without paying a surrender charge.

*Example:* Your client purchases a variable annuity contract with a Ten Thousand (\$10,000) Dollar purchase payment. The contract has a schedule of surrender charges, beginning with a seven (7%) percent charge in the first year, and declining by 1% each year. In addition, your client is allowed to withdraw ten (10%) percent of the contract value each year free of surrender charges. In the first year, your client decides to withdraw Five Thousand (\$5,000) Dollars, or one-half of the contract value of Ten Thousand (\$10,000) Dollars (assuming that the contract value has not increased or decreased because of investment perfor-

mance). In this case your client could withdraw One Thousand (\$1,000) Dollars (10% of contract value) free of surrender charges, but your client would pay a surrender charge of 7%, or \$280, on the other Four Thousand (\$4,000) Dollars withdrawn.

**Mortality and Expense Risk Charge**—This charge is equal to a certain percentage of the account value, typically in the range of 1%-1.25% per year. This charge compensates the insurance company for insurance risks it assumes under the annuity contract. Profit from the mortality and expense risk charge is sometimes used to pay the insurer's costs of selling the variable annuity, such as a commission paid to the financial professional for selling the variable annuity.

*Example:* Your client's variable annuity has a mortality and expense risk charge at an annual rate of 1.25% of account value. Your client's average account value during the year is Twenty Thousand (\$20,000) Dollars, so you will pay Two Hundred Fifty (\$250) Dollars in mortality and expense risk charges that year.

**Administrative Fees**—The insurer may deduct charges to cover record-keeping and other administrative expenses. This may be charged as a flat account maintenance fee (perhaps \$25 or \$30 per year) or as a percentage of the account value (typically in the range of 0.15% per year).

*Example:* Your client's variable annuity charges administrative fees at an annual rate of 0.15% of account value. Your client's average account value during the year is Fifty Thousand (\$50,000) Dollars. Your client will pay Seventy-Five (\$75) Dollars in administrative fees.

**Underlying Fund Expenses**—The annuity owner will also indirectly pay the fees and expenses imposed by the "mutual funds" that are the underlying investment options for your variable annuity. These expenses are not unlike the expenses imposed by mutual funds purchased independent of an annuity. In fact, there are many annuities using mutual funds that are available directly through a broker or mutual fund company. In such cases, your client should compare the expenses of the fund choices in the annuity versus those purchased separately.

**Fees and Charges for Other Features**—Special features offered by some variable annuities, such as a *stepped-up death benefit*, a *guaranteed minimum income benefit*, or *long-term care insurance*, often carry additional fees and charges. Other charges, such as initial sales loads, or fees for transferring part of the account

from one investment option to another, may also apply. Aside from your own analysis, you should ask the financial professional to explain all charges that may apply. Finally, you can also find a description of the charges in the prospectus for any variable annuity that you are reviewing.

## Tax-free "1035" Exchanges

Besides simply investing cash proceeds into annuities, some clients might be asked to "upgrade" an annuity that they have previously purchased by exchanging it for a new one. Section 1035 of the U.S. Tax Code allows you to exchange an existing variable annuity contract for a new annuity contract without paying any tax on the income and investment gains in the current variable annuity account. These tax-free exchanges, known as "1035 exchanges," can be useful if another annuity has features that are preferable, such as a larger death benefit, different annuity payout options, or a wider selection of investment choices.

An investor may, however, be required to pay surrender charges on the old annuity if they are still in the surrender charge period. In addition, a new surrender charge period generally begins when they exchange into the new annuity. This means that, for a significant number of years (as many as 10 years), they typically will have to pay a surrender charge if funds are withdrawn from the new annuity. Further, the new annuity may have higher annual fees and charges than the old annuity, which will reduce investment returns.

Variable annuity contracts typically have a "free look" period of ten or more days, during which your client can terminate the contract without paying any surrender charges and your client gets back the purchase payments (which may be adjusted to reflect charges and the performance of the investment). Advise your client to continue to ask questions in this period to make sure you understand your variable annuity before the "free look" period ends.

Hopefully, your client calls before the "free look" period ends or even before they decide to buy a variable annuity. If so, you might consider the following questions:

- Will they use the variable annuity primarily to save for retirement or a similar long-term goal?
- Are they investing in the variable annuity through a retirement plan or IRA (which would mean that they are not receiving any additional tax-deferral benefit from the variable annuity)?

- Are they willing to take the risk that their account value may decrease if the underlying mutual fund investment options perform badly?
- Do they understand the features of the variable annuity?
- Do they understand all of the fees and expenses that the variable annuity charges?
- Do they intend to remain in the variable annuity long enough to avoid paying any surrender charges if they have to withdraw money?
- Are there features of the variable annuity, such as long-term care insurance, that they could purchase more cheaply separately?
- Have they considered all the tax consequences of purchasing an annuity, including the effect of annuity payments on their tax status in retirement?
- If they are exchanging one annuity for another one, do the benefits of the exchange outweigh the costs, such as any surrender charges they will have to pay if they withdraw their money before the end of the surrender charge period for the new annuity?

Whether annuities are an appropriate investment vehicle depends on our clients' individual circumstances and objectives. For more information on annuities, visit the New York Attorney General's website at [www.oag.state.ny.us](http://www.oag.state.ny.us), or the United States Attorney General's website at [www.usdoj.gov](http://www.usdoj.gov). Additional information can be found at the Securities and Exchange Commission's website at [www.sec.gov](http://www.sec.gov).

## Annuity Task Force

As mentioned at the outset of this article, it has become too common to find our clients being "advised" to invest in an annuity that is not at all appropriate for their circumstances. Through the work of the Annuity Task Force, this issue was examined. Ultimately, it was the recommendation of the Task Force to eventually see this issue addressed legislatively, with the help of Michael Amoruso's Legislative Committee, draft a Concept Paper to prompt the New York State Legislators to examine this topic and follow any legislation that might be introduced in the Assembly or Senate. Throughout this process, the Task Force will continue to monitor any actual proposals made and seek further input from the Section's membership and the New York State Bar Association's Executive Committee and House of Delegates if applicable.

In addressing this topic, we recognize that there are already disclosure guidelines, procedures and requirements in place primarily through the National Association of Securities Dealers (NASD) and the National Association of Insurance Commissioners (NAIC). However, with sales commissions that can sometimes exceed eight (8%) percent of the initial investment, abusive sales persist and especially so among the elderly. Therefore, our focus is on how these existing requirements need to be enforced.

The NASD also recognizes this need for change as they are currently seeking to amend their recommendation requirements for the sale of deferred variable annuities (proposed new NASD Rule 2821 in Amendment No. 3 to SR-NASD-2004-183). In addition, states are taking action to supplement and/or amplify the suitability and disclosure requirements imposed on advisors through industry regulatory organizations. One example is California, which is considering ways to legislate protections for seniors from abusive sales practices and to ensure that their investment decisions are made in a suitable and fully disclosed manner (California Senate Bill 192, proposed June 28, 2006).

The Annuity Task Force would like to see New York take a similar lead in this area. The following topics are among those which our Section hopes to submit to both the Senate and Assembly in the way of a Concept Paper for their consideration and further discussion as they may draft actual legislation in this regard:

### A. Disclosure Requirements

1. An advisor who sells an annuity to a senior should be required to inform that senior that an annuity is an available resource for the purposes of qualifying for Medicaid benefits in New York and that the annuity may be subject to recovery by New York State upon the annuitant's death for the acceptance of certain governmental benefits (Medicaid).
2. An advisor should be required to inform a senior that the purchase of an annuity may be considered a disposal of assets under the Deficit Reduction Act of 2005 as enacted by New York State and thus, affect Medicaid eligibility.
3. An advisor should be required to inform a senior that any income derived from an annuity could potentially impact the minimum maintenance needs allowance of an annuitant's spouse for Medicaid purposes.
4. An advisor should be required to disclose that the sale or any liquidation of any asset for the

purchase of an annuity may result in certain tax consequences and/or penalties.

5. An advisor should be required to advise that taxes on all gain will be due when the annuity is cashed out.
6. Disclosures should be made on a sheet that is printed in 12 point font and initialed by both the salesperson and purchaser.
7. Disclosure should include the length of time for which insurers will impose surrender charges for termination of the annuity and state clearly the penalty (in dollars) in effect each year of the contract until no surrender charges will apply.
8. All annuities sold to someone over age seventy-five (75) should have a waiver of surrender charge if assets are needed to pay for nursing care, such as a nursing home, home care and/or assisted living.
9. Annuity contracts should be written in plain English and be easily understood by a layperson.
10. An advisor or insurer shall be required to disclose any commissions, surrender charges (with specific dollar amounts), and, in the case of a maturing annuity or rollover, whether or not the senior is required to buy a new annuity or if they are allowed to simply keep their current annuity with no penalty.

## **B. Suitability of Product**

1. An advisor or insurer should have reasonable grounds for believing that the sale of an annuity is suitable for the senior investor.
2. Suitability should be determined by obtaining the following information from every senior prior to the sale of an annuity: 1) the senior's age; 2) the senior's tax status; 3) the senior's liquid net worth; 4) the senior's investment objectives; 5) the senior's health; 6) the senior's eligibility for Medicaid; 7) whether the senior has long term care insurance; and 8) any other information used to make a reasonable determination by the advisor or insurer.
3. An advisor should be required to inform the senior to consult with their attorney/accountant/tax advisor as to the suitability of the

annuity in their overall estate and financial plan. This requirement, once disclosed may be waived in writing by the senior.

4. A checklist should be developed and required to review that this information was obtained and discussed with the client.
5. An insurer should assure that a system to review annuity sales to seniors is established and maintained that conducts periodic reviews of its records. The review system should be designed to assist in detecting and preventing violations relating to suitability and rectifying identified problems and complaints.

## **C. Surrender Charges and Free Look Periods**

1. The length of time for which insurers can impose surrender charges should be limited and clearly stated on the policy in no less than 12 point font.
2. Senior citizens should be granted a free "cooling off" period, wherein they are permitted to cancel an annuity policy within a certain period of time free from penalties.

## **D. Civil and Criminal Liability**

1. An advisor or insurer should be susceptible to civil or criminal penalties for the sale of an unsuitable annuity contract.
2. Senior citizens should have a cause of action against the seller of an annuity for any losses sustained as a result of an unsuitable annuity sale.
3. No Bank or Financial Institution shall be subject to civil or criminal liability if the disclosures set forth above are followed by their advisor in the sale of an annuity to a senior.

## **E. Other Important Considerations**

1. Restrictions should be made on the sale of annuities in the home of a senior.
2. All sellers of annuity products should undergo special training courses regarding the sale of annuities to senior citizens.
3. Annuity contracts entered into by senior citizens should be done in the presence of a disinterested third party.



## ELDER ABUSE

4. The Insurance Commissioner should be allowed to order an insurer or advisor to take reasonably appropriate corrective action for any senior consumer harmed by an insurer's or advisor's violation of the law.
5. The Insurance Commissioner should be allowed to order a general managing agency or independent agency that employs or contracts with an advisor to transact annuities to senior consumers to take reasonably appropriate corrective action for any senior consumer harmed by the advisor's violation of these provisions.
6. The Department of Insurance should report, on an annual basis, to the New York State Legislature: 1) the number of applications received by insurers for annuities from residents of New York State; 2) age of the applicants; and 3) total number of applications for annuities that were rejected and the reasons for the rejections.
7. An advisor or insurer shall not issue an annuity contract to any individual, if after a reasonable inquiry, it is suspected that said individual is only being listed as the owner of said policy on behalf of a senior for the sole

purpose of circumventing any/all age requirement rules.

As stated earlier, these ideas each require further discussion and analysis of what is being done by other regulatory bodies (e.g., NASD) before they are broadened or pared down, combined or incorporated into existing legislation. Ultimately, however it is the Task Force's objective to obtain greater disclosures and safeguards for seniors when they are formulating, changing or updating their financial plans so that they are doing so with investments that are clearly suitable to their unique situation.

**Timothy E. Casserly, Esq., is a Certified Financial Planner and a founding shareholder of the law firm Burke & Casserly, P.C., in Albany, New York. Tim is Chair-Elect of the New York State Bar Association's Elder Law Section and Chairs its Financial Planning and Investments Committee. Tim is also active with the Financial Planning Association and Chairs its Professional Issues Committee.**

In addition to the contributions from the members of the Elder Law Section's Annuity Task Force, Carrianna Eurillo-Travinski assisted in the writing of this article.

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### ***Elder Law Attorney* Index**

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# Can We Regulate Respect for the Profession? Effects of the New Advertising Rules on the Elder Law Bar

By Laurie Menzies and Ronald Fatoullah

## Why Do We Have the New Rules?

New regulations on attorney advertising went into effect on February 1, 2007. These regulations are the result of recommendations made by a task force appointed in June 2005 to address concerns about perceived excesses and abuses in lawyer advertising. New York State Bar Association President Mark H. Alcott announced that the new rules will “realize our goal—more protection for the public and more dignity for the profession.” The NYSBA press release states that the new regulations are “designed to protect consumers from inappropriate, misleading, or overly aggressive advertising.” However, after a review of the new regulations, we believe that they will burden many practitioners with unnecessary red tape. Further, we question the effect that these regulations will have on overly aggressive advertising campaigns undertaken by a handful of attorneys, the likely cause for these rules in the first place.

## What Hasn't Changed?

The new regulations are to be “self-enforcing,” which means that the system will continue to rely on lawyers to notify their local grievance committee of violations. Changes to the proposed rules eliminated the requirement to file copies of print and electronic advertisements and the potential review of random samplings. The subcommittee on enforcement began with the premise that enforcement of the old advertising rules had been ineffective. In the final rules only “solicitations” must be filed and “advertisements must be kept by the law firm for three years. See the definitions of “advertisement” and “solicitations” below.

In addition, the lines between an “advertisement” and a “solicitation” can blur. We can argue that most elder law attorneys “advertise” rather than “solicit.” A “solicitation” is “any advertisement initiated by or on behalf of a lawyer or law firm that is *directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives . . . and a significant motive for which is pecuniary gain.*” Can a firm’s educational newsletter be considered a “solicitation”? The answer is yes, if it’s targeted at a specific group. Of course, a significant motive of the attorney likely is to bring in clients and make money. But, what if your true motive was the betterment of society through your work, and to educate the public? Then, can the difference between an “advertisement” and “solicitation” be determined based on the subjective intent of the attorney? Clearly, solicitations were meant to be enforced in situations

where, for example, a negligence attorney prepared advertising targeted to the families of an airplane crash.

Another example to consider are “brochures.” Are they “advertising” or “solicitations”? Brochures are likely considered “advertising” and should be labeled as such. But if they are targeted at specific recipients, they could be deemed “solicitations.” Can you argue that the primary purpose of your brochures is to “share information and inform the public” rather than “the retention of the lawyer or the law firm”? In any event, who will spend time in front of the Grievance Committee proving you wrong? Will the new law encourage a barrage of complaints by unscrupulous competitors in your marketplace?

In addition, simple paraphernalia such as pens with the attorney’s name and telephone number given out to prospective clients will likely have to be labeled “attorney advertising.”

## It’s Better Than It Could Have Been

The presiding justices of the Appellate Division’s four departments proposed new restrictions on lawyer advertising and solicitation in June 2006. After discussion with bar groups, law firms and the FTC, the draft reforms have been watered down considerably. The resulting requirements are complicated and open to interpretation. Unfortunately, there appears to be nothing in the regulations that will require a change in the overly aggressive tactics of advertisers that are the source of much of the problem. They can still work their way through the new requirements, albeit with certain disclosures.

For the rest of us, here is a rundown of what the some of the final changes look like:

## Definitions

“Advertisement” means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers. (Definitions, subdivision [k]).

“Solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary

gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client. (DR 2103[B]).

### **Content-Based Restrictions**

DR 2101 contained most of the content-based restrictions on advertising and the new regulations continue the ban against claims or statements that are false, deceptive or misleading. But they do not, as expected, ban the depiction of a court or courthouse as long as the use of this technique is “disclosed.”

There are limits on the use of testimonials or dramatizations. Testimonials with respect to pending matters are prohibited. Other testimonials must be factually supported and accompanied by a disclaimer that prior results do not guarantee a similar outcome. If a person has been paid to provide an endorsement or testimonial, that fact must be disclosed. Similarly, if an advertisement utilizes dramatizations or actors, that fact must be disclosed. (DR 2-101[C]-[E]).

### **Labeling Requirements**

Requirement that advertisements other than those appearing in a radio or television advertisement or in a directory, newspaper, magazine or other periodical be labeled “Attorney Advertising” (DR 2-101[F]). For example, self-mailing brochures and postcards must include the words “Attorney Advertising.” E-mail advertisements must say “Attorney Advertising” on the subject line and the law firm website must be labeled “Attorney Advertising” on the home page.

### **Records and Filing**

Unlike the original draft, the new rules do not require that “advertisements” be filed for possible review. “Solicitations” to New York residents, however, must be filed with the appropriate disciplinary committee. Advertisements must be pre-approved by the lawyer or law firm and retained for three years (one year in the case of computer-accessed communications). (DR 2-101[K]).

### **Internet Domain Names**

A lawyer or firm may utilize a domain name that does not include the name of the lawyer or firm, provided (1) all web pages clearly and conspicuously include the actual name of the lawyer or firm, (2) the lawyer or firm does not attempt to engage in the practice of law using the domain name, (3) the domain name does not imply an ability to obtain results, and (4) the name does not otherwise violate a disciplinary rule. (DR 2-102[E]). (Law firms are still allowed to use a telephone number that contains a nickname, moniker or motto, if it does not violate any disciplinary rule.)

### **“Solicitations” or “Advertisements”?**

For example, the new requirement that solicitations directed to pre-determined recipients disclose how the lawyer learned the recipient’s identity and need for legal services (DR 2-103[H]). In addition, attorneys must now determine whether their mailings to clients and others have pecuniary gain as a significant motive (putting them in the solicitation category) or if they are educational or informational in nature (advertisements).

### **An Expansion of the Certification Provision for Pleadings (Contained in Part 130 of the Rules of the Chief Administrator)**

Under the expanded provision, by signing a paper, a lawyer or party certifies that, to the best of that person’s knowledge, information and belief, the presentation of the paper is not frivolous and, where the paper is an initiating pleading, that the matter was not obtained through illegal conduct or, if it was, that the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing fees and that the matter was not obtained in violation of DR 7-111. (22 N.Y.C.R.R. 130-1.1-a[b]).

### **Where Are We Now?**

During NYSBA’s Annual Meeting in New York City, Ms. Menzies attended the State Bar Ethics Committee meeting and listened to their discussion about the new rules and how they may be implemented. The President of the New York State Trial Lawyers Association said that the issue is really a debate within our profession over how to procure clients, and that the judiciary is put in a difficult position to try and regulate it. Ms. Menzies commented that this could be a little like gun control legislation, wherein law abiding citizens all register their guns, but the criminals keep doing what they have always done. Associate Judge Pigott told Ms. Menzies not to worry and to “keep sending out her brochures.”

The final version of the amended rules on attorney advertising can be found on the NYSBA website at: [www.nysba.org/AdvertisingRegulations](http://www.nysba.org/AdvertisingRegulations).

**Ronald Fatoullah and Laurie Menzies are respectively Chair and Vice-Chair of the Elder Law Practice Committee of the New York State Bar Association. Laurie Menzies is a partner of Pfalzgraf, Beinhauer & Menzies, LLP, an elder law, estate planning and special needs law firm with offices located in Buffalo, New York. Ronald Fatoullah is the principal of Ronald Fatoullah & Associates, an elder law, estate planning and special needs law firm with offices located in Great Neck, Forest Hills and Brooklyn, New York.**

# Beware of Florida's Stringent Requirements for the Appointment of Personal Representatives

By Howard S. Krooks and Scott M. Solkoff

We attorneys are often asked whether a Last Will and Testament signed in one jurisdiction will be honored if the testator dies in and requires probate in another jurisdiction. Generally, if the Will is valid in the jurisdiction in which it was signed it will be honored in the foreign jurisdiction to which the decedent relocated prior to his death. What if a New York attorney prepares a Will for a client while she is in New York but who owns a home or spends a great deal of time in Florida? New York practitioners should be aware of Florida's special requirements for a person to serve as Personal Representative, Florida's term for the executor of the Will.



**Howard S. Krooks**

In order for an estate to go through the probate process in Florida, the Personal Representative must meet stringent requirements. Failure to do so will result in that individual being disqualified from serving as Personal Representative of the estate, in some cases giving rise to extensive and costly litigation. Consider a woman who resided in Westchester County who owned a home in Florida and who died in Florida in 2004. "Jane Doe" had a multimillion dollar estate, had her New York attorney prepare her Will pursuant to which she attempted to appoint four individuals to serve as her Personal Representatives. In her Will she named her son, her accountant (a Florida resident) and two of her friends, both of whom were New York residents. When the estate was admitted to probate in Florida, the Probate Court appointed the son and the accountant as Co-Personal Representatives, but refused to appoint the two friends from New York as Personal Representatives, notwithstanding the express wishes of the decedent that all four individuals serve.

Why? Because under Florida Statutes, only the following individuals may serve as personal representatives: "Any person who is sui juris and is a resident of Florida at the time of death of the person whose estate is to be administered is qualified to act as personal representative in Florida." F.S. Section 733.302.

Furthermore, a person who is not domiciled in the state of Florida cannot qualify as personal representative unless the person is:

1. a legally adopted child or adoptive parent of the decedent;
2. related by lineal consanguinity to the decedent;
3. a spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or
4. the spouse of a person otherwise qualified under this section.



**Scott M. Solkoff**

F.S. Section 733.304.

In addition to the foregoing, certain trust companies and other corporations may serve as personal representative of an estate being administered in Florida. F.S. Section 733.305.

What happened to the estate of the Westchester woman who died in Florida? Over 2 years after her death, the estate is still mired in litigation over, among other things, who should properly serve as personal representatives of the estate. Therefore, New York practitioners need to be aware of the requirements for serving as personal representative in Florida and make efforts to be sure anyone appointed in a Will to serve as such satisfies Florida's requirements.

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**Scott Solkoff, Esq. is a former Chair of the Florida Bar's Elder Law Section and a principal with Solkoff Associates, P.A., a law firm exclusively representing the interests of the elderly and disabled throughout Florida.**



# Recent New York Cases

By Judith B. Raskin

**An attorney appealed a court awarded fee in an Article 81 proceeding. Remitted for explanation of fee award. *In re Audrey J.S.*, 2006 N.Y. Slip Op 8996; 2006 N.Y. App. Div. LEXIS 14320 (App. Div. 2d Dep't, November 28, 2006).**



The Supreme Court, Queens County, awarded a fee of \$7,500 including disbursements to an attorney in an Article 81 proceeding. The attorney appealed the fee award.

The Appellate Division remitted the matter to the lower court to submit an explanation of the fee award. While the court has discretion in determining reasonable fees, it must provide an explanation based on the following: "(1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problem presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved."

**Petitioner appealed from a fair hearing decision that upheld a Medicaid denial where the petitioner claimed she was misled by a DSS worker and documentation was missing. Appeal denied. *Bensman v. Weiner, et al.*, 2006 N.Y. Slip Op 6661; 32 A.D.3d 1181, 821 N.Y.S.2d 341, 2006 N.Y. App. Div. LEXIS 11195 (App. Div. 4th Dep't, September 22, 2006).**

On October 11, 2002, Petitioner submitted a Medicaid application for her mother, who was then in a nursing home. DSS denied the application because of uncompensated transfers and the failure to produce requested documentation. In March 2003, petitioner returned the transferred assets in reliance upon the assurances of a DSS worker that return of the transferred assets would remove the ineligibility factor based on the gift. On May 8, 2003, petitioner reapplied. The application was approved retroactive to February 1, 2003. Petitioner was unsuccessful in arguing at a fair hearing that the coverage should be based on the first application date because she relied on the assurances of the worker and therefore did not file for a fair hearing when that application was initially denied. She appealed in an Article 78 proceeding which was transferred to the Appellate Division to review the determination.

The Court held that the denial of the October, 2002 application was correct. The May 8, 2003 application was the first application to include all of the required documentation. While the Commissioner of DOH is not estopped by erroneous advice of a worker, the denial of the first application would have been upheld regardless of the return of the assets because the necessary documentation was missing.

**Attorneys for an incapacitated beneficiary requested that the agent under power of attorney receive the beneficiary's inheritance in lieu of a guardian as required by SCPA 2220(1). Granted. *In re Teufel*, 2006 N.Y. Slip Op 52475U; 2006 N.Y. Misc. LEXIS 3898 (Surr. Ct., Erie County, December 21, 2006).**

Clara Rennie, sister of the decedent, was to receive approximately \$40,000 as a beneficiary of the estate in this judicial settlement proceeding. Because Clara Rennie was in the advanced stages of Alzheimer's Disease she was unable to receive her inheritance directly. In 2000 she executed a durable power of attorney and health care proxy appointing her son to act on her behalf. The durable power of attorney included the power to act for the principal in "estate transactions." SCPA 2220(1) requires that a guardian receive the inheritance for an incapacitated beneficiary. However, Clara Rennie's attorney advised the court that the Supreme Court, pursuant to Article 81, would not appoint a guardian for the beneficiary because the durable power of attorney and health care proxy rendered a guardian unnecessary.

The court held that the durable power of attorney be given recognition in a probate or administration proceeding. The principal set up a plan for herself which should be honored by the courts.

## Request for Case Submissions

If you receive a decision in an interesting case or come across an interesting case, please send a copy of the decision to Judy Raskin. If the case is suitable for this column she will summarize it and give credit to the attorney submitting and/or participating in the case. Section members will benefit from reading about unreported cases. Fax to 516-228-6525 or email to [jbr@raskinmakofsky.com](mailto:jbr@raskinmakofsky.com).

**Judith B. Raskin is a member of the law firm of Raskin & Makofsky. She is a Certified Elder Law Attorney (CELA) and maintains memberships in the National Academy of Elder Law Attorneys, Inc., the Estate Planning Council of Nassau County, Inc., and NYS and Nassau County Bar Associations. She is the current chair of the Legal Advisory Committee of the Alzheimer's Association, Long Island Chapter.**

# Medicaid and Married Couples: Class Action Challenging Reduced Income Levels for Couples and Fair Hearing Decision Allowing Disabled Spouse to Deposit Well Spouse's Income into SNT

By Valerie Bogart

## (1) Fair Hearing Decision Allowing Beneficial Use of Supplemental Needs Trust for Couples

In a situation where a married Medicaid applicant has little income of her own, she may nevertheless incur a high spend down because the non-applying spouse's income is deemed to her. To avoid the risk of spousal refusal, Julie Morse, a staff attorney and Skadden Fellow at Legal Services of Central New York, Inc. had a creative idea that was approved in a fair hearing decision. *In re JT*<sup>1</sup> held that a NYSARC trust may properly be funded by the spouse of the person seeking medical assistance, and directs Oneida County to authorize the Appellant's request to deposit her Medicaid spend down, composed of the spouse's income, into a pooled trust. In this case, the non-applying spouse could not open his own pooled trust account because he is not disabled. If the non-applying spouse was also disabled, and also needed Medicaid, then the non-applying spouse could open his own NYSARC trust account, and it would reduce the spend down for both spouses.

- **EXAMPLE** where non-applying spouse does *not* need Medicaid—Ralph's income is \$1,100/month and he is not disabled and does not need Medicaid. Betty, his wife, has Social Security of \$500/month and needs Medicaid. Her spend down is \$680 (\$1,600 less \$900 income level for 2 less \$20 disregard = \$680). Under the fair hearing decision, SHE may open a NYSARC trust and deposit \$680 of HIS income, to eliminate HER spend down. This is better for her than opening her own trust and putting in her own income, since that would still leave a \$180 spend down.
- **EXAMPLE** where spouse with higher income DOES need Medicaid—In the same couple, Ralph now needs Medicaid. Their spend down is still \$680 but he can open the NYSARC trust himself since he is disabled and put the same amount of money in—\$680—to eliminate a spend down for both of them.

**TIP:** If both spouses are disabled and need Medicaid, open a NYSARC account only for one instead



of both—and save money on fees and administrative hassle. One spouse may even put ALL of his/her income into the trust—the idea is that the total income left after the NYSARC deposit should be the \$920 couple rate (with \$20 disregard) plus enough to pay any health insurance premiums.

For training outlines, forms, links to directives, and more information on Supplemental Needs Trusts, see the webpage on SNTs on the Western New York Law Center Online Resource Center at <http://onlineresources.wnylc.net/healthcare/docs/SNTOutline.pdf>. This page is linked to the general Health Care Resource page at [http://onlineresources.wnylc.net/healthcare/health\\_care.asp](http://onlineresources.wnylc.net/healthcare/health_care.asp) which has lots of information and links on Medicaid, EPIC, Family Health Plus, and other programs.

## (2) Reduction in Income Limit for Couples to \$900

In January 2006, for the first time in the 30-year history of the state's Medicaid medically needy program,<sup>2</sup> the income level for couples was reduced to \$900, rather than increased from the previous year. This left indigent couples on Medicaid with less income to meet their basic needs than couples who receive Supplemental Security Income (SSI) in New York State. Couples on SSI benefit from Social Services Law § 209(2), which has since the 1980s set an income level deemed minimally adequate for the support of elderly, blind and/or disabled couples (\$1,008 in 2006). Since the federal SSI benefit is lower than this state standard, the state provides a state supplement through the Additional State Payments program.

Until the 2006 revisions, the medically needy income standards for elderly, blind and/or disabled couples were the same as the standard of need in SSL § 209(2), the standard employed by the state to set the SSI supplement amount for elderly, blind and/or disabled individuals and couples. Those who receive such payments are automatically eligible for Medicaid. As

a result, the medically needy were permitted to retain at least the same level of income as SSI recipients were provided with to meet their basic needs.

The amount of the Additional State Payments SSI supplement historically increased each year with a cost of living increase. The comparable Medicaid limit was likewise indexed to an increase based on the consumer price index.

In the 1996 federal welfare reform legislation, a cap was set on a state's medically needy income standard. The income limit was capped at 133-1/3% of the state's 1996 standards under the state's Aid to Families with Dependent Children (AFDC) program. Social Security Act § 1903(f). This cap was incorporated in 1997 amendments to state Medicaid law, which also included a cost of living increase based on the consumer price index.<sup>3</sup>

In 2005, the New York State Legislature eliminated the provision that increased the medically needy income cap by the annual percentage increase in the federal consumer price index. L. 2005, Ch. 12. As applied to two person households, this amendment had the effect of reducing the medically needy cap from above the standard of need in SSL § 209(2) to \$900 a month, which is 133% of the public assistance standard of need as it was in Suffolk County in July of 1996 (\$867) plus an income disregard of \$33. This is \$108 below the SSL § 209 standard of need for elderly, blind and disabled couples in 2006, which is \$1,008 a month.

Defendant's elimination of the indexing of the medically needy cap has meant, and will continue to mean, that the medically needy income standard for a two person household is no longer equivalent to the standard of need for elderly, blind and disabled couples in SSL § 209(2). In fact, since the SSL § 209 standard of need is adjusted annually and the medically needy income level will now remain static, the income medically needy couples who are elderly, blind and/or disabled will be permitted to retain for their maintenance will fall further and further below the level of income considered minimally adequate to meet the needs of elderly, blind and/or disabled couples who are eligible for SSI.

Beginning in January of 2007, couples receiving SSI are provided with \$1,038 a month in income assistance to meet their basic needs in addition to full Medicaid benefits, with no spend down obligation. By comparison, couples who only need Medicaid and not SSI will only be allowed to retain \$900 a month to meet their basic needs since, without the indexing provision, the medically needy income standard for the elderly, blind and/or disabled population will remain static year after year. Plaintiffs will once again

be required to apply all of their monthly income over \$900 to the payment of their medical bills before they can qualify for Medicaid.

In addition, in January of 2007, the medically needy income standards for *single individuals* who are elderly, blind and/or disabled (at \$700) is falling behind the SSL § 209(2) standard of need for one person living alone (\$710). As with medically needy couples, the income that singles will be permitted to retain to meet their daily living expenses will fall further and further below the level of income considered minimally adequate for the support of an individual in their circumstances.

The state's rationale for this reduction was that it was at risk of losing Federal Financial Participation for Medicaid because the prior income levels ran afoul of a federal regulation that limits Medicaid medically needy income levels to a cap of 133.33% of the 1996 AFDC level. Advocates maintain that there are ways in which the federal match can be maintained that do not hurt low-income people as severely as this reduction in the income level does. Income disregards are allowed under federal law that the state could adopt, for example.

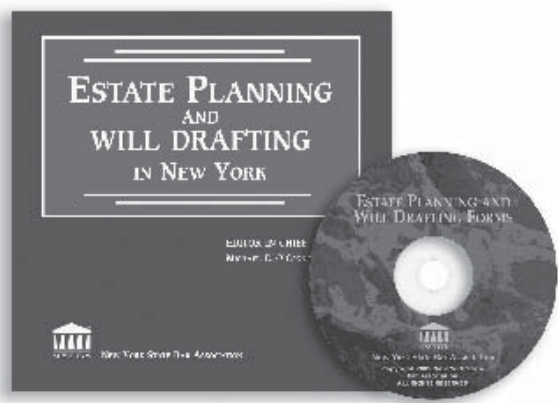
In December 2006, the Empire Justice Center ([www.empirejustice.org](http://www.empirejustice.org)) filed a class action suit in state court in Monroe County.<sup>4</sup> The lawsuit claims that the reduction in state levels violates the state constitutional duty to care for the needy by failing to meet their basic needs, under Article XVII, Section 1 of the New York State Constitution. The reduced income levels fall below the long established statutory standard for the minimum income level needed to fulfill this state constitutional mandate under Social Services Law § 209(2). The lawsuit also challenges inadequate notices of the change.

## Endnotes

1. Fair Hearing #4576742M (Nov. 16, 2006, Oneida Co.) To view the hearing decision, you must login to the WNYLC Online Resource Center at <http://onlineresources.wnylc.net/welcome.asp?index=Welcome>.
2. In federal parlance, "medically needy" individuals and couples must apply any income above a specified level to the payment of the cost of medical care and services (the "spend down"). 42 U.S.C. § 1396a(a)(17).
3. L. 1997 Ch. 436, § 58.
4. *Blair v. Novello* (Supreme Ct., Monroe Co).

**Valerie Bogart is senior attorney for the Evelyn Frank Legal Resources Program at Selfhelp Community Services in New York City. She received her J.D. from New York University School of Law.**

# Updated Estate Planning and Will Drafting in New York



## Editor-in-Chief:

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*Estate Planning and Will Drafting in New York* provides an overview of the complex rules and considerations involved in the various aspects of estate planning in New York State. Each chapter has been brought completely up to date for the 2006 revision. Several chapters — including “New York Estate and Gift Taxes” and “Marital Deduction” have been totally revised for this update.

Written by practitioners who specialize in the field, *Estate Planning* is a comprehensive text that will benefit those who are just entering this growing area. Experienced practitioners will also benefit from the practical guidance offered by their colleagues, and use this book as a text of first reference for areas with which they may not be as familiar.

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