

**AMERICAN BAR ASSOCIATION
COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY
SENIOR LAWYERS DIVISION
REPORT TO THE HOUSE OF DELEGATES***

RECOMMENDATION

RESOLVED, That the American Bar Association supports efforts to improve the response of the state courts to elder abuse, adopts the attached "Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse," dated August, 1996, and urges the implementation of these Guidelines by courts at the state, territorial, and local level.

* This recommendation was adopted by the House of Delegates at the August 1996 Annual Meeting.

REPORT

The foregoing recommendation calls for adoption and implementation of the twenty-nine numbered guidelines for state courts handling cases involving elder abuse that are attached to the recommendation.

As explained in this Report, these Guidelines were developed in a project sponsored by the ABA Commission on Legal Problems of the Elderly and funded by the State Justice Institute. The Guidelines were published in 1995.

I. BACKGROUND

Elder abuse has been called the hidden crime. While its magnitude is not completely known, it is widely agreed that the problem affects a significant number of older persons. In 1990, the Subcommittee on Health and Long-Term Care of the House of Representatives Select Committee on Aging reported that one out of twenty older Americans, or more than 1.5 million persons, may be victims of abuse each year.

The nation's elderly population is growing at a much greater rate than any other segment. As people live longer, frailty and vulnerability increase, along with the potential to become victims of abuse, fraud, and exploitation. In addition, several recent initiatives by government agencies and by professional organizations such as the American Medical Association have expanded awareness of elder abuse and fostered increased reporting of it. Thus, the incidence of abuse and professional and public awareness of it will continue to grow, and this problem will demand increasing attention by lawyers and the courts. Indeed, the National Center on Elder Abuse reports that the 241,000 reported cases of domestic elder abuse in 1994 represents a 106% increase over the number of reported cases in 1986.

Elder abuse may take many forms and it is defined differently by each state. Statutory definitions of elder abuse may include physical abuse, psychological or emotional abuse, sexual abuse, financial exploitation, neglect, abandonment, and/or self-neglect. As a result, judges may see elder abuse in a variety of contexts: criminal cases of assault, battery, rape, or theft (which may carry enhanced penalties when committed against an older person); civil fraud or conversion matters; personal injury actions; guardianship or conservatorship; mental health commitment; special protective proceedings initiated through adult protective services agencies; cases involving health care decisions for an incapacitated patient; and criminal or civil cases regarding institutional care in nursing homes or other long term care facilities.

Elder abuse may have a particularly devastating impact on older persons. They may have fewer options for resolving or avoiding the abusive situation due to their age, health, or limited resources. They may be more vulnerable to and harmed by physical abuse because of their existing physical condition. Older persons may have less ability to recover from financial exploitation if they are already retired or because of their short

remaining life span.

State legislatures have paid considerable attention to the problem of elder abuse. All fifty states and the District of Columbia have enacted legislation addressing domestic or institutional elder abuse, along with reporting systems to identify these cases. However, the statutes vary widely in: the age at which a victim is covered; the definition of elder abuse; classification as criminal or civil; types of abuse covered; reporting requirements (mandatory or voluntary); investigation procedures; and remedies for abuse. Institutional abuse is covered by state statutes (sometimes in the same law covering domestic abuse, sometimes separately) and by federal Medicaid and Medicare statutes, which provide for prosecution of abuse occurring in federally reimbursed facilities. All states and the District of Columbia have laws authorizing the Long Term Care Ombudsman Program, which is responsible for advocating on behalf of long term care facility residents who are abused or who experience other problems. In addition, an increasing number of states have criminal statutes and other laws that specifically address elder abuse.

Despite the plethora of elder abuse statutes and protective services, the wide range of potential proceedings involving elder abuse, and keen interest in minimizing abuse and neglect, court systems do not appear to be heavily involved in resolving such cases. Research conducted by the ABA Commission on Legal Problems of the Elderly indicates that very little of either the legal or social science literature addressing elder abuse discusses the role or involvement of the courts. There are few reported cases on elder abuse. Court data on cases involving elder abuse is nonexistent, according to the National Center on Elder Abuse, the National Center for State Courts, state court administrators, Adult Protective Services (APS) administrators, and other agencies focusing on elder abuse. Most state courts do not even keep data about the age of the parties involved in court proceedings. Anecdotal evidence supports these research findings. Judges, lawyers, prosecutors, law enforcement officers, and protective services workers who were involved in various stages of the Commission's recently concluded project on Elder Abuse and the State Courts (who were selected or who self-selected for participation because of their knowledge and/or interest in the topic of elder abuse) reported that there are few elder abuse cases entering the court system.

Nevertheless, the Commission's research indicates that interest in the pursuit of legal remedies for elder abuse is expanding as APS workers, aging advocates, lawyers, prosecutors, law enforcement officers, researchers, and others recognize that the provision of traditional protective services does not prevent or fully address elder abuse. To some extent, this recognition stems from the fact that professionals in the field of elder abuse now realize that elder abuse encompasses much more than physical abuse. Twenty years ago, when elder abuse laws were first enacted, their authors borrowed both concepts and language from child abuse laws. As a result, these laws are often particularly weak on matters such as financial exploitation (children have no money to exploit), and they offer few remedies other than removal of the abused person

from the setting where the abuse is occurring or the provision of services intended to alleviate or terminate the abuse. In the past few years, however, some states have amended their adult protective services statutes and other pertinent laws by adding or augmenting the legal remedies available to older persons who have been abused. These states include Arizona, California, Florida, Minnesota, and South Carolina. Other jurisdictions are contemplating similar reforms.

II. DEVELOPMENT OF THE RECOMMENDED GUIDELINES

In the light of this background of growing interest in elder abuse and the lack of information about judicial practices for handling elder abuse cases, the ABA Commission on Legal Problems of the Elderly (Commission), with funding from the State Justice Institute through the ABA Fund for Justice and Education, undertook a groundbreaking project to study current practices and to develop recommended guidelines to enhance the ability of the courts to handle cases involving elder abuse. The Commission based its efforts on these three premises:

- not all incidents of elder abuse need to be or should be resolved in the courts, but some are so serious that they should be addressed by the judicial system;
- some incidents of elder abuse that should be considered by the courts are not being tried because of a variety of barriers; and
- cases involving elder abuse that are considered by the judicial system could be handled more effectively in many instances.

The project's findings demonstrated substantial support for these premises.

The project used a two-pronged approach to gather the information necessary to develop recommended guidelines regarding state court handling of elder abuse cases. Project staff established a baseline of knowledge by examining existing practices and procedures through analysis of civil and criminal statutes pertaining to elder abuse; research of case law; and review of the legal and social science literature. At the same time, using the Delphi research methodology and a series of nine focus groups, the project developed a vision for the future of the courts' involvement in these types of cases by tapping the expertise of judges; court administrators; lawyers; prosecutors and attorneys general; protective services, aging, and social services providers and advocates; law enforcement officers; health care providers; researchers and academicians; and others.

The recommended guidelines are the result of the project's study. They reflect those ideas on which at least 75% of the 170 Delphi participants who completed both rounds of the study reached a consensus.

III. DISCUSSION OF RECOMMENDED GUIDELINES

The twenty-nine recommended guidelines are divided into three broad categories.

- Ways in Which the State Courts Can Improve Their Handling of Cases Involving Elder Abuse

These recommendations urge that judges and court personnel receive training about elder abuse. They also encourage the courts to support training of the myriad professionals and service providers who may appear before the court in cases involving elder abuse.

Numerous recommendations related to judicial administration and court management are offered. These include that the court should provide accommodations for persons with disabilities and expedite cases involving elder abuse on the calendar, assess an abused person's capacity and understand how incapacity can relate to the likelihood of abuse and the ability to present testimony, consider the safety and other needs of the abused person when accepting plea agreements, and understand and use limited guardianship and other alternatives to guardianship appropriately. The need for courts to have ways of knowing that the parties appearing before them may be or have been involved in other cases in other divisions of the court also is supported.

The recommendations encourage the further study of the use of alternative dispute resolution and procedural innovations such as videotape testimony or cross-examination, closing the courtroom to the public, or easier admission of evidence from collateral sources in cases involving elder abuse.

- Ways of Ensuring that Cases Involving Elder Abuse Enter the Court System

The report does not suggest that all incidents of elder abuse should be resolved by the courts. Indeed, whether court proceedings should be initiated may depend upon various circumstances such as the severity of harm, whether the elder person was at fault to some degree, and in other relevant circumstances. Nevertheless, the findings make it clear that there are many barriers to bringing appropriate cases into the judicial system. To help reduce some of those barriers, the recommendations encourage training of newly appointed guardians about recognizing and reporting elder abuse. The report also supports the involvement of victim/witness advocates in criminal and non-criminal cases involving elder abuse and suggests that court staff can do more to explain the court process to older abuse persons.

- Coordination of the State Judicial System with Other Community Resources

This cluster of recommendations addresses the important role that the courts can take in addressing the problem of elder abuse, just as they have done with domestic

violence, child abuse, and other law-related social problems. Specifically, these recommendations discuss the courts' encouragement of or involvement in task forces or coordinating councils on elder abuse, establishing linkages with adult protective services and aging services to address elder abuse, supporting the development of or continuation of multidisciplinary teams on elder abuse, and backing development of protocols for entities involved in investigating and responding to elder abuse. Further, these recommendations encourage judges and court personnel to have some familiarity with the community organizations addressing elder abuse or to develop within the court the ability, using trained volunteers, to link older abused persons to appropriate sources of assistance.

IV. RELATED ABA POLICY

This resolution is consistent with and builds upon policy actions taken previously by the Association's House of Delegates. These policies include:

(1) A February 1978 resolution supporting federal, state, and local efforts to combat the incidence, causes and effects of family violence and to support implementation of programs to protect victims of family violence;

(2) An August 1978 resolution recommending the implementation of very specific potential solutions to the problem of law enforcement reaction to incidents of domestic violence;

(3) An August 1980 resolution supporting increased efforts to prevent, identify and treat child abuse and neglect;

(4) An August 1981 resolution encouraging individual attorneys and state and local bar associations to work more actively to improve handling of cases involving abused and neglected children and to improve state legislation, court rules, and administrative regulations regarding all stages of proceedings in these cases;

(5) An August 1983 resolution adopting the Guidelines for Fair Treatment of Crime Victims and Witnesses in the Criminal Justice System;

(6) An August 1987 resolution supporting efforts to improve judicial practices regarding guardianship and to adopt the Statement of Recommended Judicial Practices on Guardianship Proceedings for the Elderly and to encourage their implementation at the state level;

(7) An August 1991 resolution supporting efforts to make the state judicial systems more responsive to the needs of older persons and persons with disabilities and adopting and urging implementation of the recommendations of the National Conference on the Court-Related Needs of the Elderly and Persons with Disabilities;

(8) An August 1994 resolution making specific recommendations about the components of unified family courts;

(9) An August 1995 resolution encouraging support for and implementation of "Resource Guidelines: Improving the Child Abuse and Neglect Court Process" published by the National Council of Juvenile and Family Court Judges;

(10) An August 1995 resolution urging support for and development of multidisciplinary, community programs to respond to domestic violence and offering specific recommendations as to the essential elements of such programs; and

(11) A February 1996 resolution recommending mandatory training programs for judges about domestic violence.

The National Probate Court Standards also lend support to these recommendations.

V. CONCLUSION

The Association has taken a leadership role on the critical issues of domestic violence and child abuse and has the opportunity to do the same regarding elder abuse. Adoption of these recommended guidelines will enhance the Association's ability to encourage bench and bar involvement in their implementation.

Respectfully submitted,

John H. Pickering
Chair
Commission on Legal Problems of the Elderly
August 1996

Victor Futter
Chair
Senior Lawyers Division
August 1996

**RECOMMENDED GUIDELINES FOR STATE COURTS
HANDLING CASES INVOLVING ELDER ABUSE
August, 1996**

I. Ways in Which the State Courts Can Improve Their Handling of Cases Involving Elder Abuse

A. Training of Judges and Other Court Personnel

Recommendation 1. Judges should receive training about elder abuse.

a. Topics should include:

- i. Dynamics of elder abuse and family violence;
- ii. Types of cases involving elder abuse;
- iii. Capacity issues;
- iv. State laws concerning elder abuse;
- v. Adult Protective Services (APS) system and Aging Services;
- vi. Case management issues and procedural innovations; and
- vii. Crafting effective orders in elder abuse cases.

b. Training should be designed and presented with the input and involvement of advocates, APS, prosecutors, law enforcement, aging services providers and should include coverage of their roles and resources.

Recommendation 2. Court staff should receive training about elder abuse.

a. Topics should include:

- i. Dynamics of elder abuse and family violence;
- ii. Types of cases involving elder abuse;
- iii. Capacity issues;
- iv. Adult Protective Services system;
- v. Aging Network and other Social Services;
- vi. Case management issues and procedural innovations; and
- vii. Data collection about elder abuse cases.

b. Training should be designed and presented with the input and involvement of advocates, APS, prosecutors, law enforcement, aging services providers and should include coverage of their roles and resources.

B. Training of Other Relevant Professionals

Recommendation 3. Courts should ensure that prosecutors, investigators, lawyers, law enforcement officers, adult protective services workers, social workers, bank and financial institution officials, health care providers, and any other professionals appearing before them in cases involving elder abuse are familiar with the dynamics and issues of elder abuse and with the role of the courts in addressing elder abuse. To achieve that

achieve that objective, courts should encourage and support the development and implementation of cross-training for victim/witness programs, APS staff, aging services providers, lawyers, prosecutors, law enforcement, banking officials, health care providers, and any other relevant professionals about the resources and assistance offered by each of them to older abused persons and about the ways in which they need to coordinate those efforts.

C. Judicial Administration and Case Management

Recommendation 4. Courts should provide accommodations for persons with physical and mental deficiencies and, if necessary, hold hearings in cases involving elder abuse in the setting that best accommodates the needs of the abused older person.

Recommendation 5. Courts should recognize that the capacity of older persons may fluctuate with time of day, medications, etc. and should be flexible in scheduling hearings to accommodate those individual variations.

Recommendation 6. Courts should expedite cases involving elder abuse on the calendar.

D. Case Management Where the Older Person's Capacity is at Issue

Non-Criminal and Criminal Court

Recommendation 7. Courts should use expert witnesses, evaluators, guardians *ad litem*, court investigators, court visitors, or interdisciplinary teams who are trained and knowledgeable about the problems of older persons to assess the older person's capacity.

Recommendation 8. Courts should understand gradations of diminished capacity in order to more effectively manage and adjudicate cases involving elder abuse.

Recommendation 9. Courts should consider that incapacity could increase the likelihood of abuse and, if necessary, order a qualified evaluator to conduct an unbiased assessment of the older person's capacity.

Non-Criminal Court

Recommendation 10. Courts should understand and use limited guardianship and other alternatives to guardianship appropriately.

Recommendation 11. When counsel for the older person is required to be appointed, or is otherwise appointed, the appointment should be at the earliest possible stage of the proceedings.

Criminal Court

Recommendation 12. Courts should allow prosecutors special latitude in questioning

older abused persons and in offering additional witnesses and corroborating evidence.

Recommendation 13. Courts should ensure that plea agreements meet the needs of the older abused person, including protection from further abuse, and be willing to be creative in negotiations and sentencing, exploring the alternatives available to the older abused person.

E. Implementation of Procedural Innovations

Recommendation 14. Further analysis and study should be undertaken of the ramifications of courts more readily allowing an older abused person's testimony to be videotaped before capacity is lost or the individual dies.

Recommendation 15. Further analysis and study should be undertaken of the ramifications of courts taking steps when necessary to reduce the level of fear experienced by an older person who is testifying against his or her abuser such as allowing the hearing to be held in a less confrontational setting, allowing testimony and cross-examination of the older abused person by videotape or closed-circuit television, and closing the courtroom to the public.

Recommendation 16. Further analysis and study should be undertaken of the ramifications of courts more readily allowing admission of evidence from collateral sources if the older abused person's capacity is at issue, as has been done by the Department of Justice regarding child witnesses and child abuse cases.

F. Intra-Court Coordination

Recommendation 17. Courts must develop ways of ensuring that judges become aware of cases involving older abused persons that might be underway simultaneously in different divisions or that might previously have been heard and have some influence on a current case.

Recommendation 18. Further study should be given to the concept of consolidation of the courts handling cases involving elder abuse, for example into a "family court."

G. Alternative Dispute Resolution

Recommendation 19. The use of alternative dispute resolution (ADR) in cases involving elder abuse is not recommended at this time. The possible use of ADR should be studied further.

II. Ways of Ensuring that Cases Involving Elder Abuse Enter the Court System

A. Training Guardians

Recommendation 20. Newly appointed guardians should receive training about their role and responsibilities as guardians, and about preventing, recognizing and reporting elder abuse.

B. Assistance from Victim/Witness Advocates and Court Staff

Recommendation 21. Victim/witness advocates should be available and involved in assisting older abused persons throughout the judicial process in both non-criminal and criminal court proceedings.

Recommendation 22. All victim/witness advocates should be trained about the dynamics of elder abuse and about the APS system and other aging network services available to assist older abused persons. Additionally, there should be an elder abuse specialist at every victim/witness program.

Recommendation 23. Especially if there are no victim/witness advocates available to help an older abused person, court staff should help explain and de-mystify the court process for older abused persons who may be intimidated or confused, or who may have some type of mental or cognitive disability.

III. Coordination of the State Judicial System with Other Community Resources

Recommendation 24. Courts should:

- encourage and support the development and continuing operation of a state or local task force or coordinating council on elder abuse issues;
- lend their support to existing task forces or coordinating councils on elder abuse; or
- encourage evolving or existing task forces or coordinating councils on family violence or domestic violence to incorporate elder abuse advocates into their membership and elder abuse issues into their agenda.

Task force or coordinating council members should include judges and court personnel, representatives of the Attorney General, representatives of the Medicaid Fraud Control Unit, public and private lawyers, law enforcement officers, APS administrators or workers, social services providers, health care providers, banking and financial institution officials, victim/witness advocates, representatives of the long term care ombudsman program, and other relevant professionals. In addition to addressing systemic problems faced by the courts and the council members in preventing and responding to elder abuse, these task forces or coordinating councils should develop materials that explain their roles and their relationships to each other and the court system, and disseminate those materials to each other, the courts, and the public.

Recommendation 25. Courts should include APS and aging services on court advisory

councils or develop other mechanisms for establishing linkages with those organizations and others that address elder abuse.

Recommendation 26. Courts should encourage and support the development and continued operation of multidisciplinary teams on elder abuse.

Recommendation 27. Courts should encourage and support the development of protocols or memoranda of understanding between various entities involved in elder abuse cases as to their roles and relationships.

Recommendation 28. Judges and court personnel should have familiarity with APS, aging, and social services providers in their community or brochures or other materials from those agencies so that they can direct an older abused person to appropriate service providers.

Recommendation 29. Courts should encourage and support the development of a "court social worker" or "court ombudsman" program using trained volunteers to help older, disabled, incapacitated or other individuals by giving them information about social services and other community organizations; linking, rather than just referring, them to social services and other community organizations; assisting them with the completion of *pro se* documents; and helping them to understand the nature of the court process.

GENERAL INFORMATION FORM

Submitting Entity: **Commission on Legal Problems of the Elderly
Senior Lawyers Division**

Submitted By: **John H. Pickering, Chairperson
Victor Futter, Chairperson**

1. Summary of Recommendation(s).

This recommendation expresses the Association's support for efforts to improve the response of the state courts to elder abuse and the Association's adoption of the "Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse" that were developed by the Commission on Legal Problems of the Elderly under a grant from the State Justice Institute (SJI) and published in 1995. The Commission's project developed a vision for the future of the courts' involvement in these types of cases by tapping the expertise of judges; court administrators; lawyers; prosecutors and attorneys general; protective services, aging, and social services providers and advocates; law enforcement officers; health care providers; researchers and academicians; and others. There was a substantial amount of judicial involvement in the project. The Honorable Gladys Kessler of the U.S. District Court for the District of Columbia chaired the advisory committee. The Honorable John Kirkendall of the Washtenaw County Probate Court in Michigan served on the advisory committee as well. Numerous other judges were involved in the project through their participation in the study that formulated the recommendations and in the focus groups that considered the potential recommendations.

2. Approval by Submitting Entity.

The recommendation was approved by the Commission on Legal Problems of the Elderly at its meeting on May 3-4, 1996. The Senior Lawyers Division decided to co-sponsor the recommendation at its meeting on May 16-20, 1996.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The Association has adopted a number of policies related to improvements in the judicial system for cases involving child abuse and domestic violence (2/78, 8/78, 8/80, 8/81, 8/83, 8/94, 8/95, and 2/96). Moreover, the Association has policy supporting efforts to make the judicial system more responsive to the court-related needs of older persons and persons with disabilities in guardianship and other types of proceedings (8/87, 8/91). The proposed recommendation is consistent with these existing policies and would not affect them.

5. What urgency exists which requires action at this meeting of the House?

National dissemination of the “Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse” was begun in January 1996 and is continuing. By establishing policy supporting the recommended guidelines at the 1996 Annual Meeting, the Association can play a key role in urging their implementation at the state, territorial, and local levels.

6. Status of Legislation. (If applicable.)

There is no applicable legislation pending at the current time.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

Simultaneously with this submission, referral is being made to:

- Commission on Domestic Violence
- Commission on Homelessness and Poverty
- Commission on Mental and Physical Disability Law
- Criminal Justice Section
- Family Law Section
- General Practice Section
- Government and Public Sector Lawyers Division

- Judicial Administration Division --
National Conference of Special Court Judges
National Conference of State Trial Judges
- Real Property, Probate and Trust Section
- Young Lawyers Division
- Conference of Chief Justices
- National Association of Attorneys General
- National Association of Women Judges
- National District Attorneys Association

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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12. Contact Person Regarding Amendments to This Recommendation.

There are no known proposed amendments at this time.