

INTRODUCTION

Elder abuse¹ has been called the hidden crime. While its extent is not completely defined, 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.² The National Aging Resource Center on Elder Abuse (now known as the National Center on Elder Abuse) estimates that two million reportable cases of elder abuse occurred in 1988 in domestic settings alone.

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 service providers, policy makers 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. 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. The charts at Appendix C summarize the provisions of these statutes for every state and the District of Columbia.

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 for this project 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 non-existent, 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 this project (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, this project'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 elder abuse 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 states are contemplating similar reforms.

Because of the confluence of these factors, the ABA Commission on Legal Problems of the Elderly (Commission), with funding from the State Justice Institute and through the ABA Fund for Justice and Education, undertook this groundbreaking project to study current practices and to develop recommended guidelines to enhance the ability of the courts to handle elder abuse cases. The Commission grounded its efforts in 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 demonstrate substantial support for these suppositions.

By recommending guidelines for judicial handling of elder abuse cases, the project hopefully will aid courts in:

- ⊗ **providing appropriate judicial solutions that respect the values and wishes of elder abuse victims while protecting their welfare;**
- **easing access of appropriate cases to the court system; and**
- **enhancing coordination among the court system, state and local agencies, and the aging network.**

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 discussion and recommendations contained in this report reflect those ideas on which 75% of the 170 Delphi participants who completed both rounds of the study reached consensus.³ Those ideas have been synthesized, and the recommendations have been drafted by project staff with the advice and counsel of the project's advisory committee, the members of the ABA Commission on Legal Problems of the Elderly, and the SJI project officer. These court-focused recommendations, however, reflect only a portion of the information gathered and proposals promulgated in this project. The Delphi and focus group participants also provided an abundance of ideas related to statutory reform; to enhanced coordination between the judicial, aging, adult protection, and law enforcement systems; to education of the public and professionals; and to counseling and helping older abused persons. Those ideas are discussed only briefly in this report, but they will be useful in future initiatives on elder abuse.

The project's findings will be summarized into three categories, following the rubric of the premises outlined above. Following this introduction, the project's recommendations will be set forth. After that, the recommendations will be repeated in conjunction with commentary explaining their basis and level of support among the Delphi and focus group participants and offering other foundations for the recommendations. The remaining sections of the report will include a description of the project methodology; a discussion of the other information derived from the Delphi Study and focus groups; a bibliography; a glossary; a chart of the numbers and percentages of respondents by round and category; and charts summarizing the pertinent legislation in each state and the District of Columbia.

A. Types of Cases Involving Elder Abuse that Should Enter the Courts

In order to determine what types of cases involving elder abuse should be brought to the court system by prosecutors and lawyers, Delphi Study participants were asked to indicate what circumstances should provoke the pursuit of remedies in the criminal and non-criminal courts. Participants generally reached consensus on only the most substantial or clear forms of abuse. Factors that might contribute to abuse, such as alcoholism of a caregiver or a self-neglecting individual, were not deemed sufficient to trigger court involvement.

Participants manifested support for non-criminal court involvement in cases of abandonment; domestic violence; fiduciary abuse; elder abuse within a Medicaid-certified nursing facility; abuse by an older person's guardian or caregiver; emotional, psychological or mental abuse; financial exploitation; improper institutionalization; sexual abuse; and theft by a caregiver from an older person. Support was also garnered for non-criminal court involvement in situations involving severe harm or death due to abuse, when a protective order or injunction is needed to stop the abuse, when an incapacitated older person refuses to accept protective services, and when abuse recurs following intervention.

Responding to a question about what types of situations should spark criminal court involvement in elder abuse cases, participants indicated arrest of an abuser; crimes committed in nursing homes that would be prosecuted if they had occurred on the street; criminal neglect; elder abuse committed with criminal intent; abuse by a public guardian; abuse committed by an individual with a history of abusive behavior; abuse of a person who is mentally ill or mentally impaired; abuse by a caregiver; fiduciary abuse and other forms of financial exploitation; intentional medical neglect or abuse within an institution; physical abuse resulting in severe harm or injury; and sexual abuse. Participants also indicated that abusers who violate protective orders should be prosecuted.

Self-neglect generally is addressed through the courts by the appointment of a guardian or by an order for the provision of protective services to an individual who refuses to accept them voluntarily. Participants expressed their beliefs that only serious examples of self-neglect should prompt non-criminal court involvement. Such examples include: when self-neglecting behavior poses a risk to others or the individual; when the individual is experiencing a high degree of harm and lacks the ability to understand the consequences of that harm; when there is an emergency situation; when there is financial mismanagement resulting in loss or the threat of loss of housing, utilities, or medical care; when the individual lacks the ability to provide informed consent and is at serious risk of harm; and when an individual is suffering from dementia and has no caregiver.

B. Current Practices and Barriers that Inhibit Entry of Cases Involving Elder Abuse into the Courts

The abused person's attitudes about the courts and about the pursuit of legal remedies were perceived as very significant barriers to court involvement in these cases by the project's participants. Older abused persons are seen as reluctant to press charges against abusive family members or caregivers because "they do not want to get that person in trouble." Often, the

abused person is dependent on the abuser for care or companionship, and therefore believes that he or she has "no choice" but to continue in the abusive relationship. Older persons also fear that involving adult protective services or law enforcement in their problems will lead to their removal from their home and placement in a nursing home. They also fear that APS or court intervention will not prevent further abuse or retaliation.

The participants also indicated that older abused persons' are so afraid of testifying in court and so ashamed to have their abusive situation aired in public that they are willing to forego pursuit of their legal rights. Older persons' lack of knowledge about their rights and about the judicial system also inhibits their pursuit of appropriate legal remedies. Further, older abused persons may have no means of traveling to the courthouse for hearings or may have no one to provide care for their ill spouse while they are meeting with lawyers or testifying at trial. Project participants also stated that older abused persons often are ignorant of the availability of APS and other services that may be able to help them correct an abusive situation. Additionally, even if they are aware of these services they may not think of themselves as abused.

A number of systemic practices and barriers were identified as problematic by the project's participants. The participants opined that the lack of knowledge about and sensitivity to elder abuse by judges actually inhibits lawyers, prosecutors, and abused persons from bringing cases into the court system. The failure of court staff to explain the judicial process to older abused persons, particularly to those who have a mental or cognitive disability or who may be intimidated or confused, also was seen as a barrier to their pursuit of legal remedies by the project's participants.

Substantial obstacles result from the courts' failure to recognize that older persons who are homebound or bedbound may be incapable of traveling to the courthouse even though they are capable of testifying. Participants indicated that court delays are particularly onerous to older abused persons who are nearing the end of their life span, and who may be frail or who may be losing their capacity to remember the abuse and testify about it. Delays in proceedings resulting from a court's caseload may impede a prosecutor's ability to prove the case.

Lack of knowledge about elder abuse among prosecutors, lawyers, and law enforcement officers was also viewed as a barrier by the participants. They reported that prosecutors have little training or experience in prosecuting domestic or institutional abuse cases and that even those prosecutors and attorneys general who are knowledgeable about elder abuse may be reluctant to try these cases because of barriers imposed by statutes or court rules. Participants also indicated that law enforcement officers are not trained to recognize or gather evidence about elder abuse and that APS workers are not trained to work with law enforcement officers in developing a case.

C. Ways the Judicial System Can Handle Cases Involving Elder Abuse More Effectively

The findings presented above suggest a variety of solutions and the recommendations describe them. The importance of supporting and assisting older abused persons, whether they are pursuing non-criminal court remedies or they are witnesses in criminal proceedings, surfaces

throughout the recommendations. Another theme that emerges from these findings is the significance of ensuring that an older abused person is fully aware of the range of powers and remedies that the courts can exercise. For example, an abused older woman's reluctance to prosecute an abusive spouse or child may be overcome if she understands that the court has the power to mandate treatment and counseling for substance abuse, as well as order time in jail or prison. Other solutions might include expanding the range of resources and remedies available to older abused persons beyond what is currently available in statutes pertinent to elder abuse.

Training of judges about elder abuse, with the input of the other disciplines involved in addressing elder abuse, would enhance the courts' ability to handle elder abuse cases by making judges more aware of the prevalence of elder abuse in their communities, of the existence of state statutes addressing the problem, and of the state and local agencies equipped to provide intervention and support to the parties involved. Judges' knowledge of the broad range of medical, psychological, social and cultural issues raised by these cases and of the available community resources, social services or alternatives to an abused person's current living situation or caregiving arrangements would also be heightened. A number of the recommendations deal with judges' awareness of the link between incapacity and abuse because that awareness may have some influence on a judge's decisions regarding admissibility of evidence, jury instructions, and the final outcome of a case.

The recommendations provide many other proposals intended to reduce or remove the barriers identified by the project's participants. In addition to multidisciplinary training of judges, the recommendations also include multidisciplinary training of court personnel and other participants in the judicial process. Additional recommendations relate to flexibility in scheduling court appearances for older abused persons and in setting the location of hearings; expediting abuse cases; and appointing counsel to represent an older abused person whose capacity is at issue. The recommendations also address some procedural innovations, such as closing courtrooms, allowing the older abused person to testify in a less confrontational setting, expanding the use of "hearsay" evidence, and using alternative dispute resolution, that should be studied further.

Another theme that appeared throughout the project's findings was that the court may benefit from better coordination among all the entities involved in investigating elder abuse and providing services to older abused persons. Enhanced linkages between these organizations and the courts was viewed as beneficial because (1) it may lead to case resolutions that do not involve the courts unnecessarily or inappropriately and (2) it may result in better developed cases being brought before the judicial system. A number of the recommendations focus on methods of improving coordination between the courts and the other players in the judicial system.