

RECOMMENDATIONS & COMMENTARY

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.

Commentary: The necessity of judges becoming knowledgeable about elder abuse is supported overwhelmingly by both the Delphi study and focus group participants. According to 80% and 76%, respectively, of the Delphi respondents, one reason why lawyers and prosecutors do not bring elder abuse cases to non-criminal court and criminal court is that judges lack training and education about elder abuse. Given that there was consensus among the participants that the lack of knowledge about and sensitivity to elder abuse by judges is actually a barrier to bringing cases into the court system, it is not surprising that 95% of the respondents said that training of judges about elder abuse, with the input of the professions listed above, would enhance the courts' ability to handle elder abuse cases.

Every focus group said that a need exists for judicial education about elder abuse. A few of the judges expressed concern about all of the competing areas in which they need training. Nevertheless, a greater number of the judges said that the judicial system had needed and benefited from training to enhance judicial sensitivity and awareness about the dynamics of and laws about domestic violence, and that similar education about elder abuse was important. A number of judges, particularly those who are probate judges, talked about the need for a better understanding of incapacity and for a shared definition and understanding among legal, medical and social services professionals about incapacity. Different opinions were expressed about the training methods that might be developed and offered, with some participants expressing preferences for a packaged curriculum, a videotape, or a deskbook.

Elder abuse is a system-wide issue; everyone who addresses it is affected by the actions or inactions of the other players in the system. Therefore, it is critical to have the

involvement of the various professionals listed above in the development of training curricula or materials on elder abuse. Every type of professional involved in the Delphi Study and focus groups indicated that judges need to be sensitive to and knowledgeable about elder abuse. Obviously these participants, selected to participate in this project because of their involvement and expertise in the field of abuse or in the courts, believe that the courts' handling of elder abuse cases can be improved. These professionals have experienced the problems with the judicial system that educational efforts would be intended to correct. Therefore, training design and implementation would be enhanced if these professionals are able to bring their experiences and suggestions to the process. Moreover, these professionals have important substantive knowledge that is critical to judges and court personnel. They understand the dynamics of abusive relationships and the impact of abuse on older persons. They know how the laws and the legal, protective services, and social services systems really work in these situations, not just how they're written in code books. They know the state-of-the-art in research and program development related to elder abuse and capacity, issues that may affect a judge's decisions regarding appointment of a guardian or sentencing in a criminal matter.

Additional support for judicial training on elder abuse can be found in existing ABA policy, the National Probate Court Standards, and the ABA Standards Relating to Court Organization. In 1986, the ABA adopted policy supporting judicial education programs that address stereotypes that might affect decision-making in cases involving rape and domestic violence.⁴ As in cases of rape and domestic violence, stereotypes of older persons might affect a judge's decision-making in cases involving elder abuse (and rape and domestic violence are two of the many aspects of elder abuse). Both the ABA Standards Relating to Court Organization and Administration⁵ and the National Probate Court Standards⁶ speak of the courts' need to respond to change and to use task forces and training to keep abreast of new conditions or events. The increase in incidents of elder abuse and in the reporting of that abuse, as well as the legislative shift toward more legal remedies for elder abuse discussed in the introduction, demonstrate that the courts will face an increasing number of cases involving elder abuse and therefore will need training to prepare for that change.

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.

Commentary: Training of court staff about elder abuse also is deemed important by the Delphi study and focus group participants. The lack of training and education about elder abuse among court personnel other than judges was perceived by 75% of the Delphi Study respondents as a reason why cases involving elder abuse are not brought to non-criminal court and criminal court by lawyers and prosecutors. The failure of court staff to explain and de-mystify the court process for older abused persons who may have a mental or cognitive disability or who may be intimidated or confused was perceived as a serious barrier to court involvement in elder abuse cases by 75% of the respondents. The same 96% of the respondents who said that judicial training would be useful also supported the concept of training court staff on the topics listed above with the involvement of the professionals listed above. Although judicial and court staff training might focus on the same issues, the coverage of topics should be tailored to the different roles and responsibilities of the trainees. Multidisciplinary training development is critical to meet the needs of court personnel because, as discussed above regarding judges, the different professionals involved in elder abuse have the knowledge of how court staff can improve their assistance to older abused persons.

The focus group participants did not directly address the issue of training for court staff, but they did examine the important roles of court personnel in helping victims of abuse access services or in making the court a more "user-friendly" institution. Training of court staff is necessary to help them fulfill those roles. When asked to provide reasons why elder abuse cases are not entering the courts, Delphi Study respondents indicated that the reluctance of abused persons to go to court and to pursue legal remedies was even more of an obstacle than the systemic problems deriving from lack of professional training and awareness about elder abuse. Close to 90% or more of the Delphi participants related that an older abused person's fear of the courts or lack of knowledge about their rights and about the judicial system may inhibit their pursuit of appropriate legal remedies. Further, 95% of the Delphi Study participants opined that older abused persons do not pursue either non-criminal or criminal remedies against abusers who are family members or caregivers because "they do not want to get that person in trouble." These findings indicate that older abused persons need to have a better understanding of the legal remedies that may be available; court personnel can address that problem by better informing older abused persons about the court process and the available remedies. To illustrate, an older woman who has been physically abused or exploited by her substance-abusing son may not want to see him go to jail, but she may be willing to press criminal charges if she understands that he may be placed on probation and provided with counseling and treatment for his substance abuse problem.

Support for educating court staff about the court-related needs of older persons who have been abused can be found in ABA policy resulting from the SJI-supported Conference on Court-Related Needs of Older Persons and Persons with Disabilities.⁷ Additional support comes from the National Probate Court Standards, which assert that the public perception of the court's accessibility increases the likelihood that persons in need of the court's services will take advantage of them in the future.⁸

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 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.

Commentary: One of the most constant and powerful themes throughout the Delphi Study responses and in each of the nine focus groups was that judges can only base their decisions on the evidence brought to them by lawyers, parties, witnesses, and investigators. In cases involving elder abuse, judges must rely on the professionals listed in the recommendation to fulfill their responsibilities to develop that evidence. Training of these other professionals about elder abuse and the role of the courts is critical to enable them to do a better job and thereby help judges handle these cases more effectively. Another benefit of such training is that these professionals are better able to assess whether an incident of elder abuse needs to be addressed in the judicial system, rather than in some other manner, and determine how to proceed appropriately and effectively through referrals or cooperative investigations. Cross-training should also include information about rules of evidence and burdens of proof so that the non-lawyers involved in addressing elder abuse have a better understanding of the constraints imposed by the law upon judges, prosecutors, lawyers, and law enforcement officers.

Participants' reached consensus that the lack of knowledge about the needs of the judicial system and the focus on providing social services restrains abused persons and their advocates from bringing elder abuse cases into the system. Cross-training of and by the professionals listed above is deemed useful in overcoming that barrier by 96% of the Delphi respondents. The focus groups also wholeheartedly supported the idea of cross-training.

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.

Commentary: The project findings decisively recognize that "inaccessible justice is justice denied"⁹ and call for the courts to accommodate the needs of older abused persons with physical and mental impairments. Indeed, there is almost unanimous support for

this concept among the Delphi respondents, with 98% and 96% of them respectively indicating that criminal courts and non-criminal courts should make allowance/accommodations for impairments of the older abused person in cases in which the person's capacity is at issue.

Two forms of accommodations were raised and supported by the respondents. These included making courtrooms more accessible to older abused persons with disabilities and holding court proceedings outside of the courthouse when necessary. Consensus was reached, with 76% support from the respondents, that it would be useful for non-criminal courts to have a courtroom that was specially equipped to accommodate persons with disabilities and was perceived as non-threatening. Consensus was also reached when the same question was asked regarding such courtrooms in criminal court, with 75% of the respondents supporting that approach. Almost all (94%) of the Delphi participants said it would be useful for non-criminal courts to have the ability to hear cases in settings where the older abused person is located, while 90% of them backed the same idea for criminal courts. The courts' lack of flexibility in setting the location of hearings and trials, failing 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, was deemed to be a barrier that affected a court's ability to handle cases involving elder abuse effectively by 84% of the Delphi respondents.

This recommendation is in accord with the objectives of the Americans with Disabilities Act (ADA).¹⁰ Additionally, the ABA already has a body of work and policy supporting this recommendation from the 1986 National Conference of the Judiciary on Guardianship Proceedings for the Elderly;¹¹ the 1991 Conference on Court-Related Needs of the Elderly and Persons with Disabilities which was funded, in part, by SJI;¹² and the SJI-funded 1992 publication designed to educate the courts about access requirements of the ADA and options for implementing them.¹³

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.

Commentary: The fullest possible participation of an older person in a court proceeding pertaining to his or her abuse is a goal recognized by the participants in this project and the ABA. Almost all (96%) of the Delphi respondents supported the idea that non-criminal courts should, whenever possible, be flexible in scheduling hearings in order to accommodate the fluctuations of capacity that older persons sometimes experience due to the time of day (this phenomenon is referred to as "sundowning" because many older people are less capable at the end of the day than they are at the beginning of it), use of medications, diet, and other causes. Court evaluators or guardians *ad litem* should explore these fluctuations and advise judges of the influence they may have on an older abused person's ability to testify or appear in court. Judges should follow the evaluators' recommendation when scheduling the time or location of a hearing, according to 86% of the study participants. The idea that criminal courts should make allowances or accommodations for the impairments of an abused older person was supported by 98% of

the respondents.

These issues were discussed during a number of the focus groups, generating agreement that courts need to be sensitive to the circumstances of older abused persons who are appearing before them and flexible in scheduling court hearings in order to accommodate those circumstances.

ABA policy based on the recommendations of the Conference on Court-Related Needs of the Elderly and Persons with Disabilities support this recommendation as well. That policy calls for the design of caseload management systems that allow case events to be scheduled in accord with time-of-day considerations, among other things.¹⁴

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

Commentary: Delays in court proceedings may present problems to all litigants and other persons involved in the judicial system. This project's findings, along with ABA policy and pertinent court standards, clearly recognize 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. Failure to expedite cases involving elder abuse was cited as an important barrier affecting the courts' ability to handle cases involving elder abuse by 75% of the Delphi respondents. An even higher percentage, 82%, said that delays in proceedings resulting from a court's caseload may damage a prosecutor's ability to prove the case. When asked in what ways non-criminal courts and criminal courts should handle cases involving elder abuse differently when the abused person's capacity is at issue, 95% and 92%, respectively, of the Delphi respondents said that the cases should be expedited on the calendar. The numbers were slightly higher when the participants were asked if expediting trials on the calendar is useful, with 96% of them supporting this approach in non-criminal court cases and 95% supporting it in criminal court cases.

This issue was discussed in the focus groups held with district attorneys and with members of the National Conference of Special Court Judges. Those participants recognized the benefits of expediting these cases and supported the general concept. Nevertheless, they expressed some concerns about the realistic ability of judges to expedite cases given court caseloads.

As with the previous recommendations, there is ABA policy and other national standards that support this concept. ABA policy derived from the recommendations of the Conference on Court-Related Needs of the Elderly and Persons with Disabilities supports the development of caseload management systems that identify at the earliest possible point cases involving persons who are older, determine whether special processing of those cases is necessary, and then schedule case events based on a consideration of the likelihood of imminent death or illness.¹⁵ The National Probate Court Standards support that concept as well, stating that "...certain parties or cases may require special handling or scheduling. The caseload system should provide for the early

identification of these parties and cases, and the court should be prepared to give them appropriate attention and accommodation. Instances where special attention may be needed include cases in which ... parties or witnesses are ill, elderly, or near death.¹⁶

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.

Commentary: In many cases involving elder abuse, the older person's capacity may be at issue. For example, capacity will be at issue if the older person is the subject of a guardianship petition brought in an attempt to terminate the abusive situation or if the alleged abuser defends a civil or criminal action by claiming that the older person willingly and knowingly entered into a transaction. Consistent with ABA policy and pertinent national standards, the Delphi Study participants strongly endorsed the concept that courts should authorize and use trained, knowledgeable individuals (their title varies from one jurisdiction to another) to assess the older person's capacity to make decisions. For questions asked about non-criminal court proceedings, levels of support ranged from 82% to 93%, depending on which title was used in the question. (The use of guardians *ad litem* received the lowest of those rankings; a possible explanation for that finding is that in some jurisdictions a guardian *ad litem* is perceived as being an advocate, rather than an unbiased evaluator.) Criminal courts should order or ensure evaluation of an older abuse victim's capacity, according to 76% of the Delphi respondents. No comments were offered to explain this different rate of response. It is possible, however, that some of the respondents did not recognize the need for capacity assessments in criminal proceedings due to a lack of understanding that an abused older person's capacity may be raised in a criminal trial either by the abuser as a defense or by the prosecutor as an indicator of the vulnerability to abuse.

The ABA already has a body of policy regarding capacity assessments in guardianship proceedings. In 1987, the ABA endorsed the Recommended Judicial Practices adopted by the National Conference of the Judiciary on Guardianship Proceedings for the Elderly.¹⁷ These recommended practices called for the use of guardians *ad litem*, visitors, or court investigators who are professionally trained and knowledgeable about the problems of older persons to assist the court in determining capacity.¹⁸ Additional ABA policy states that capacity assessments should take place in the "usual environment" of the older person, with "all due consideration given too their privacy and dignity."¹⁹ ABA policy also provides that individuals should be assessed to determine their capacity to make specific decisions and undertake certain tasks.²⁰ The National Probate Court Standards lend weight to this recommendation, stating that in both guardianship and conservatorship proceedings the court should "avail itself" of knowledgeable experts and professionals when making determinations about an

individual's capacity.²¹

The focus groups comprised of elderlaw practitioners discussed these issues, and agreed upon the importance of capacity assessments in cases involving elder abuse. Training of the individuals making those determinations and standards to guide their decision-making were deemed critical by these focus group participants.

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

Commentary: The capacity of an older abused person may be a pivotal issue in any type of court proceeding involving elder abuse. An increasing number of guardianship and adult protective services statutes direct judges to search for the "least restrictive alternative" when limiting decision-making authority or imposing protective services upon an adult. Therefore, it is critical that judges are cognizant that capacity is no longer viewed as an "all or nothing" matter. Individuals vary enormously in their functional ability, and situations demand different levels of capacity. Through their answers to a variety of questions, Delphi Study and focus group participants overwhelmingly expressed the need for judges to be knowledgeable about and sensitive to the possibility that an individual may have varying degrees of capacity. This issue may present itself not only in regard to scheduling and expediting court procedures, but also in a judge's decisions about admissibility of evidence, jury instructions, and the final outcome of a case.

In recent years, developing law and legal commentary regarding determinations of capacity have reflected this shift in thinking. Capacity assessments are now generally based on a determination of functional limitations, rather than as a conclusion founded on a medical diagnosis. Both ABA policy and the National Probate Court Standards reflect that change in thinking.²²

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.

Just as vulnerability can be a risk factor for becoming a victim of street crime, incapacity is generally perceived as a risk factor for abuse.²³ Accordingly, 85% of the Delphi participants believe that judges need to consider that fact when handling cases involving abuse and ensure an unbiased, qualified evaluation of capacity if necessary. A judge's awareness of this link between incapacity and abuse may have some influence on decisions regarding admissibility of evidence, jury instructions, and the final outcome of a case.

Judges, prosecutors, lawyers, and adult protective services workers participating in the focus groups spoke repeatedly of the importance of judges being knowledgeable about the dynamics of elder abuse and sensitive to the needs and circumstances of older abused persons. Some of the judges voiced concerns about stereotyping older persons or

giving them special treatment, while other judges argued that sensitivity and awareness do not necessarily equate to stereotyping or special treatment.

Non-Criminal Court

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

Commentary: Adult Protective Services workers cannot force services upon an abused individual, unless that person is found to be incapable of knowingly and willingly refusing assistance. As a result, guardianship is sometimes used in an attempt to terminate an abusive situation, particularly in instances of self-neglect. Almost all (91%) of the Delphi participants indicated that courts hearing petitions for guardianship of an older abused person should explore his or her level of capacity and the possibility of using limited guardianship or other less restrictive alternatives than plenary guardianship. This recommendation is consistent with ABA policy and with the National Probate Court Standards, both of which encourage the use of alternatives to guardianship whenever feasible.²⁴

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.

Commentary: The involvement of a lawyer is critical to help ensure the rights of an older abused person in non-criminal court proceedings. Accordingly, 83% of the Delphi participants and many of the focus group participants supported the idea of having court-appointed lawyers for older abused persons in non-criminal court proceedings. A slightly smaller proportion (80%) of the Delphi respondents indicated that non-criminal courts should appoint counsel to represent an older abused person immediately if his or her capacity is at issue.

ABA policy calls for the appointment of counsel, who shall act as an advocate for the respondent, in every guardianship proceeding.²⁵ The National Probate Court Standards also support this recommendation, through their discussion of how appointment of counsel for respondents may be critical in many cases even if it is not necessary in all cases. Recognizing the vulnerability of respondents in guardianship proceedings, these standards also examine the timeliness of appointing counsel and discuss the possible need of the respondent for information and assistance prior to counsel's assignment.²⁶

Criminal Court

Recommendation 12. Courts should allow prosecutors special latitude in questioning older abused persons and in offering additional witnesses and corroborating evidence.

Commentary: Consistent with the participants' over-arching concern about the reluctance or inability of older abused persons to testify in court, this recommendation offers two ways of making it easier to get an older abused person's "story" before the criminal court. Delphi respondents expressed concerns about the problems that prosecutors experience in pursuing perpetrators of elder abuse, with 80% of them indicating that prosecutors believe that older people are not good witnesses and 82% replying that prosecutors often lack credible witnesses to elder abuse. The two ideas posed in this recommendation were endorsed by 80% and 89%, respectively, of the respondents.

Prosecutors participating in the focus groups spoke of the difficulty of prosecuting cases when the victim has memory problems or is unable to testify. In these discussions, they indicated that lack of any special latitude from the courts is only one barrier to their prosecution of abuse cases. They also examined their reliance upon law enforcement officers and APS workers to thoroughly investigate complaints of abuse while maintaining an awareness that the alleged abuser may ultimately need to be prosecuted.

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.

Commentary: Although plea agreements are sometimes disparaged, they are necessary to ensure the functioning of the criminal justice system. They may be viewed as a useful tool in the prosecution of elder abuse cases, particularly those involving family or caregiver abuse, because of the reluctance of abused persons to bring criminal charges against family members or caregivers. Indeed, 95% of the Delphi respondents indicated that older abused persons are reluctant to press charges against abusive family members or caregivers because "they do not want to get that person in trouble." More than 80% of the respondents recognized that the abused person is often dependent on the abuser for care or companionship, and is therefore unwilling to pursue the criminal process. These results suggest that judges, prosecutors and law enforcement officers ought to ensure that an abused person is aware that the courts have the authority to impose penalties such as counseling, rather than time in jail or prison. Nevertheless, 93% of the respondents believe that courts must examine whether a proposed plea agreement will benefit the abused person or, instead, place him or her in further jeopardy.

D. 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.²⁷

Commentary to Recommendations 14, 15, and 16: In recent years, advocates in the fields of child abuse and elder abuse have been debating procedural innovations and reforms that might make it "easier" to get an abused individual's "story" before the court in spite of that individual's fear of testifying or inability to testify due to incapacity or death. That discussion continued as part of this project, with the results depending on the particular innovation under consideration. Those innovations have been arranged into three categories. The ideas contained in these three categories generated diverse levels of support from the Delphi Study participants. Some ideas garnered substantially less support than the amount needed for consensus, while others received near unanimous support. Nevertheless, for reasons discussed below, this project is recommending that each of the three procedural innovations be studied further.

The innovation discussed in Recommendation 14 -- allowing an older abused person's testimony to be taken and preserved on videotape so that a case can proceed if the individual becomes incapable of testifying or dies -- was the least controversial of the three. This idea drew widespread support among the Delphi respondents, 95% of whom said that non-criminal courts should allow an older abused person's testimony to be videotaped before the individual loses the capacity to testify. The benefits of this strategy are bolstered by the substantial support, 91% and 92% respectively, of the Delphi respondents for the concept of allowing a non-criminal court and criminal court action to continue even if the older abused person dies before the case concludes.

An older abused person's fear of testifying against his or her abuser was perceived as a reason why elder abuse cases are not brought to non-criminal and criminal court by 93% and 86%, respectively, of the respondents. The response rates were almost identical (91% and 87%, respectively) when participants were asked if the reluctance of older persons to air the abusive situation in public was a reason why cases were not brought to the courts. Recommendation 14 raises procedural innovations that might be instituted to help alleviate some of that fear and that produced consensus among the Delphi respondents. Support for conducting non-criminal court proceedings informally while protecting due process rights was offered by 76% of the Delphi participants. Allowing an older abused person to provide testimony on videotape or by closed-circuit television was regarded as useful by 91% of the respondents for non-criminal actions and by 85% of them for criminal proceedings. Questions about closing courtrooms to the public or conducting hearings in chambers received varying responses; 89% of the respondents indicated that criminal court judges should close the courtroom to the public

if the capacity of an older abused witness is at issue, yet only 50% of them thought that non-criminal court actions should be conducted in chambers if the abused person's capacity is at issue. Members of the advisory committee expressed concern about the idea of closing elder abuse proceedings off from public scrutiny. In addition, one might speculate that the different level of response results from participants' belief that a victim of a criminal act whose capacity is at issue should be afforded greater privacy than a party to a civil proceeding (comparable to the privacy granted to rape victims in some jurisdictions).

Recommendation 16 addresses the issue of making hearsay evidence more readily admissible in cases involving elder abuse. Delphi respondents did not reach consensus on the questions pertaining to this issue, with 62% indicating that judges in both criminal and non-criminal court proceedings should more readily admit hearsay evidence.

There was controversy about these potential recommendations, particularly those regarding admission of hearsay evidence and closing the courtroom to the public. The judges, prosecutors, and lawyers who participated in the Delphi Study, the focus groups, and the Advisory Committee expressed significant doubts about the merits of and need for these suggested changes in traditional procedure. Some of those participants felt that changing these procedures would not enable lawyers to do anything they can't already do or would not add anything of benefit. Others were more concerned with the implications of changing these rules for other types of cases and litigants.

Each of these proposals raises constitutional due process questions, particularly in the criminal court setting. Many of the non-lawyers who participated in the Delphi Study and in the focus groups may not have understood the reasons for the traditional rules of evidence pertinent to these three recommendations. Therefore, they may not have understood the ramifications of revising them, even if only for specific types of cases such as those involving elder abuse. Although the respondents reached consensus on some of these strategies, this project recommends only that these issues be studied further. These are difficult issues with potentially serious repercussions that have not yet been analyzed in the context of elder abuse, as they have been to some extent in child abuse. Further study of these issues is necessary to advance the dialogue about their implementation.

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.

Commentary: The need for intra-court coordination regarding elder abuse cases was brought to the attention of project staff by a judge and lawyer serving on the project's advisory committee. To illustrate the problem, the lawyer shared a personal experience of representing the guardian of an abused person and obtaining a temporary restraining

order against the abuser, only to discover that within days of that order the same judge had granted the abuser a temporary restraining order to keep the guardian away from the abused ward without cross-checking any of the names of the persons involved. This example indicates that having a system that allows intra-court coordination is not sufficient; judges and court personnel must use it. This lack of intra-court coordination and cooperation was identified as a barrier to the courts' effective handling of elder abuse cases by 82% of the Delphi respondents.

The judges participating in the focus groups were not concerned about this issue. The judges opined that coordination was not much of a problem to begin with, and that it was becoming even less of one as courts make more use of computers to track cases. Nevertheless, the extent of the concern about this issue among the Delphi participants, practicing lawyers in the focus groups, and advisory committee members supports this recommendation for enhanced intra-court coordination. This problem has existed in cases of domestic and family violence as well, and is often cited as one of the reasons for support of family courts and of family violence task forces and coordinating councils.

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."

Commentary: Related to the idea of intra-court coordination is the broader concept of consolidating certain types of cases into "unified" or special courts, for example "drug courts" or "family courts," that are linked with services and other interventions. This concept is highly controversial, although it is supported by the ABA.²⁸ Between 50% and 60% of the Delphi respondents indicated support for the use of special or family courts to handle cases involving elder abuse. It is important to note, however, that the number of respondents who had no opinion about the usefulness of family court was generally twice the number of the persons who indicated that they were not useful. Further, because of the phrasing of the questions, it is not possible to determine whether the doubts about usefulness related to the specific idea of family courts or to the broader idea of consolidating these cases in some type of special court. Therefore, this project recommends that the idea of consolidating elder abuse cases into a family court or some other type of special court be studied further. At the very least, the continuing dialogue about the merits of the family court concept should be expanded to incorporate discussion about the inclusion of elder abuse cases within the court's jurisdiction.

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.

Commentary: ADR is widely perceived as having many advantages over traditional dispute resolution by the judicial system. The Delphi Study participants recognized the general benefits of using ADR, reaching consensus that, among other things, ADR is less

intimidating and less costly, more flexible, and allows for more creativity than the judicial process. Nevertheless, there also was consensus that (1) ADR doesn't stop continuous abuse of older persons immediately (76% of participants agreed with that statement); (2) neither the ADR process nor enforcement of any ADR result will work effectively when either the abused person or the abuser is mentally incapacitated (these two issues attracted the support of 77% and 80%, respectively, of the participants); (3) ADR may be used by an abuser hoping for death or incapacity of the older abused person to stall court proceedings (77% of the participants agreed with this statement); (4) ADR lacks enforcement mechanisms (supported by 76% of the respondents); and (5) ADR staff and volunteers generally are not trained or knowledgeable about the dynamics of elder abuse (75% of the participants agreed with that statement).²⁹ Each of these negative attributes of ADR might be present if it were used in cases involving elder abuse. Further study of this issue might be useful in determining whether any or all of these attributes actually are present. Additional investigation also might indicate whether there are certain types of elder abuse cases or certain characteristics of parties for which the benefits of using ADR might outweigh its disadvantages.

A few of the focus groups addressed the use of ADR. While there was some diversity of opinion, in general the participants expressed skepticism about the use of ADR in cases involving elder abuse because of the same concerns indicated by the Delphi Study participants and discussed in the previous paragraph.

This recommendation for restraint and further study is consistent with ABA policy providing general support for the use of and experimentation with ADR as long as parties' constitutional and legal rights are protected,³⁰ on the use of ADR in "appropriate cases" to meet the needs of older persons and persons with disabilities,³¹ and on the need for further study of "victim-offender mediation/dialogue programs".³² Indeed the ABA Commission on Legal Problems of the Elderly is in the midst of a demonstration project to test the viability of using mediation to resolve bioethical disputes in nursing homes. Support for this position also comes from the National Probate Court Standards, which provide that the court should refer appropriate cases for mediation but, in the commentary, state that mediation may not be appropriate in cases "in which one of the parties is at a significant disadvantage."³³ Examples given of cases that may be inappropriate include those in which persons are involved "who have been physically or emotionally abused by another party" or those in which parties "perceive themselves as significantly less powerful than the opposing party."³⁴

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.

Commentary: The benefits of such training are two-fold: (1) training may help prevent a guardian from abusing his or her ward or may help the guardian prevent abuse by a third party, in part by making the guardian more aware of community services that may prove helpful in meeting the ward's needs; and (2) as the surrogate decision-maker for an older person, a guardian is in a good position to recognize that abuse is occurring and report it to APS or other appropriate entities. This recommendation was deemed useful by 89% of the Delphi respondents. Additional support for training of guardians can be found in ABA policy on recommended judicial practices in guardianship and in the National Probate Court Standards.³⁵

The ABA policy already calls for training of guardians to address the aging process, autonomy and the concept of the least restrictive alternative, community resources -- including the services provided by the aging network, fiduciary responsibility, and requirements of guardians imposed by statute and court rules.

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.

Commentary to Recommendations 21, 22, and 23: Another major theme of the Delphi Study results is the importance of supporting and assisting older abused persons regardless of whether they are pursuing non-criminal court remedies or they are witnesses in criminal proceedings. Close to 90% or more of the Delphi participants related that an older abused person's fear of the courts or lack of knowledge about their rights and about the judicial system may inhibit their pursuit of appropriate legal remedies. More than 90% of the participants as well as some focus group members also indicated that the lack of support may preclude abused older persons from pursuing their rights. For example, 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. Accordingly, more than 95% of the respondents believe that victim/witness program advocates should assist older abused persons in non-criminal and criminal court proceedings.

To assist older abused persons effectively, victim/witness advocates need training

on the dynamics of elder abuse as well as on the other forms of aid available from APS and aging services in that community. A victim/witness advocate who specializes in elder abuse and thus has more in-depth knowledge is perceived as useful by 94% of the Delphi participants.

Recommendation 23 is intended to benefit abused individuals who seek help from the courts, but who are not represented by a lawyer or who have no victim/witness advocate. In spite of campaigns to raise public awareness about the existence of APS and aging services, many older persons remain uninformed of those services and sometimes turn first to the courts for help in addressing a problem. Additionally, older persons bring *pro se* actions before the courts. The failure of court staff to explain the judicial process to older abused persons was seen as a barrier to their pursuit of legal remedies by 75% of the Delphi participants.

ABA policy already endorses adequately funded victim/witness programs that are responsive to the needs of older persons and persons with disabilities; the ABA also supports the concept of making the judicial system more "user-friendly" through the same means suggested in Recommendation 23.³⁶ These recommendations expand upon that policy by calling for victim/witness advocate programs that assist parties and witnesses in non-criminal court proceedings. The National Probate Court Standards also lend support to these recommendations.³⁷

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.

Commentary: State and local task forces and coordinating councils on elder abuse, family violence, and domestic violence have already been established in a number of jurisdictions. Some have the support and leadership of the courts.³⁸ Indeed, the State Justice Institute has funded the National Council of Juvenile and Family Court Judges to assist in development of Statewide Family Violence Coordinating Councils. As of January 1995, such councils existed in Alaska, Arizona, Arkansas, Delaware, the District of Columbia, Florida, Georgia, Guam, Illinois, Iowa, Maine, Massachusetts, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, and West Virginia.³⁹ It is not known whether any of these Family Violence Coordinating Councils are addressing elder abuse as part of the continuum of family violence. Statewide task forces on elder abuse exist in Colorado, Florida, Massachusetts, New Hampshire, South Carolina, and Virginia. These entities have been organized through state departments of human services or by the state's attorney general, but they have not involved judicial leadership.⁴⁰ This recommendation is certainly not intended to encourage duplication of efforts or competition for scarce resources, but rather to encourage the courts to foster coordination among the relevant professionals in the manner best suited to the needs of the jurisdiction. An average of 90% of the Delphi participants supported the questions relating to the various components of this recommendation. The focus groups participants supported these concepts as well.

ABA policy provides substantial support for this recommendation. ABA policy endorses the recommendation of the Conference on Court-Related Needs of the Elderly and Persons with Disabilities calling for the chief justice of each state's highest court to convene an "interdisciplinary coordinating committee" to address many of the same issues discussed in these recommendations regarding elder abuse.⁴¹ On comparable matters, ABA policy supports the creation of interdisciplinary children's committees to address the needs of children.⁴² Judicial involvement in educating the public about law and justice is also supported by the ABA.⁴³

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.

Commentary: Linkages between the courts and other organizations involved with cases of older abused persons were highly regarded by the Delphi participants as useful tools for helping the courts handle these cases. Consensus level support was reached for linkages between the courts and the following organizations: APS (81%), pertinent bar association committees and sections (84%), publicly-funded providers of legal services for older persons (91%), banking community (84%), law enforcement (95%), the Medicaid Fraud Control Unit and Attorney General's victim's advocacy division (87%), the state long term care ombudsman program (92%), mental health agencies and advocacy organizations (91%), and aging services organizations (89%).

Interestingly, in spite of the high levels of support for linkages between the courts and these other organizations, only 68% of the Delphi respondents thought that including

APS or aging services on court advisory councils would help the courts handle elder abuse cases more effectively. Of the 166 individuals responding to that question, 41 (25%) of them had no opinion (7 of those respondents were judges, 1 was court personnel; the largest category of respondents without an opinion on this issue was composed of 9 APS workers and administrators). No comments were provided by respondents, so it is impossible to tell whether they were unsure of the value of court advisory councils in general or if they were not sure whether including these organizations on the council would impact judicial decision-making in elder abuse cases. Participants may also have believed that other mechanisms (such as a task force or coordinating council on elder abuse or family violence) for establishing linkages might be more valuable; other suggested mechanisms are discussed in the next two recommendations.

Nevertheless, court advisory councils may be an important means of creating linkages with APS, aging services, and other relevant organizations. This recommendation does not take a position on whether participation of these entities on court advisory councils should be in addition to or in lieu of a task force or coordinating council on elder abuse or family violence or some other mechanism for establishing linkages because that decision depends on the state of affairs and needs of each court and community. Including advocates for older abused persons on a court advisory council may help to integrate the issue of elder abuse into the functioning of the entire court system more than can be done if the issue is addressed by a separate task force or coordinating council. Further, advocates' participation on a court advisory council may enhance the awareness of the judges and court personnel and encourage their leadership in the development of a task force or coordinating council on elder abuse or in the incorporation of elder abuse into an existing task force or coordinating council on family violence. On the other hand, a task force or coordinating council may be better able to address the broader range of issues and systems that intersect with the courts on 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.

Commentary to Recommendations 26 and 27: Courts should lend their support to efforts to enhance coordination among the various organizations that address the problem of elder abuse. Mechanisms for coordination include the "multidisciplinary team" on elder abuse and the creation of protocols or memoranda of understanding to coordinate investigation of abuse incidents and services to abused individuals. The courts may benefit from better coordination among these organizations 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.

Multidisciplinary teams (MDTs) may be known by different names (such as a "Human Resources Team" or an "Adult Protection Team"), but they generally have the same objectives. MDTs meet regularly to discuss individual cases; address systemic problems such as their organizations' response to elder abuse, inter-agency cooperation, funding, and legislative reform; and to develop and provide community and professional education on elder abuse. MDTs may be comprised of some or all of the following: APS workers; psychiatrists, psychologists, or other trained counseling personnel; police officers or other law enforcement agents; physicians, nurses, or other health care providers (including visiting nurses and home health care agency staff); social workers; area agency on aging staff; aging services providers; legal services or private elderlaw attorneys; advocates for older persons or persons with disabilities; prosecutors; representatives of the Attorney General's office; advocates for victims of domestic violence; bankers; clergy and representatives of social services agencies sponsored by religious organizations; members of civic groups; court personnel; long term care ombudsman program staff; rape crisis center staff; hospital social workers; public housing authority staff; victim/witness program staff; and community leaders.

There are a variety of ways in which courts can support the MDTs. First, courts can encourage pertinent organizations to develop a team if none currently exists in the jurisdiction. Second, judges and court personnel can provide needed training about the role and functioning of the courts to MDT participants. MDTs including judges or court personnel (among others) as members were seen as useful by 80% of the Delphi participants; the judges, lawyers, and prosecutors participating in the focus groups also supported the concept of MDTs but were strenuously opposed to the idea of sitting judges taking part in MDTs if individual case discussions are part of the team's effort. This project recognizes that sitting judges cannot participate in MDTs that discuss cases that may come before them, but nonetheless suggests that the courts can play a key role in nurturing MDTs. Additionally, retired judges can bring valuable wisdom about the judicial process to MDTs. The Fiduciary Abuse Specialist Team (FAST) in Los Angeles benefits greatly from the participation of a retired judge in its deliberations.

The fact that protocols or memoranda of understanding between relevant organizations regarding case referrals and investigations can help the courts improve their handling of elder abuse cases was recognized by 87% of the Delphi respondents. An even greater number of participants (91%) supported the idea of entities such as law enforcement, APS, and licensing agencies developing protocols for sharing reports about incidents of abuse. The courts can use their authority within a community to help foster the development and implementation of such protocols and memoranda.

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.

Commentary to Recommendations 28 and 29: A meaningful way in which courts can better handle cases involving elder abuse is by directly connecting older abused persons who are unaware of APS and other aging and social services with those organizations. While these recommendations may seem onerous at first glance, they are likely to be limited in their application to those individuals who seek help from the judicial system without benefit of counsel or without the assistance of a victim/witness advocate. As discussed previously in the Commentary to Recommendation 23, older abused persons often are ignorant of the availability of APS and other services. Additionally, even if they are aware of these services they may not think of themselves as abused.

Some judges and court staff are already aware of the service organizations in their community and make referrals when necessary. The availability of brochures or other materials would make this effort easier for them as well as for the majority of judges and court staff who are less knowledgeable of community services. Moreover, printed materials might help the older person actually make contact with the organization.

A far greater level of assistance than that suggested in Recommendation 28 is supported by the Delphi participants, 81% of whom think that it would be useful to have "court social workers" who link (rather than just refer) older abused persons with appropriate social services and who also connect the courts with pertinent advocacy and service organizations. This concept is an essential component of family courts and other types of special courts, and thus no longer a foreign concept to the judicial system. A lengthy discussion of this idea by the project's advisory committee and the members of the ABA Commission on Legal Problems of the Elderly led to the suggestion that courts could utilize trained volunteers to serve as court social workers or ombudsmen. Although some participants in the discussion expressed concerns about relying on volunteers for such efforts, others pointed out examples of successful use of volunteers in the courts. These examples included the Court Appointed Special Advocate (CASA) program for cases involving children and the American Association of Retired Persons' (AARP) programs using AARP members to serve the courts as volunteer monitors of guardianship cases.

Further support for these recommendations is offered by the ABA's policy, derived from the recommendations of the Conference on Court-Related Needs of the Elderly and Persons with Disabilities, that calls for court staff to provide assistance and referrals to *pro se* litigants.⁴⁴ The ABA also has policy regarding crime victims and witnesses that states that the courts should provide information to those individuals or their representatives about available social and medical services and about their role in the judicial process.⁴⁵