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Dispute Resolution

Developing Ethical Standards for Elder Mediation: Questions Along the Way

Part II of a Series. See part I in the June 2007 issue of *BIFOCAL*.

By Kathryn Mariani

The First National Symposium on Ethical Standards for Elder Mediation was held April 19-20, 2007, at Temple University's James E. Beasley School of Law. More than one hundred scholars and practitioners from the fields of mediation, elder law, gerontology, and medical ethics engaged in vigorous discussions that raised additional questions and topics that must be examined on the road to the development of standards.

Harry "Rick" Moody, a national figure on aging, and a dynamic speaker, opened the program by sensitizing the audience to issues of aging and ageism. He referred to eminent American gerontologist Robert Butler, who, in 1969, defined ageism as "a process of systematic stereotyping and discrimination against people because they are old . . ." Ageism may manifest itself in covert and overt avoidance or exclusion, even disdain or pseudo-positive attitudes towards older people at the micro and macro level of social interactions.¹ The relationship between ageism, conflict involving older adults, and elder mediation practice was a recurrent theme throughout the symposium.

Dr. Moody charged the audience to approach mediation ethics from the "reality of lived experience." He stated "gerontological correctness does not account for life's complexity." Dr. Moody poignantly described families who strove to follow their loved one's end-of-life wishes only to have extenuating circumstances and American medical practice dictate otherwise.

Dr. Moody pointed to mediation, even in its imperfect state, as a source of hope for families who struggle with ethical dilemmas. He exclaimed, "if not mediation, then what?" Court intervention can intensify grief and potentially tear families apart.

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Kathryn Mariani is the director of elder mediation at the Montgomery County Mediation Center, in Norristown, Pennsylvania.

Safety Net for Older Americans: What Can Be Done to Protect it?

You are invited to attend the 7th Annual National Aging and Law Conference, October 10-13, 2007, in Arlington, Virginia.

For more information, see page 98.

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Why Elder Mediation?

Elder conflict is unique because it may affect us all. However, the term “elder mediation” raised concerns. Who exactly is an “elder” and what constitutes an elder mediation case? Is the term value neutral or does it imply advocacy?

Panelist Nancy Solnick, a mediator and retired elder law attorney, explained what makes elder mediation different is that it is often “multi-party, multi-generational, and multi-issue.” She compared elder mediation to elder law, which evolved from the issues that arise during a particular phase of life. “Loss, stress, and change in circumstances as we age may be the true axis around which elder mediation turns,” concluded Ms. Solnick.

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Conflicts addressed in elder mediation cross into substantive areas such as estate planning, real estate transfers, long-term care, and guardianship. Elder mediation may require the involvement of others, such as lawyers, surrogates, and resource individuals to help participants “properly discuss issues.”

“Ageism is another factor,” noted Paul Solnick, also a mediator and retired elder law attorney, as well as a physician. Mediators need to be sensitive to the lost voice of the older adult even when the conflict is not specifically age-related. “Ageism itself may be the origin of the dispute,” said Dr. Solnick. Part of ageism is the judgment that an older person who is willing to accept risk is associated with incapacity. Ageism may prompt other participants, and perhaps even the mediator, to exclude the older adult from decision-making.

While older clients may need accommodations due to factors associated with normal aging, mediators need to watch out for making assumptions and the unconscious influence of ageism on their own communication and body language. Dr. Solnick instructed mediators to treat older persons as clients of any age and not become over solicitous or protectionist.

James Madison University communications professor Dorothy Della Noce cautioned that the subspecialty of “elder mediation” may segregate the experience of conflict by age, when loss and conflict are major sources of stress for people at any age, and managing conflict by avoidance or submission can also occur at any age.

Is Elder “Mediation” All the Same?

Professor Della Noce asked how we can establish ethical standards for elder mediation when we don’t share a common understanding of “mediation.” “The word has multiple value-based definitions and we don’t all share the same values,” she explained. What is ethical for mediation when understood as conversation is not same as when it is understood as negotiation or as a settlement conference.

Differences in mediation practice permeated discussions throughout the symposium. Some mediators focus on producing legally sound agreements, while others place emphasis on less tangible goals such as empowerment and enhanced communication. The first gives significant power and responsibility to the mediator and the other minimizes mediator influence and rests power in the hands of the parties. One tends to be oriented more toward rights and the other toward process. These core differences impacted opinions about capacity issues, the provision of substantive information, dual roles, and professional requirements.

Mediators' Stake in Outcomes

Differences in approach crystallized during a presentation featuring a dialogue between mediation ethics scholar Robert Baruch Bush and bioethics mediation expert Nancy Neveloff Dubler. The topic question was "does the mediator have a role in ensuring that the outcome of a mediation does not violate ethical and legal norms?" Professor Bush holds that mediators should attend to the dialogic quality of the conversation and must respect the parties' capacity to make and live with their own decisions. Working within a hospital setting, Ms. Dubler feels responsible to create a setting where the lower members of the hierarchy have a voice, staff is supported during patient/family complaints, and decisions follow agreed-upon medical ethical norms and hospital guidelines.

The dialogue spurred discussion of the dual role inherent in positions that some conflict intervenors hold within institutions or government, particularly within long-term and acute-care settings. As a hospital ethicist or psychiatrist or a long-term care ombudsman, a meditative approach may bring parties together, but ultimately the intervenor may be required to conduct an evaluation, advocate for residents or staff, or insert an ethical norm or institutional policy. Questions arose as to the impact on the participants' interaction and perception of neutrality when the mediator has an active stake in the outcome.

The dialogue heightened questions that loomed over the symposium, such as "what is the mediator's responsibility when a "vulnerable person" is involved in the dispute?" "What defines vulnerability?" "Are all parties vulnerable at some level?" "How should a mediator respond when efforts are made to exclude someone whose body and life are directly impacted by the mediation?" "Are outcomes of such a mediation process legal or ethical?" The symposium

The Author and ABA Commission Invite Your Comments

The symposium revealed striking differences of opinion on many aspects of elder mediation.

We would like to hear from you and foster a dialogue on this important topic.

E-mail your comments c/o BIFOCAL, to: Philpotj@staff.abanet.org.

Please include the words "elder mediation" in the subject line of your e-mail.

scratched the surface of the pressing issues associated with these questions.

Capacity Issues and Elder Mediation

A large segment of the symposium examined capacity issues and different understandings within the legal, medical, and mediation contexts. All three begin with an assumption of capacity. All understand that there is no bright line defining whether one does or does not have capacity. Instead, capacity can fluctuate, is task specific, and is affected by context and available resources.

Dr. Robert Roca, an expert in medical decisional capacity, explained that there is no diagnosis for incapacity. The question is whether a particular individual can make a particular decision at a particular point of time in light of current symptoms. If it is unclear whether symptoms affect decision-making, the gravity of the decision and level of impairment will be considered.

Attorneys are regularly burdened with the task of deciding about a client's capacity to enter into an attorney/client relationship or to perform certain legal tasks, stated **ABA Commission on Law and Aging Director Charlie Sabatino**. Likewise, the burden falls on the mediator as to whether to proceed with mediation. It is unlikely that a mediator will get a medical determination on whether one has the capacity to mediate or to make the specific decisions at hand.

Therefore, there needs to be a conceptually sound and practical protocol, such as set forth for attorneys in the publication *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (ABA & APA 2005, see page 92 in this issue). Many of the guidelines are transferable to mediation.

What Constitutes Capacity to Mediate?

Tim Hedeem, professor of alternative dispute resolution, spoke of "mediation readiness." He used qualifiers, such as the ability to focus on one issue at a time, assess options, identify desired outcomes, and give voluntary and informed consent to any agreement. He suggested that the ability to carry on some level of interactive communication is necessary. Nevertheless, Professor Hedeem supports the use of accommodations to assist persons with impairment to participate. Mr. Sabatino, who described contractual capacity as what you generally want for mediation, also supports inclusion of persons with diminished capacity.

As attendees highlighted the benefits of mediation beyond the potential construction of an agreement, many

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supported broad participation by those with or without a legal or medical determination of capacity. It was suggested that mediation may be an effective means to resolve common disputes between an agent under POA or guardian and the person under their care. Mediation was proposed as a tool to improve the monitoring and operation of guardianships.

The majority took the position that persons with an impairment should be involved “to the greatest extent possible” in order to make some choices, experience connection to others, and maintain their dignity and personhood. Someone may not fully understand what is being discussed, but may be able to express a feeling or preference about the topic. Mediators need to look at different ways to structure the process in order to maximize capacity. Time of day, familiar setting, duration of the session, and use of support persons should be considered. The question should be not whether the person has the capacity to mediate, but does person have capacity to mediate with support.

Should the Older Adult Always Be Present?

Penny Hommel, executive director of the Center for Social Gerontology, expressed that her greatest concern about elder mediation is “will the elder voice be heard?” The goal of TCSG’s 20-year-old guardianship mediation program is to find an alternative to a formal guardianship proceeding. Not that mediation can or should be used to determine legal capacity for guardianship, but it is a process that may increase the role of the older adult, lead to less restrictive measures, and uncover underlying issues that cannot be

Collaborate is a listserv dedicated to providing a forum for the aging, disability, and dispute resolution communities. Sponsored by the ABA Commission on Law and Aging, the listserv includes more 185 mediators, lawyers, long-term care ombudsmen, aging and disability advocates, service providers, and academics. The objective is to promote the use of creative dispute resolution mechanisms in the aging and disability communities.

The listserv is low-key, and offers a useful way to exchange information, updates, and announcements.

To sign up, e-mail to ericawood@staff.abanet.org.

addressed in court. If the older person is not present or does not have a spokesperson, how is mediation better?

Many expressed the power of a person’s physical presence at a mediation session, even if he or she has limited ability to engage in discussion. On the capacity continuum, expressions of pain, sadness, joy, and desire are very much alive even when reasoning is impaired. Family members and healthcare personnel are more likely to make decisions that consider the wishes and values of a person who is directly involved. Some even favor holding mediation at the bedside of a person in a coma.

Others spoke to the risk of including an elder person with diminished capacity arbitrarily. A person with severe impairments will not be able to voluntarily agree to participate. Conflict can be particularly difficult for people who are in progressive dementia and mediation could cause further trauma and loss of dignity for the elderly person. There is also a risk of other participants posturing to a vulnerable person in order to influence him or her. In turn, the elder may make decisions based upon the desire not to cause any trouble.

There was consensus that mediators need to be alert to these risks and regularly check in with participants, including the use of caucus. Mediators may need to halt the process or the older adult may need to come in and out of the session.

When an elder is not physically present for all or part of the time, mediators discussed the need to work with the other participants to include the voice of the older person through discussion of the elder’s values, wishes, personal history and through the use of a surrogate, neutral spokesperson, or advocate.

Drawing the Line Between Mediation and Advocacy

As the symposium progressed, emotional debate occurred regarding where to draw the line between mediation and advocacy. What price will be paid if mediators intervene to ensure that the older adult is included and heard? What approach should they use?

The main concern is the risk of alienating family members. Families are complex. Some may be fearful of upsetting their older loved one. Some members feel the older person has power and control, and they are the ones feeling vulnerable. Others have painful histories with the older adult and would be offended if they perceived the mediator was partial to the older person’s needs. Some may feel the need to discuss some issues or air feelings without the older person present. The same may be true in a hospital or long-term care setting.

There was agreement that mediators must be sensitive to the needs of all members of the conflict. Building rapport and

the confidence of all participants is essential. Mediators should use a collaborative approach to decide who needs to attend and topics of conversation.

Are Capacity Issues Limited To the Older Adult?

A repeated theme was that capacity issues are not restricted to older adults. One person asked, “aren’t we all incapacitated in some way when embroiled in conflict? We must stay open and not stereotype.” Mental illness, domestic violence, abuse, duress, fraud, addiction, developmental disability, and stress associated with conflict may impact anyone’s ability to use the process safely and effectively. Careful screening should be conducted of all participants to assess if support or accommodations are necessary or whether mediation is appropriate.

Intake and Screening

The role of intake in any mediation is to explain the process, help parties decide if mediation is appropriate, and determine who, where, when, and how to hold the mediation. The goal is to create an optimal setting for productive communication, to ensure that everyone is comfortable, and to maximize the capacity of all to effectively participate. Additionally, parties can explore whether experts, advocates, or resource persons are needed to support informed decision-making. Symposium attendees added that mediators should expose their model of practice or whether they are functioning in a dual role.

Special intake issues identified for elder cases involve sensitivity to normal aging, screening for capacity issues and elder abuse, and the influence of ageism. Questions arose whether the person conducting the intake interview and the mediator should be the same person. Should the interview be held over the phone or in person? Should the mediator insist on access to the older adult alone? Is it ever appropriate for a mediator to suggest a geriatric assessment?

**National Guardianship Association 2007 Conference
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Models of practice impact one’s approach, but most would operate on a case-by-case basis in keeping with basic principles of safety and inclusion.

Many are in favor of the use of neutral witnesses during intake to help draw out the voice of a person with an impairment and support communication of that person’s point of view at the mediation. This role will relieve mediators from carrying information for the older adult or breaching confidentiality.

There was consensus that resource persons, advocates, and neutral witnesses should be contacted ahead of time to orient them to the process. Their role should be determined by those directly involved in the dispute and may change over the course of the mediation.

All agreed that intake workers need to be flexible and familiar with community resources.

Role of Advocates, Support Persons, Experts

Attendees agreed with **ABA Commission on Law and Aging Assistant Director Erica Wood** that support persons or neutral witnesses should amplify the voice of a participant who may have impaired abilities. Those providing support should regularly consult with the person and whenever possible allow the person to speak. Geriatric ethicist Bethany Spielman noted that the role can be vague since it may be difficult to discern when the support person is inserting him or herself. Mediators need to highlight any differences between the support person and the elder. This holds true for surrogates and advocates, as well, who may impose their own agenda or self-interest.

Much debate arose over the use of experts or resource persons. Law professor and mediator Ellen Waldman presented that mediators should provide substantive information to participants if it will help them make informed decisions in an expedient way. She believes this is what clients expect. Some attendees agreed, stating that it is the mediator’s responsibility to produce durable agreements.

Others greatly opposed. They argued that mediators cannot provide information without diverting themselves from their primary role as facilitators of the conversation. Factual information is subject to interpretation and providing it places the mediator at risk of being perceived as partial by one or more of the parties. They asked at what point the mediator enters into an attorney/client or therapist/client relationship and slips into advocacy. There is a risk of dual professional role or perhaps the unauthorized practice of law or unlicensed social work.

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Most conceded that mediators should know when substantive information is needed. They agreed mediators need to be aware of resources and collaborate with parties to decide if and how to involve experts.

In cases when a person with diminished capacity is in the room and legal decisions are at stake, the mediator may need to decide whether or not to proceed unless the person is represented. A zealous advocate may be needed to argue for the person's wishes or best interest.

Training and Professional Requirements

Many expressed concern that elder mediation is an unregulated practice. Elder mediation, particularly in guardianship cases, involves essential human liberties. All agreed that advanced training is necessary to practice competently. Those with a rights-based approach emphasized education in substantive areas. Those who are process oriented agreed that enough substantive information is needed to know when to involve experts and advocates.

Recommended training included:

- Sensitivity to aging
- Intergenerational family dynamics
- Impact of ageism and bias
- Ethical considerations
- Intake and screening procedures
- Knowledge of elder abuse, neglect, and self-neglect
- Understanding of capacity issues
- How to work with outside experts, advocates, and support persons
- How to maximize capacity and use accommodations
- Practice in multi-party facilitation skills
- Cultural diversity as it relates to aging and dynamics of communication
- Community resources
- Glossary of elder law and aging terms
- Subcategories of advanced training for guardianship, estates, long-term care, healthcare, etc.
- On-going peer consultation

Topics for Further Exploration

The following topics were identified for further exploration:

- Deeper exploration of mediation model differences and ethical issues
- Mediators' responsibility regarding confidentiality and abuse
- When to refer to an outside mediator in institutional settings instead of using staff (administrators, social workers, ethics committee members, etc.) to resolve a dispute
- Use of mediation proactively to bring families together to consider issues surrounding retirement, estate planning, onset of new illness prior to the crisis stage
- Opportunities for interdisciplinary collaboration
- Credentialing for Elder Mediation Practitioners

Conclusion

The First National Symposium on Ethical Standards for Elder Mediation opened the door for discussion of issues that are important to the entire field of mediation. Further work is being done by organizations such as the Montgomery County Mediation Center (www.mediation-services.org), the Institute for the Study of Conflict Transformation (www.transformativemediation.org), and the Elder Mediation Institute (www.tcs.org), to explore the questions raised, examine the implications for elder mediation practice, and to move toward the articulation of standards. Because of differences in mediation models, more than one set of standards may be required. The common goal is to support older adults, families, and care providers in a process where everyone has an opportunity to be heard and to participate in decision-making.

For more information about the symposium and elder mediation, contact Kathryn Mariani at eldermediation@verizon.net or (610) 277-8909.

Notes

1. John Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* 6-7 (Cambridge Univ. Press 2005).



Voting Symposium/ABA Annual Meeting Inside the Commission

ABA Adopts Voting Rights and Cognitive Impairment Policy

By Jamie Philpotts

The ABA House of Delegates adopted a voting rights and cognitive impairment policy submitted by the Commission on Law and Aging, at its annual meeting on August 13.

The policy is based upon the joint efforts of the ABA Commission on Law and Aging, the Borchard Foundation Center on Law and Aging, and the Capital Government Center on Law and Policy at the Pacific McGeorge School of Law in Sacramento, California.

The groups hosted a working symposium of national experts in law and aging, medicine, long-term care, voting technology, and elections administration, entitled *Facilitating Voting As People Age: Implications of Cognitive Impairment*, which convened in March 2007 at the Pacific McGeorge School of Law. (See Charles P. Sabatino, *Facilitating Voting As People Age: Implications of Cognitive Impairment*, 28(4) BIFOCAL, Newsletter of the ABA Comm'n on Law and Aging (Apr. 2007)).

The ABA recommendations represent a "careful distillation" of the full set of symposium recommendations. They focus on protecting and facilitating voting by persons with

disability, with a special focus on cognitive impairments and other brain impairments that increase with age. The recommendations urge federal, state, local, and territorial governments to:

- Improve the administration of elections through four enumerated strategies, including the use of mobile polling stations;
- Ensure retention of the legal right to vote in the event of disability, unless four enumerated judicial criteria are met;
- Expand the availability of absentee or "vote at home" balloting;
- Improve access to voting by residents of long-term care facilities through three enumerated strategies;
- Require and fund the development of universal design in voting systems so that persons with any impairment, including physical, sensory, cognitive, intellectual, or mental, can vote privately, independently, and with ease;
- Recruit and train election workers to address the needs of voters with disabilities.

To read the full report and recommendation, go to the Web page of the ABA Commission on Law and Aging at www.abanet.org/aging.

The complete symposium recommendations, along with the six working papers that formed the basis of the group's deliberations, and the keynote address of Vermont Secretary of State and head of the National Association of Secretaries of State, Deborah Markowitz, will be published in a special issue of the *Pacific McGeorge Law Review* in September.

Subscribe to BIFOCAL, the ABA Commission on Law and Aging's bi-monthly journal, which provides timely, valuable legal resources pertaining to older persons, generated through the joint efforts of public and private bar groups and the aging network.

The ABA Commission distributes BIFOCAL for free six times a year to elder bar section and committee members, legal services providers, elder law and other private practitioners, judges, court staff, elder advocates, policymakers, law schools, elder law clinics, law libraries, and other professionals in the law and aging network. To read the most recent issue, as well as to search back issues, go to <http://www.abanet.org/aging>

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Inside the Commission

ABA Commission Welcomes Law Student from France

In August, the ABA Commission welcomed its first-ever international law student intern—Audrey Mercat, a rising third-year law student at the University of Panthéon-Sorbonne in Paris, France.



Law Student Audrey Mercat

During Ms. Mercat's internship she has been working on a paper comparing the guardianship system in France with that in the United States, especially in light of new guardianship laws passed in France in 2007. With guidance from ABA Commission assistant director Erica Wood, Ms. Mercat is examining the differences in procedural protections, scope of court orders, monitoring, public guardianships, and how the judge determines whether a person is incapacitated.

Ms. Mercat will return to Paris in September, where she has two or three more years of studying before she graduates, depending on what specialty she chooses. She has already specialized in what the French call "Private Law," which includes a wide array of subjects such as civil law (law of civil or private rights), criminal law, labor law, and business law. She will be taking additional courses in international and European law, as well as in comparative law.

Ms. Mercat has not yet chosen her masters program, or decided whether she will pursue work as an attorney in a private practice or for the public interest doing research and helping with policymaking.

Second Imprint

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

ABA Commission on Law and Aging and American Psychological Association (72 pp. 2005. \$25)

The ABA Commission has reissued its popular handbook *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*.

The book offers elder law attorneys, trusts and estates lawyers, family lawyers, and general practitioners a conceptual framework and a practical system for addressing problems of client capacity, in some cases with help from a clinician. While most older adults will not have impaired capacity, some will. Obvious dementias impair decision-making capacity—but what about older adults with an early stage of dementia or with mild central nervous system damage? Such clients may have subtle decisional problems and questionable judgments troubling to a lawyer. To order, e-mail your request to the ABA Commission at abaaging@abanet.org.

New Resource

Title IIIB Legal Services Nationwide Directory Posted Online

The AARP Foundation Technical Support for Legal Hotlines Project has posted online a directory of all Title IIIB Legal Services providers.

The directory, in the form of a state-by-state map, lists legal services providers who serve people age 60 and older with Older Americans Act Funds. Each state Unit on Aging distributes these funds to its local area agencies on aging, which contract with local attorneys or nonprofit legal services. Where the local contractor is a private attorney, the directory does not identify the provider by name.

Staff from the AARP Foundation Technical Support for Legal Hotlines Project polled legal services developers, legal hotlines, legal services providers, and area agencies on aging. The information is current as of summer 2007.

The directory can be accessed at: <http://www.legalhotlines.org/title3.cfm>

For more information, or to change or correct a listing, contact Shoshanna Ehrlich of the AARP Foundation Technical Support for Legal Hotlines Project at: sehrlich@aarp.org.

Creative Ways to Include and Nurture Volunteer Attorneys in Your Elder Law Practice

By Ellie Crosby Lanier

Finding Diamonds

There is a state park in Arkansas that allows visitors to search its trails for diamonds. Those who find diamonds are allowed to keep their gems. Tools are not required, just a sharp eye and the willingness to explore beyond the surface, because diamonds in the rough aren't always as glittery or obvious as those resting on velvet pillows in store windows. Adapting your elder law office or program to include volunteer attorneys can be a bit like finding diamonds in unexpected places: it takes a little work, but the payoff far exceeds the effort.

This article attempts to identify themes that are common among those programs that have uncovered their own “diamonds.” It highlights the creative ways three successful managers have found to use volunteer lawyers in their law offices. It also spotlights a few notable volunteer efforts of some other programs.

David Mandel, managing attorney of the California Senior Legal Hotline, Sue Wasserkrug, managing attorney of the Pennsylvania SeniorLAW Helpline, and Bill Broker, managing attorney of the Savannah office of the Georgia Legal Services Program, are all big believers in the power of volunteers to further their work to serve older clients. They agreed to share their secrets.

What Works

While the services each of these law offices provide vary, they all share some common approaches to utilizing volunteers. All three offices give volunteers a say in the type of work they do to support the program. They also take advantage of the special skills and interests of particular volunteers. For example, a volunteer with a background in zoning law might be recruited to train other staff on zoning issues and appeals or to draft client material related to this area of expertise.

Ellie Crosby Lanier is a project attorney with the AARP Foundation. She is based in Athens, Georgia.

Bill Broker makes sure that volunteer lawyers in the Savannah office of the Georgia Legal Services Program do the kind of work they want and that their assignments are ones they are comfortable with. Most of his volunteers handle individual casework for clients on matters such as consumer problems, housing, public benefits, and incapacity planning. One volunteer works with local community organizations on economic development and nonprofit concerns. In Savannah, volunteers can elect to work on any number of the office's special initiatives, including the kinship care, elder abuse, or health law projects.

David Mandel's dozens of volunteers at the California Senior Legal Hotline perform a wide range of tasks, from support functions to telephone mediation to serving as interpreters—though the majority of his volunteers (active and retired lawyers, paralegals, and law students) are hotline advocates who advise clients directly.

Sue Wasserkrug's volunteers with the Pennsylvania SeniorLAW Helpline take regular weekly or monthly shifts on the phone and elect the subject matter of calls they wish to handle. The subjects range from answering a question about a caller's legal rights in a consumer case to helping a client navigate legal issues related to health benefits such as Medicaid and Medicare.

All three programs treat their volunteers as they do their paid staff members. They provide volunteers with dedicated office space (unless the volunteers prefer to work in their own offices) and assure that they have all the training, resources, and tools available to other staff.

Be Creative and Flexible

Each of the highlighted offices exhibits both creativity and flexibility in the use of volunteers. They find unusual ways to mobilize resources to meet specific unmet needs in the community. Rather than expecting volunteers and clients to adapt to current office structures and schedules, successful efforts tend to utilize novel ways to link lawyers to unmet client needs.

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Including and Nurturing Volunteer Attorneys

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For example, Erin and Brynne McBride of Wisconsin Judicare Inc. developed a unique approach to attract attorneys to pro bono. They founded Legal Grounds Wisconsin®, a free monthly “legal coffeehouse” held at a public library. The concept is simple: offer pro bono services in a relaxed atmosphere at convenient times for those who work during the day (both for the volunteer lawyers and their low-income clients). Area attorneys volunteer for monthly slots to answer brief questions and provide advice in legal areas, including family law, landlord-tenant rights, and small claims procedures. The coffee is provided at no cost by the local Starbucks™ coffee store. The service is available to Judicare-eligible clients in 33 counties in northern Wisconsin. This approach has proved so successful that the McBrides were recognized by the state bar in 2005 as “Wisconsin lawyers who make a difference.”¹

Other creative examples abound. In the Savannah office of the Georgia Legal Services Program, volunteers have provided end-of-life planning services to hospice residents.

The Atlanta Volunteer Lawyer’s Foundation has similar projects that deploy volunteer attorneys in creative ways to meet the needs of low-income clients. Among them is “Wills on Wheels,” a program that sends lawyers to senior centers, nursing homes, and hospitals to assist low-income clients with wills and estate planning. The foundation also sponsors a Probate Law Information Center, which sends volunteer attorneys to the courthouse on a regular basis to assist unrepresented clients with probate questions and forms. In addition, their Saturday Lawyer Program sends volunteers to the main office of the Atlanta Legal Aid Society each week to help serve those who cannot be served by the legal services office.

Volunteer opportunities also can help programs get through times of crisis. In 2005, the Pro Bono Project of the State Bar of Georgia worked with the Pro Bono Committee of the bar’s Younger Lawyers Division to send volunteer attorneys to disaster sites. There, the volunteers answered questions about unemployment insurance, identification replacement, food stamps, and FEMA-related issues. Pro bono coordinator Mike Monahan made sure that volunteers had all the support information they needed. He established a special Web page that included necessary information and forms. It was a creative use of technology to support the critical volunteer effort.²

Bill Broker and his volunteers in Savannah have received national attention for their work. This recognition included positive publicity for the work of the volunteers, receipt of grant awards to expand the program, and presentations at national conferences on the creative model they developed.

California’s volunteers have also received national recognition. Joe Montoya began working as a volunteer attorney at the California Senior Legal Hotline in 1995 after a career as chief counsel for the California Department of Transportation. He is not only the hotline’s longest serving volunteer, but he also recruits others to volunteer and serves as a mentor to newer colleagues on staff. According to David Mandel, when addressing prospective volunteers Joe Montoya shares the reasons he finds the work rewarding. He explains that although many callers’ problems seem small to the volunteer, they loom much larger for the seniors. He swells with pride when seniors say “thank you,” realizing that he has helped fulfill the organization’s mission.³

Last year, Mr. Montoya was honored by the National Association of Area Agencies on Aging with a MetLife-sponsored team spirit award for his work. At the Washington, D.C. event, Joe and his family not only celebrated his award but also commemorated his 80th birthday.

Dazzling Benefits

Using volunteers has enabled each of these offices to serve many more clients than paid staff could handle alone.⁴ In addition, volunteers can be terrific ambassadors for a program and its needy clients, both in the legal community and in the community at large.

At the California Senior Legal Hotline, volunteers assisted the program’s advocacy efforts to obtain state funding to continue serving the large number of seniors in the state with unmet legal needs. One politically-savvy volunteer advocated directly with the California Assembly for these much-needed state funds.

In the early days of the Georgia Senior Legal Hotline, volunteer attorneys who did not want to answer client questions worked instead to help promote volunteerism at the hotline among other bar members and to publicize the availability of the new service in the senior community. This public relations work freed up staff time to focus on direct service to callers and served an important outreach function in the community.

What Makes Volunteers Shine?

The face of volunteering is changing as our work force ages. According to current statistics, Americans are living longer

and healthier lives, and they are better educated and more highly skilled than ever before. This vital aging population is interested in finding ways to continue to use their skills and talents in retirement.

However, because many workers have retired by choice and could re-enter the work force, volunteers seek opportunities that are flexible and fulfilling and that provide opportunities for leadership. A recent Metlife Foundation study revealed that volunteers who are given meaningful opportunities to use their skills are much more likely to continue volunteering over time than those who are given general tasks that do not closely match their skill sets and interests. Experts predict that this trend will continue and that nonprofits that are prepared to work with volunteers will reap the benefits of tapping this valuable resource.⁵

We know that many volunteers enjoy working with older clients and families. Older clients are generally appreciative and, unlike some other categories of clients, they often listen and heed the advice that is given.

According to Sue Wasserkrug, her hotline volunteers not only love the client interaction, but they especially value the fact that their service is bounded and discrete. In other words, the volunteer is not signing on to be the client's lawyer forever, but rather to use his or her expertise to help the client understand and best address a legal question or problem. The elements of service and appreciation are two keys to Sue's program's success. Her volunteers are given an opportunity to share their legal expertise with those who desperately need help to ameliorate an often difficult situation.

Karen L. Forman, the pro bono coordinator at Philadelphia's Saul Ewing LLP, states:

the Helpline provides an excellent opportunity for Saul Ewing litigators and transactional attorneys to provide pro bono assistance to seniors across the Commonwealth. Even our busiest lawyers have dedicated an evening or two a month to reach out to seniors who would not ordinarily have access to legal assistance, either because they can't afford it or can't get to our offices.

Bill Broker's volunteers express much the same sentiments, from those who want to remain active and use their legal skills in their retirement, to those who are beginning their careers. Most just want to be able to use their skills and talents to make a difference to those less fortunate.

But what else makes for a good experience for a volunteer? One sure way to find out is to ask. When the California Bar surveyed its emeritus attorneys in December 2006,

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State Pro Bono Emeritus

Three More States Pass Emeritus Pro Bono Attorney Rules, Bills

Currently, 22 states and the District of Columbia have practice rules that allow retired and non-practicing attorneys to volunteer to provide pro bono legal services through qualified nonprofit providers as one means of meeting the civil legal needs of low- and moderate-income individuals and seniors.

Following are summaries of recently passed emeritus pro bono attorney rules or bills.

Colorado: Effective July 1, 2007, the Supreme Court of Colorado adopted Rule 223 that will allow retiring or inactive lawyers to provide pro bono legal services to the indigent through a Colorado nonprofit agency that serves the poor. These attorneys will not have to pay annual registration fees. Attorneys included under this rule are those who are licensed in Colorado, as well as those who are licensed in another state as long as their practice is restricted to taking pro bono cases. For more information, go to <http://www.courts.state.co.us>.

North Carolina: On June 28, 2007, the North Carolina General Assembly enacted HB 1487, which allows attorneys to claim inactive status, permitting them not to pay bar dues or take annual CLE credits, while being able to practice pro bono (effective July 8, 2007). Under the new law, inactive members are able to continue to represent indigent clients on a pro bono basis under the supervision of nonprofit corporations. For more information, see <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H1487v6.html>.

Alaska: On June 26, 2007, the Supreme Court of Alaska adopted rule 43.2 regarding emeritus attorneys who wish to practice pro bono (effective October 15, 2007). The purpose of the rule is to encourage attorneys who would not otherwise engage in the practice of law to provide pro bono legal services to those who qualify. The rule states that an emeritus attorney who provides pro bono legal services may have bar dues for the following year waived. The pro bono legal services must be provided under the supervision of a qualified legal services provider. See <http://www.state.ak.us/courts/sco/sco1641leg.pdf>

For more information on state emeritus pro bono attorney rules, contact Holly Robinson at robinsoh@staff.abanet.org.

Including and Nurturing Volunteer Attorneys

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results indicated that transportation costs were a potential barrier to volunteering. This barrier could be addressed by partnering with an area agency on aging that provides transportation costs for volunteers, creating joint volunteer activities for attorneys in suitable locales, or by allowing a volunteer to work from a more convenient location.

The volunteers in some of the highlighted offices appreciate program flexibility and accommodation. They like that their work can be done on-site at the program office or from the comfort of their own offices, and that volunteer shifts can be scheduled during the day or during evening hours. This flexibility is a hallmark of the Pennsylvania Helpline, as well as California's Senior Legal Hotline, which stays open late one evening a week to accommodate volunteers with day jobs. As an added incentive, the hotline provides dinner to the volunteers on the nights they are open later.

A Word About Barriers

Every program interviewed agreed that while teaching a volunteer how to use the office database, copier, phone, and other basic tools can initially be challenging, it should not dissuade offices from using volunteers. In fact, everyone agreed that the benefits all far outweigh any challenges, and through creativity many of these challenges can be easily overcome. As an example, two of the programs delegate some of the office equipment-training tasks to non-management staff, which helps these staff members develop profes-

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sionally and gives them a chance to share their expertise. Another program developed a self-guided training tool for volunteers that only needs updating periodically.

Conclusion

There are fields of "diamonds" waiting to be discovered that will enrich both your practice and your clients' experiences. To truly appreciate these gems, the wise law office manager will follow a few simple recommendations:

- Be creative and think outside the bounds of traditional constructs for volunteering; look for ways to conveniently link clients and volunteers, whether through use of technology or by placing the volunteer outside of the office in areas where clients are likely to congregate at times that work for both. Don't be afraid to test something and make changes if it doesn't work well initially.
- Listen to your volunteers and let them figure out how to best use their skills and availability.
- Make it easy to volunteer and to keep coming back; provide training, needed resources, and flexible work hours.
- Make volunteers feel a part of the office and allow them to contribute to your program's goals. Treat volunteers as if they were paid professional staff; include them in staff outings and celebrations, include them in strategic planning efforts and let them help you shape future directions.
- Reward volunteers and let them know how much you appreciate their efforts.

When I asked for their advice to a program interested in using volunteers, each of those interviewed urged programs to "go for it!" As Bill Broker aptly put it, "volunteers enrich our lives, make us better people, and equip us to do more and better work."

Notes

1. State Bar of Wisconsin, *Inside the Bar*, Wisc. Lawyer (Sept. 2005).
2. Mike Monahan, State Bar of Georgia Pro Bono Project, *Lawyers Needed to Visit Disaster Shelters, Provide Advice* <www.gaadvocates.org/news> (Sept. 2005).
3. Kathleen Harris Kelly & David L. Mandel, *Older Americans Enrich America Award Goes to Senior Legal Hotline Volunteer, Joseph A. Montoya*, 105 Sacramento Lawyer (Newsletter of the Sacramento Bar Association) (Nov.-Dec. 2006).
4. See, for example, AARP's annual productivity reports for Senior Legal Hotlines years 1998-2002, which demonstrate profound increases in cases served with increased use of volunteers. <www.legalhotlines.org>.
5. Deborah Geering, *The New Volunteers, Older Contingent Putting Skills, Experience, Vitality to Work*, T1 Atlanta J. Constitution (Jun. 12, 2007).

Changes Urged to Guard Against Representative Payee Abuse of Social Security Benefits

By Jamie Philpotts

Most people who manage Social Security benefits on behalf of others carry out their responsibilities effectively, but the Social Security Administration would be well-served to make changes to their Representative Payment Program to better prevent and detect the misuse of funds. This is according to a July 2007 report by the National Academy of Sciences' Committee on the Assessment of the Social Security Representative Payee Program.

Currently, there are more than 7 million people who receive Social Security benefits that are managed by a representative payee—either an individual or an organization. These payees manage Old Age, Survivor and Disability Insurance funds for retirees, surviving spouses, children, and the disabled, as well as Supplemental Security Income payments to disabled, blind, or elderly people with limited income.

More than half of those who receive payments through a representative payee are children, with the rest being adults and older persons, who are incapable of managing their Social Security or SSI payments.

According to the Social Security Administration, there are currently more than 5.3 million individual and organizational representative payees. The funds distributed through the program total nearly \$4 billion per month.

In response to a Congressional request in 2004, the Social Security Administration asked the National Academies to study the program and determine how payments were being managed on behalf of beneficiaries. The National Academy appointed the Committee on the Assessment of the Social Security Representative Payee Program. Two members of that committee are former ABA Commission director **Nancy Coleman**, and ABA Commissioner **Pam Teaster**, of the Graduate Center for Gerontology at the University of Kentucky .

Specifically, the Commissioner of the Social Security Administration set four objectives for the study. They were asked to: 1) assess the extent to which representative payees are not performing their responsibilities in accordance with agency standards; 2) learn whether the program's policies are practical and appropriate; 3) identify characteristics of repre-

sentatives payees who have the highest risk to misuse funds; and 4) find ways to reduce the chances of misuse and better protect beneficiaries.

The committee found that the majority of representative payees understand their responsibilities and carry out their duties well. In a survey conducted as part of the study, almost 86 percent of payees reported being in touch with the beneficiary at least once a week. In addition, the survey revealed almost 95 percent of payees and beneficiaries indicated that they are "satisfied" or "very satisfied" with the program.

The committee also found that although the rate of reported misuse by the Social Security Administration is low (0.01 %), its current tools for detecting misuse are insufficient. When allegations of misuse are made, the typical response is to find a new payee rather than to formally determine misuse.

Using a new methodology developed by the committee to identify potential misusers, the report estimated the actual number of cases of misspending to be significantly higher.

The Committee's report includes the recommendations that the Social Security Administration:

- Standardize the process for selecting representative payees and screen potential representatives, including organizations.
- Provide comprehensive and formal training for representative payees, along with better long-term support through field staff, toll-free telephone numbers, and the Internet.
- Encourage representative payees to save money for beneficiaries, and enforce the agency requirement that saved money is put in a specified savings account.
- Redesign the annual accounting form, on which representative payees declare how much they spent during the previous year, to obtain meaningful accounting data and payee characteristics that would facilitate evaluation for risk factors and payee performance.
- Store data from the redesigned accounting forms in a database suitable for program analysis.
- Establish protocols for handling accusations of representatives' misspending.
- Shift from auditing a random sample of representative payees to conducting more targeted audits of those most likely to misspend funds.
- Give special scrutiny to recipients of large lump-sum payments (retroactive benefits for

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Rep Payee Changes Urged

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many months that are awarded in one payment).

Copies of the executive summary and full report, *Improving the Social Security Representative Payee Program: Servicing Beneficiaries and Minimizing Misuse* (ISBN: 978-0-309-11099-0, 172 pp.) are available from the National Academies Press, online at <http://www.nap.edu>.

Note: In 1998, the ABA Commission and Center on Children and Law, supported by grant funds from the Social Security Administration and the State Justice Institute, launched a project to examine how coordination, communication, and mutual education about the state court system and

the representative payee program might enhance the operations of each.

The project also sought to suggest how that coordination could advance broader goals of maximizing beneficiary/ward autonomy and providing needed money management help with the fewest possible personal restrictions.

This effort produced four work products: a set of “best practices” for courts with guardianship jurisdiction and for juvenile/family courts to advance productive coordination and interaction with the Social Security Administration, and two curriculum models that would enable state court judges and their staffs to better understand, work with, and take advantage of the Social Security representative payment system in administering their state guardianship program and in the juvenile and family courts.

Limited copies of these publications are available from the ABA Commission. Send your e-mail request to: ababag-ing.abanet.org.

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Questions? E-mail Marcy Gouge at mgouge@aarp.org
or Holly Robinson at robinsoh@staff.abanet.org.

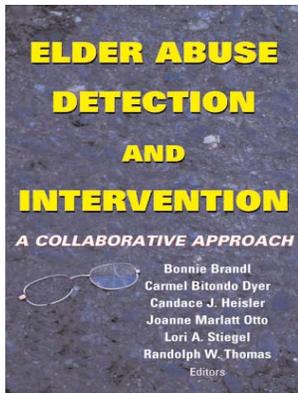
Book Review

Elder Abuse Detection and Intervention: A Collaborative Approach

By Bonnie Brandl, Carmel Bitondo Dyer,
Candace J. Heisler, Joanne Marlatt Otto,
Lori A. Stiegel, and Randolph W. Thomas
307 pages. Springer Publishing (2007). \$45.

Review by Robert A. Mead

Elder Abuse Detection and Intervention: A Collaborative Approach is a dense and finely textured examination of the use of collaborative, multidisciplinary teams to respond to elder abuse and neglect. In the past decade, multidisciplinary teams have become the state of the art approach for intervening in cases of elder abuse because, as the authors explain:



[T]he expertise, services, and resources of our respective disciplines were, on their own, inadequate to enhance the safety of older victims. Prosecutors cannot mend broken bones. Each of us began to look for others who were willing to collaborate to provide a wider array of options than any single system could provide.

The six authors of this book examine issues of aging and abuse from unique disciplines and perspectives. Like the collaborative teams they are advocating, the author from each discipline applied their own professional “worldview.”

Robert A. Mead, J.D., M.L.S., is a law librarian at the University of Kansas specializing in the rights of the disabled.

This review originally appeared in the Report on Victimization of the Elderly and Disabled and is used with permission. © 2007 Civic Research Institute, Inc. The Report on Victimization of the Elderly and Disabled is a bimonthly professional report letter devoted to innovative programs, legal developments, and current services and research in the fight against elder abuse. To subscribe or for additional information, write CRI at P.O. Box 585, Kingston, NJ 08528, call (609) 683-4450, or visit the CRI Web site at www.civicrosearchinstitute.com

Bonnie Brandl is the project coordinator for the National Clearinghouse on Abuse in Later Life and is trained as a social worker. Carmel Bitondo Dyer is an associate professor of medicine at Baylor and co-director of the Texas Elder Abuse and Mistreatment Center. Candace J. Heisler is a retired prosecutor from San Francisco and is currently an adjunct professor at the University of California’s Hastings College of Law. Joanne Otto serves as executive director of the National Adult Protective Services Association and as the editor of the *Report on Victimization of the Elderly and Disabled*. Lori A. Stiegel is the associate staff director of the American Bar Association’s Commission on Law and Aging. Randolph W. Thomas serves as president of the National Committee for the Prevention of Elder Abuse and is retired from a career in law enforcement, investigation, and law enforcement training.

Effective in Holding Abusers Accountable

Collaborative, multidisciplinary teams are not only effective for treating elder abuse victims, but may also be effective in holding abusers accountable. The authors explain:

One of the goals of a collaboration system is to hold the offender accountable for his actions. This affords greater protection to the victim and sends a message to the public that this behavior is unacceptable. Effective offender accountability and victim safety require strong collaboration support by quality case building that leads to successful prosecution.

One key area of collaboration is between law enforcement and social service. The authors cite a study that showed many officers and social service professionals have varying expectations of the role of law enforcement in elder abuse cases, with social service professionals responding “accompany workers on visits to the victim’s home” as the first expectation for officers; “arrest the perpetrator” was ranked a low sixth. Collaboration with prosecutors and civil litigation attorneys is also necessary to ensure accountability for abuse and neglect. Unfortunately, varying standards of professional ethics and confidentiality between attorneys and other professionals may cause friction on collaborative teams. Reforms in legal professional responsibility, such as amending the rules to allow multidisciplinary practices, may result in less role confusion for lawyers who serve on collaborative teams.

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Review: Elder Abuse Detection

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Scientifically Valid Studies Lacking

In tone and substance, this book is appropriate for both professionals and educators. The authors include numerous case examples to “let the experiences of the victims speak for themselves.” These case studies should make the varieties of elder abuse and neglect clear to students and are useful for highlighting the ideas discussed in the text. Additionally, the authors cite the primary findings of elder abuse researchers and effectively use this research to inform their intervention methodologies and policy solutions.

If the methodology advocated by the book has a flaw, it is centered in the lack of scientifically valid studies of the efficacy of multidisciplinary teams. A study proving the effectiveness of this approach is probably impossible to construct, given the ethical and liability issues inherent in not providing control groups of abused and neglected elders the benefit of working with a multidisciplinary team. Nevertheless, the claimed benefits of the collaborative approach should be the continued scope of rigorous study by the few academics specializing in elder abuse, if only to persuade professional skeptics who are tightly tied to the methodologies of their own, narrow disciplines.

Research Urgently Needed

The authors cite a 2003 National Research Council analysis of the state of elder abuse research that highlights this concern:

Research on the effects of elder mistreatment interventions is urgently needed. Existing interventions to prevent or ameliorate elder mistreatment should be evaluated, and agencies funding new intervention programs should require and fund a scientifically adequate evaluation as a component of each grant.

This study noted a number of concerns with elder abuse research, including:

- Unclear and inconsistent definitions;
- Unclear and inadequate measures;
- Incomplete professional accounts;
- Lack of population-based data;
- Lack of prospective data;
- Lack of control groups; and
- Lack of systematic evaluation studies.

Two key roots of these problems are the lack of funded researchers examining elder abuse and “inadequate links between researchers and service agencies.” If this book serves to increase understanding within service agencies of the effectiveness of the collaborative team approach and provides practical ideas for the successful use of teams, then it will have achieved a major accomplishment.

The National Center on Elder Abuse (NCEA) **Elder Abuse Listserve**, which is managed by the ABA Commission on Law and Aging, provides professionals working in fields related to elder abuse with a free forum for raising questions, discussing issues, and sharing information and best practices related to elder abuse. The goal of the listserve is to enhance

- efforts to prevent elder abuse;
- delivery of adult protective services; and
- responses of the justice and social services systems to victims of elder abuse.

The following professionals working in elder abuse or allied fields are eligible to subscribe to the listserve: adult protective services practitioners and administrators, aging services providers and administrators, educators, domestic violence and sexual assault advocates, health professionals, long-term care ombudsman, judges, lawyers, law enforcement officers, prosecutors, policymakers, researchers, and victim services professionals.

A request to subscribe must come from the individual who wishes to subscribe; no one will be subscribed at the request of another person. To subscribe, use the online subscription request form on the listserve page of the NCEA Web site, www.elderabusecenter.org (the URL to the form is <http://www.elderabusecenter.org/default.cfm?p=listservesubscribeform.cfm>). If you don't have Internet access or have trouble with the form, then send a subscription request via e-mail to the list manager, Lori Stiegel, at [lstiegel@staff.abanet.org](mailto:lstieg@staff.abanet.org). Your request must include all the following information in the body of the message: your e-mail address (even if it will appear in the “from” line of your e-mail), your name, your job title, your profession, a statement of your interest/expertise in adult protective services/elder abuse, the name of the organization for which you work (if applicable) and its address, and your phone number so that you can be contacted in the event of an e-mail problem.

Alzheimer's Association Releases Dementia Care Practice Recommendations for End of Life in Assisted Living Residences and Nursing Homes

By Jamie Philpotts

The Alzheimer's Association published its third set of *Dementia Care Practice Recommendations for Assisted Living Residences and Nursing Homes*, which focuses on improving the end-of-life experience for people with Alzheimer's and other dementias.

The recommendations, released at the Alzheimer's Association's 15th annual Dementia Care Conference, held in Chicago, offer concrete suggestions for addressing issues unique to people with dementia at the end of life.

According to the Alzheimer's Association, over half of residents in assisted living and nursing homes have some form of dementia or cognitive impairment. That number is predicted to increase as the Baby Boomers mature and reach the age of highest risk.

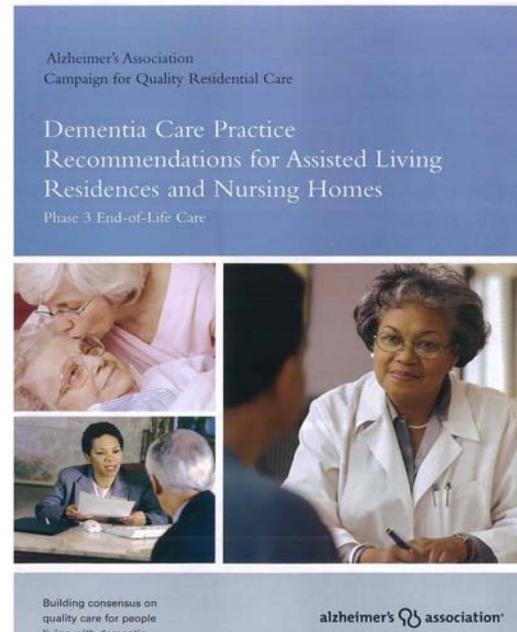
In addition, the association cites research indicating that about 67 percent of dementia-related deaths occur in nursing homes.

To improve the quality of end-of-life care for residents with dementia in assisted living and nursing homes, the recommended practices include:

- Communication and decision-making strategies for both residents and family members.
- Assessment and care of behavioral and physical symptoms, including pain.
- Psychosocial and spiritual support of residents and family.
- Care provision, coordination, and communication when residents choose hospice services.
- Acknowledgment of resident death and bereavement services.
- Staff training.

Other important aspects of the report emphasize:

- End-of-life advance planning as soon as possible after a diagnosis of dementia (including documenting the person's wishes regarding medical treatments in advanced stages of dementia and the designation of a proxy decision-maker).



- Provision of person-centered palliative care to people with advanced dementia.
- Dementia-specific training for residential care workers on end-of-life issues, such as signs of dying, pain management, and communicating with families.

The set of recommendations represents the consensus of dementia care experts and professional staff from the Alzheimer's Association and more than 30 national associations. The effort is part of the association's Quality Care Campaign to improve the experiences of residents with dementia in assisted living and nursing homes.

As part of this campaign, the association joined with leaders in dementia care to develop the tri-part set of evidence-based care practices.

The first set of recommendations focused on the basics of good dementia care, food and fluid consumption, pain management, and social engagement.

The second set focused on wandering, falls, and physical restraints.

The third set, covering end-of-life care practices and issues, **will be available from the Alzheimer's Association on August 28.**