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Educating Individuals and Families is Key in Wake of New Nursing Home Arbitration Agreement

By Charlie Sabatino

The recent rule by the Centers for Medicare and Medicaid Advocacy (CMS) permitting nursing homes to enter into pre-dispute, binding agreements with residents or their representatives was deeply disappointing to resident advocacy groups, including the ABA and its Commission on Law and Aging, which advocated strongly for a full ban on nursing home arbitration agreements. Like many groups, we do not believe that the time of admission to a nursing home is appropriate for informed decision-making about such agreements. Nursing home admission is usually a time of crisis for individuals and their families; the resident is in an impaired condition, the choice of nursing homes may be severely limited, and the resident and family have no idea of the kind of dispute that might be bound by an arbitration clause in the future. There are advantages and disadvantages to arbitration, but it is only after a dispute arises that those pros and cons can be fully weighed, and an informed and voluntary decision can be made.

Even so, the CMS final rule contains several key positive features that now put a responsibility on all our shoulders: We must educate residents, their families, and the public more emphatically about these agreements and advise them not to sign these at admission or at any time before a dispute arises.

The most favorable part of the rule is its mandate that arbitration agreements must not be used as a condition of admission to, or as a requirement for, a resident to continue to receive care at the facility. Moreover, the facility must explicitly inform residents or their representatives of the right to not sign the agreement as a condition of admission, or as a requirement, to continue to receive care at the facility. And the arbitration agreement itself must expressly state the same.

The intent is to eliminate any pressure or confusion about the need to sign these agreements so that residents and their representatives can decide freely whether to sign or decline signing without fear of repercussions. Yet, it is impossible to eliminate all the stress, fear and confusion that accompany nursing home admission. Good faith compliance by nursing homes with the intent of the rule should be the norm, but it is not out of the question that we will see a denial of admission for some other reason as a pretext for rejecting an applicant who refuses to sign an arbitration agreement. Another concern is that the rule applies only prospectively, so it has no effect on the validity of arbitration agreements already signed.

The rule, in addition to banning these agreements as a condition of admission, establishes a very important 30-day right of rescission of arbitration agreements by the resident or resident representative. This is a critical step in countering the confusion and stress surrounding the signing of documents at admission and to provide time to consult with others and reassess options. It also provides an additional window of time for advocates to better inform residents and their families about their rights.
Four other requirements of the final rule are important to understand. Facilities must ensure that:

1. The agreement is explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands;
2. The resident or his or her representative acknowledges that he or she understands the agreement;
3. The agreement provides for (a) the selection of a neutral arbitrator agreed upon by both parties, and (b) the selection of a venue that is convenient to both parties;
4. The agreement may not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including but not limited to federal and state surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsman.

"There are advantages and disadvantages to arbitration, but it is only after a dispute arises that those pros and cons can be fully weighed, and an informed and voluntary decision can be made."

The rule does not make arbitration decisions and proceedings public, but when the facility and a resident resolve a dispute through arbitration, the rule requires that a copy of the signed agreement for binding arbitration plus the arbitrator’s final decision be retained by the facility for five years after the resolution of the dispute and be available for inspection upon request by CMS or its designee.

The commentary to the rule indicates that CMS expects these records to be reviewed as part of the survey and certification process, and as part of its overall monitoring of the rule’s impact. Advocates will need to make sure CMS performs this action. There is nothing in its procedures yet to accomplish this. The phrasing of “CMS or its designee” hints at the possibility of conducting evaluative research by other governmental or private entities. The accumulated record of arbitration decisions would provide a wealth of data to inform policy makers and the public about the use and impact of arbitration in nursing home settings.

It’s noteworthy that the arc of this rule’s history began in 2016 with an outright ban on the use of pre-dispute, binding agreements for arbitration by nursing homes. Previously, CMS rules were silent on the topic. Almost immediately, the nursing home industry commenced litigation to overturn the 2016 rule, and shortly after, CMS suspended enforcement of the rule. In 2017, CMS issued a new proposed rule that swung 180 degrees in the opposite direction, permitting nursing homes to make signing a pre-dispute, binding arbitration agreement a condition of admission. That proposal hung in limbo until the final rule was issued. The final rule attempts to strike what CMS describes in its comments as a better balance between the need for resident protections with the potential burden on LTC facilities’ need for efficient and cost-effective operation. Advocates disagree with CMS’s judgment of a better balance, but at least the rule opens a wide door for advocates to make nursing home pre-dispute arbitration agreements a rare occurrence if we use every channel available to educate residents, their families, and the public. Let us set our sights on reaching a 100 percent refusal rate. That would be equivalent to a ban on these agreements.

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Government Urged to Double Down on Nursing Home Reform

By Travis Goeden

Stories of horrifying abuse and neglect in U.S. nursing homes and skilled nursing facilities were recounted at a hearing before the Senate Committee on Finance on July 23. It came one day after the Government Accountability Office (GAO) released a report urging improved and effective oversight by state agencies, providers, and the Centers for Medicare and Medicaid Services (CMS) to protect the estimated 1.4 Medicare beneficiaries receiving care in these facilities.

Megan H. Tinker, senior advisor for legal affairs at the Department of Health and Human Services, Office of Inspector General (OIG), told the committee about an 85-year-old Medicaid beneficiary who suffered abuse at the hands of the owner of a long-term care facility.

She testified that CMS, state agencies overseeing these facilities, and providers were not doing nearly enough to protect elderly or disabled individuals in more than 15,500 nursing homes in the U.S. Among the factors she cited:

- Many critical incidents including death, assault, and serious injuries, and nursing home deficiencies such as mold and other unsafe conditions, go unreported

- Background checks on nursing home staff are not conducted in many cases due to loopholes in state law, and 13 states that have no such background requirements

- CMS and states have failed to examine data in a way that could prevent potential abuse and neglect at these facilities

- A lack of oversight has enabled some facilities to continue operating without correcting deficiencies and substandard care

- Some providers have failed to alert law enforcement to incidents of potential abuse or neglect in thousands of cases
"CMS, state agencies overseeing these facilities, and providers were not doing nearly enough to protect elderly or disabled individuals in more than 15,500 nursing homes in the U.S."

Tinker encouraged CMS to immediately take steps to protect residents and improve nursing homes and assisted living facilities in part by compiling and reviewing data that indicates potential abuse or neglect, and by informing states of the availability of this data to ensure compliance with their mandatory reporting laws.

Experts stated that overall, many nursing homes and assisted living facilities do a good job of caring for their residents. But the Senate panel and the experts agreed that more must be done to address and eliminate abuse and neglect in nursing homes across America.

The July 2019 GAO report on nursing homes is here: https://www.gao.gov/assets/710/700418.pdf

The June 2019 OIG report on skill nursing facilities is here: https://oig.hhs.gov/oas/reports/region1/11600509.asp
Informed Elder Fraud and Abuse Screenings
Critical to Identifying Victims

By Joy Solomon, Esq., Deirdre Lok, Esq., and Brooke Santoro, LMSW

With Special Thanks to Brian Kupferberg, Student of the HELP Clinic, Brooklyn Law School Class of ’17

The numbers are startling. One in 10 adults age 60 and older and living at home is suspected to have suffered from abuse including physical, psychological, verbal, sexual, financial and/or neglect. Without clear ethical guidelines or mandatory reporting laws in New York State, many attorneys may not know the most practical and effective ways to identify, or respond to, suspected abuse involving an older adult client.
Integrating Screening in Your Practice

Trauma-informed screening questions that ask older adults about personal safety have been successful in helping attorneys and others to identify victims of elder abuse. The “HELP” (Helping Elders through Litigation and Policy) Clinic at Brooklyn Law School, a collaboration between the Harry and Jeanette Weinberg Center for Elder Justice at the Hebrew Home at Riverdale and several legal services agencies, focused its Fall 2015 semester on working with several legal service agencies to develop elder abuse screening questionnaires. The clinic continues to train and mentor law students serving elders through litigation and policy help. This article describes how attorneys can integrate screening into their own practices and offers elder abuse prevention and intervention tips, strategies, and resources.

Attorneys are uniquely well-positioned to identify and assist in cases of elder abuse. As fiduciaries and trusted advisors, attorneys are often privy to their clients’ finances and personal relationships, so the red flags of elder abuse, such as forged signatures, large bank withdrawals, unusual changes made to a client’s will, and visible cues such as physical injuries, often become apparent.

An effective way for attorneys to ask clients personal and somewhat difficult questions about safety is to integrate them into the standard client intake process, which provides insight into a client’s life and legal goals.

In most cases of elder abuse, a family member is the perpetrator. It is no surprise, therefore, that shame and fear are two common emotions elder abuse victims experience. Sometimes the perpetrator is also a caregiver, which could hinder an older adult from reporting abuse because of the older adult’s medical, physical, or financial dependence on the caregiver. The nature of the caregiver’s role in the older adult’s life can also cause fear of retaliation and apprehension about severing the relationship.

The hallmark of proper elder abuse screening is how it’s conducted: The client must be interviewed alone in an appropriate place in which the client feels safe. Private counseling gives a client the opportunity to speak with an attorney without the undue influence or pressure that an abusive family member or caregiver may exert.

During this conversation the attorney should assure the client that only the client’s interests will be represented. To further enhance a client’s feelings of safety and security, the attorney can ask the client who he or she would like to be involved in future client conferences and conversations, while making sure the client knows that any information exchanged privately will remain confidential. This assurance also provides clients with an understanding that even if he or she is not prepared to disclose abuse initially, the attorney will almost always be required to keep a disclosure confidential in the future.
Screening for Elder Abuse

Screening questions should be clear, simple, culturally sensitive, neutrally construed, and non-judgmental. It is important to take cultural norms such as patriarchy, filial piety, and attitudes toward government agencies into consideration when asking questions and understanding responses.

Questions can be directed for a specific response or phrased to elicit an open-ended conversation.

- How are you managing your money?
- Does anyone prevent you from using a telephone or accessing your mail or computer?
- Has anyone physically harmed or threatened to harm you?
- Has anyone touched you without your consent?

Each of these screening questions has its own benefits and appropriate application during screening. It is often helpful to say that safety-related questions are going to be personal to ensure that clients feel as comfortable as possible.

*How are you managing your money?*

Financial abuse can lead to depression, hopelessness, and even suicide. It also can reduce resources available for proper housing, good nutrition, medication, and healthy activities. The impact of financial abuse on an older adult’s physical, psychological, and financial wellbeing can affect legal work for which the attorney has been retained, highlighting the importance for an attorney to be aware of financial abuse and assist when necessary.

Victims of financial abuse lose $1.5 billion each year in New York State alone. Sign of financial abuse can be elusive. However, attorneys may be in the best position to identify this because of their fiduciary role. Attorneys may recognize and be privy to new powers of attorney, recently opened joint bank accounts, and additional lines of credit. They also might spot fraud and forged signatures. Noting such changes can potentially save older adult clients from losing their financial independence and life savings.

Attorneys could also become aware of perpetrators who prey upon and scam isolated, vulnerable older adults by requesting that money or personal information, such as a Social Security number, be sent immediately to help a “charity” or to pay a “debt.” This information is often used to steal the client’s identity. The Federal Trade Commission, the Consumer Financial Protection Bureau, and other groups
have created materials for professionals and older adults that explain prevalent scams, prevention tips, and step-by-step instructions for victims of scams and identify theft.

**Does anyone prevent you from using a telephone or accessing your mail or computer?**

Isolation is a risk factor for elder abuse. Perpetrators often make it impossible for victims to reach out to friends, family, and professionals who could intervene. Attorneys are ideally poised to ask about access to various forms of communication because of the need for ongoing collaboration between the attorney and client. Legal work will be difficult, if not impossible, to accomplish if the older adult client is unable to access mail or a computer, or to use a telephone to speak to the attorney.

**Has anyone physically harmed you or threatened to harm you?**

Physical abuse is defined as the intentional use of physical force that results in acute or chronic illness, bodily injury, physical pain, functional impairment, distress, or death, according to a recent study conducted by the Centers for Disease Control and Prevention (CDC). State law definitions vary, and with no unified definition of elder abuse or types of elder abuse, the CDC surveyed multiple definitions and offered the most comprehensive description of each type of abuse. Unlike financial or psychological abuse, signs of physical abuse—such as bruising, burn marks, and pattern injuries—can be more easily noticed and are certainly worth asking about.

Ninety percent of older adults who sustained bruising from physical abuse were able to describe the abuse even when they suffered from a cognitive impairment. This is why it’s so important to ask older adult clients directly about bruises and other apparent physical injuries, even if capacity is in question.

**Has anyone touched you inappropriately without your consent?**

In many ways, sexual abuse may be the most difficult for a victim to disclose. Including a question about sexual abuse lets clients know the attorney is open to listening and assisting, as appropriate. There also are other ways for attorneys to gather information or be alerted that sexual or any other form of abuse may be occurring.
Red Flags for Suspected Abuse

Verbal cues such as hesitation and stammering when answering questions about personal safety may be signs that a client is fearful of revealing information. Inconsistent stories, defensiveness about relationships, and nonsensical explanations may also be signs that the client is fearful or does not want to disclose information. Nonverbal cues may include lack of eye contact, restlessness, shaking, fidgeting, or physical withdrawal from a family member or caregiver. In addition, if an attorney has had more than one meeting with a client, noting and asking about changes in behavior patterns and reactions to caregivers can be helpful in identifying abuse. When the attorney picks up on verbal or non-verbal cues that the older adult’s wellbeing may be in jeopardy, the attorney should ask follow-up questions, offer resources, and schedule a follow-up appointment.

Follow-up questions can include:

- If someone is assisting you with money management, do you trust that person? Are you receiving the help that you need?
- If someone prevents you from accessing your mail, who is this person in relation to you?
- What, in particular, are you prevented from accessing?
- If you have been physically harmed, can you tell me who has harmed you? Are you afraid to return to your home because of this?
- If someone has touched you inappropriately, can you tell me who has touched you? Are you afraid to return to your home because of this?

When an Older Adult Client is Afraid to Return Home

Any professional working with older adults may have a client who discloses fear of returning home. If there is imminent risk of harm, police should be contacted with the client’s permission. Trusted family members and friends of the older adult client can be tapped as resources and sources of support. Attorneys should consider involving a client’s primary care physician or a local hospital if there is uncertainty about an older adult’s physical or mental health. It is important that attorneys be aware of the health-related needs of an older adult client, as these may warrant hospitalization if food, medications, or assistive devices are being withheld.

If it is determined that it is unsafe for an older adult client to return home due to abuse, shelters for elder abuse victims may be of assistance in some communities. The Harry and Jeanette Weinberg Center for Elder Justice at the Hebrew Home at Riverdale opened in 2005 as the nation’s first elder abuse shelter focused on serving victims with skilled nursing needs, including dementia care, that has the capacity to care for any range of physical or cognitive impairment in the older adult. Located within the Hebrew Home at Riverdale, a large continuum of care community in the Bronx, the Weinberg Center is able to provide short-term, and long-term as appropriate, placement for victims of elder abuse including medical care, therapeutic activities, legal, and social services.
Since opening, the Weinberg Center created the SPRiNG Alliance (Shelter Partners Regional National Global) to assist other organizations in starting their own elder abuse shelters. There are now two shelter programs in upstate New York: Council on Elder Abuse Shelter Network in Buffalo, N.Y., and Lifespan’s Monroe County Elder Abuse Shelter in Rochester, N.Y. Additionally, 13 other elder abuse shelters have opened throughout the United States. More information about the SPRiNG Alliance and shelter replication sites can be found at www.springalliance.org.

**Reporting Elder Abuse**

Attorneys in New York State are not mandated to report elder abuse. Therefore, protecting and understanding the attorney-client relationship and an older adult’s right to self-determination are the pillars that guide the attorney’s advice and actions when intervening in cases of elder abuse. Adult Protective Services (APS) is a government agency that receives reports of mistreatment for adults aged 18 and older and is the only agency that is required to report suspected crimes to law enforcement. Reports to APS can be made anonymously, but still must be done only when the client has consented to the referral, unless the following factors are met under the New York Rules of Professional Conduct:

Attorneys are permitted to reveal confidential information where the “disclosure is impliedly authorized to advance the best interest of the client…” and are allowed to use confidential information where it would “prevent reasonably certain death or substantial bodily harm” Furthermore, if the attorney believes that the client is: 1) at risk of “substantial physical, financial, or other harm,” 2) unable to act in his/her own interest, 3) believed to have diminished capacity, an attorney is permitted to take “reasonably necessary protective action.”

Involving a third party, such as a law enforcement or a social services agency, can escalate an abusive situation. If the attorney believes that circumstances are sufficiently severe as to warrant a report to Adult Protective Services, law enforcement, or any other entity that can respond, the attorney must also bear responsibility for thinking through the possible consequences of such reporting. For instance, if the client is living in a dangerous situation, the attorney must ensure the client has a safe place to go once a third party becomes involved.

If the attorney assists a client in cutting off financial access to a person who is exploiting the client, the attorney must also talk with the client about what to do in the event that the perpetrator becomes angry and lashes out upon learning that financial access has been cut off. Fear of retribution may prevent a client from revealing abuse, particularly when the client is physically or financially dependent on the abuser. However, with careful and thorough planning, the attorney can play a critical role...
"The hallmark of proper elder abuse screening is how it’s conducted: The client must be interviewed alone in an appropriate place in which the client feels safe."

in intervention and protection of an older adult client’s wellbeing, financial future, and overall safety.

Through vigilance and by using effective screening questions, attorneys may have the ability to prevent or stop the cycle of abuse. If elder abuse is suspected, the New York State Bar Association Elder Abuse Committee has compiled resources available for use by attorneys and clients, which can be accessed online at http://www.nysba.org/ElderAbuseResourceGuide/ The Weinberg Center for Elder Justice at The Hebrew Home at Riverdale has also compiled a variety of resources and screening materials available for distribution to clients and use at https://www.weinberg-center.org/.

The HELP Clinic has also successfully assisted various agencies in New York City in integrating screening into their intake processes. VOLS (Volunteers of Legal Service-Elderly Project) is now utilizing a six-question screen. CAP (Sanctuary for Families Courtroom Advocates Project) is asking each domestic violence victim it approaches in Family Court whether an older adult who might be affected by the abusive situation lives in the home. Brooklyn Legal Services Elder Law Unit asks a series of questions that screen for elder abuse. The Foreclosure Prevention Unit Volunteer Lawyer Project is screening adults as well. In addition, the American Bar Association Senior Lawyers Division Elder Abuse Prevention Committee created a scam prevention brochure and poster that are available for distribution at https://www.americanbar.org/groups/senior_lawyers/committees/elder-abuse-prevention-committee.

Long-term care institutions, rehabilitation centers, and assisted living providers should consider screening their patients for elder abuse. Every new long-term care admission and sub-acute patient who comes through the doors of the Hebrew Home at Riverdale is screened for abuse using the WC-RAPS (Weinberg Center Risk and Prevention Screen). This semester, HELP Clinic students, working with Patricia Fay, an associate professor in the doctoral programs in physical therapy at Rutgers University, are considering how physical and occupational therapists might effectively screen clients for elder abuse. Intervention can and should come from a multitude of professions.

If you would like assistance integrating elder abuse screening within your practice or agency, please contact the Harry and Jeanette Weinberg Center for Elder Justice at the Hebrew Home at Riverdale at www.weinberg-center.org.
New App Stores Medical Information

Mind Your Loved Ones, a new mobile app sponsored by the ABA Commission on Law and Aging, enables individuals to store important medical information for themselves and for family members -- including the prescription drugs they’re taking, the dates and outcomes from doctor visits, and even advance directives.

The data is stored on users’ smartphones and can be backed up in a Dropbox or iCloud account and emailed, faxed or printed to their health care providers.

The app is for people who are managing their own care or the care of loved ones. Up to six family members can share the app.

The Mind Your Loved Ones app is available with a $4.99 annual subscription through the ABA Store, the App Store or Google Play.

Visit mindyour-lovedones.com for more information.
Financial exploitation of older adults by family members, caregivers, and scammers has soared in the United States, according to an analysis of reports by banks, credit unions, financial services businesses, and casinos. Together, the businesses reported a record 180,000 cases of elder fraud that bilked, or attempted to cheat, elders and financial institutions out of more than $6 billion over four years.

The new analysis by the Consumer Financial Protection Bureau (CFPB) was based on Suspicious Activity Reports (SARs) filed with the Financial Crimes Enforcement Network from 2013 to 2017. During that period, the number of SARs filings quadrupled to 63,500 cases in 2017. What’s worse, the CFPB estimates that the number of filings represent only a fraction of cases involving elder financial abuse nationwide.

“Financial institutions are seeing vast numbers of their older customers fall prey to financial exploitation, and they’re filing hundreds of thousands of confidential reports with the federal government about these suspicions. The CFPB has been working hard to protect older adults from this devastating problem, and one challenge has always been a lack of detailed data,” says Naomi Karp, a senior policy analyst with the CFPB.

The first-ever public analysis of a rich dataset offers a better understanding into elder fraud as well as approaches to improve prevention and response.
“We hope to continue to work with a spectrum of stakeholders to build on the report’s findings and implications,” Karp says.

According to the report, when older adults were exploited by someone they knew, the financial losses were far greater—about $50,000 compared with $17,000 when the suspect was a stranger.

Other findings by the CFPB:

- One third of the individuals who lost money were ages 80 and older
- Adults ages 70 to 79 had the highest average monetary loss at $45,300
- In 7 percent of the elder financial exploitation SARs, older adults lost more than $100,000

In about 75 percent of the SARs, the targeted older adult lost money, according to the CFPB. The filer, or financial institution, lost money in 9 percent of all cases.

Although financial institutions increasingly were filing elder financial exploitation SARs, fewer than one-third indicated that they informed adult protective services, law enforcement, or other authorities about their suspicions. The CFPB called it a “missed opportunity to strengthen prevention and response” when financial institutions fail to report these cases directly to authorities.

**Tips to Report Elder Financial Fraud**

If you believe that you or someone you know is a victim of financial exploitation, contact your local adult protective services (APS) agency. You can find out how to reach your APS office from the Eldercare Locator at eldercare.acl.gov or by calling (toll-free) 800-677-1116.

Report scams or fraud to the Federal Trade Commission at ftc.gov/complaint.

Share a *Money Smart for Older Adults* guide with those in your community. *Money Smart for Older Adults* is an elder financial exploitation awareness and prevention program the Consumer Financial Protection Bureau created with the Federal Deposit Insurance Corporation.
For older immigrants, becoming eligible for public benefits involves a maze of immigration and program eligibility rules that are becoming increasingly complex and a major challenge to navigate. Nearly 7 million U.S. residents age 65 and older are immigrants.

**Background on Eligibility for Public Benefits**

In 1996, Congress imposed new barriers for immigrants to access means-tested federal public benefits under the Personal Responsibility and Work Opportunity Reconciliation Act. This greatly restricted immigrants’ access to Medicaid, CHIP (Children’s Health Insurance Program), TANF (Temporary Assistance for Needy Families), SNAP (Supplemental Nutrition Assistance Program) and SSI (Supplemental Security Income). The Act created new categories of immigration status known as “qualified” and “not qualified.” Qualified immigrants include individuals with statuses such as lawful permanent resident (LPR/green card holder), refugees, asylees, abused spouses, and trafficking survivors.

To be eligible for these programs today, older immigrants must have an eligible immigration status (or citizenship) and satisfy the benefit program’s requirements such as residency, work history, disability determination, and income, which may vary by state. Eligibility for federal benefits that are not means tested such as Medicare and Social Security have their own unique considerations.

Further complicating access to public benefits programs, the Trump administration has proposed a rule that would greatly expand the long-standing federal immigration law’s “public charge” test to include many of these programs. If enacted, the government could use this rule to deny green cards or admission to the U.S. to immigrants who apply for, receive, or may one-day be eligible for these benefits. Its chilling effect is described in a separate section below.
**Lawfully Present**

As a general rule, individuals must be “lawfully present,” meaning federally authorized to be in the United States, to be eligible for most federal public benefits. Lawfully present is broader than qualified. All qualified immigrants are lawfully present, as are other statuses such as individuals with temporary protected status and individuals with non-immigrant visas, including visas for workers and students. On the other hand, individuals who are undocumented and not currently federally authorized to be in the U.S. are ineligible for major federal public benefits.

Beyond the basic rules of having an eligible immigration status, each of the major federal benefit programs has its own rules. The eligibility rules for Social Security and Medicare for lawfully present individuals residing in the U.S. with at least 40 qualifying quarters of work are the same as for citizens, but there are different rules for immigrants without sufficient work history and those who reside outside the U.S.

For most means-tested federal benefits, including Medicaid and SSI, immigrants generally must have a “qualified” status, though a few categories of lawfully present beneficiaries who are “not qualified” may be eligible. For SSI, immigrants must also meet an additional condition to be eligible and, in some cases, their benefits are limited to seven years.

Moreover, most qualified immigrants are ineligible for means-tested federal benefits programs for the first five years they have a qualified status. However, a few important exceptions to this so-called “five-year bar” or waiting period include:

1) Qualified immigrants who entered the U.S. before August 22, 1996, and remained in the U.S. until they obtained a qualified status.

2) Certain “humanitarian immigrants” and qualified immigrants who are honorably discharged U.S. veterans or on active military duty and their spouses or children.

3) Qualified immigrants who have at least 40 quarters of work history in the U.S. or who are receiving disability-related assistance.

States can choose to use their own funds to provide benefits to qualified immigrants during their five-year waiting period. Also, states can set their own eligibility rules for programs such as Medicaid, TANF, and SNAP. For example, in most states, immigrants are eligible for Medicaid if they have had a “qualified” status for five years or have an exemption from the five-year bar.
States have the option to expand Medicaid coverage using federal funding to additional groups of immigrants such as all lawfully residing children and pregnant women. Some states use their own funds to provide coverage during the five-year waiting period, or to provide coverage to other individuals who are not qualified or even not lawfully present. This may include undocumented individuals as well as someone whose visa expires. California, for example, just expanded Medicaid coverage to all immigrants (even undocumented) under age 26. On the other hand, several states restrict Medicaid coverage to qualified immigrants even further than described above. For example, in Texas, most qualified immigrant adults who entered the U.S. on or after August 22, 1996 are ineligible, even if they have met the five-year bar.

Medicare Matters

Because Medicare is not a means-tested benefit, it has different eligibility rules than the programs discussed above. To enroll in either Medicare Part A or Part B, an individual must either be a U.S. citizen or be lawfully present in the United States. Individuals who are not lawfully present are ineligible to receive any Medicare coverage under any circumstances. Whether a lawfully present immigrant has to meet additional requirements to be eligible for Medicare depends on his or her work history.

Citizens and lawfully present individuals who are age 65 or older and eligible for Social Security because of their work history (or that of a spouse) or who have been receiving SSDI for 24 months qualify for premium-free Part A and do not face any length of residency requirement. This includes lawful permanent residents, individuals in Temporary Protected Status (TPS), and others who have sufficient work credits. Because they qualify for premium-free Part A, they can enroll in Part A and Part B without any length of residency requirement.
Here’s an example: Ms. Lopez is a green card holder who came to the U.S. three years ago. She married another green card holder shortly after arriving. Her husband, who is now 66, has resided in the United States for 15 years and has more than 40 quarters of work credits, making him eligible for premium-free Part A. Ms. Lopez is turning 65. Because of her husband’s work history, she can start her Part A and Part B coverage right away.

In contrast, a non-citizen who does not qualify for premium-free Part A must be a legal permanent resident with five years of continuous residence in the U.S. immediately prior to Medicare enrollment. The five-year period of U.S. residency begins the day the individual arrives in the U.S. with the intention of establishing a home. The period can start, for example, when the individual arrives under refugee or asylee status before becoming a legal permanent resident. It cannot start, however, with visitor status since visitors are assumed to be retaining their foreign residence.

**Work History and Qualifications**

In another example, Mr. Rao, a legal permanent resident, came to the United States at age 62 to join the family of his son, a U.S. citizen. He has taken on part-time work but mostly helps care for his grandchildren. Because he does not have enough work history in the U.S. to qualify for premium-free Part A, Mr. Rao must wait for five years from his date of entry to the United States to qualify for Medicare coverage. When he qualifies he can enroll in premium Medicare Part A (with a premium) and Part B. He also has the option or can decide to enroll only in Part B.

Medicare Part D and Part C do not have separate citizenship or length of residency requirements. Medicare beneficiaries with either Part A or Part B coverage can enroll in Part D, the prescription drug benefit that is administered through private health plans. Beneficiaries with both Part A and Part B coverage have the option to receive their benefits through managed care, called Medicare Advantage. Part D and Medicare Advantage plans are prohibited from requesting any documentation of citizenship or alien status.

Immigrants who are eligible for and enrolled in either Part A or Part B may also be eligible for the Part D Low-Income Subsidy (LIS or Extra Help) if they meet the income and asset eligibility requirements. There are no additional immigration status or residency length requirements for the low-income subsidy beyond what is needed for Part A and Part B eligibility.

The Medicare Savings Programs (e.g., QMB, SLMB) that relieve low-income individuals from Medicare premiums, and in some cases cost-sharing, are administered by state Medicaid programs. Therefore, to be eligible for these programs or for full Medicaid coverage, older immigrants must meet Medicaid immigration status and length of residency requirements. These restrictions mean that in most states, a Medicare-eligible individual with temporary protected status cannot get help from Medicaid with Part B premiums or cost-sharing, and that others may have to wait five years to be eligible for this Medicaid assistance.
A Chilling Challenge

The “public charge” test, which has been part of federal immigration law for decades, was designed to identify people who may depend on government benefits as their main source of support. If immigration officials determine someone is likely to become a “public charge,” the government can deny that person admission to the U.S. or refuse an application for lawful permanent residency (green card). Under current rules, the only benefits considered in determining who is likely to become a “public charge” are government-funded institutional long-term care (including through Medicaid) and cash assistance, such as SSI, TANF and comparable state and local programs.

Under the Trump administration’s proposed rule, a “public charge” is defined as an immigrant who receives one or more public benefits, including not only the benefits already considered but also any type of Medicaid (except for emergency Medicaid), the Medicare Part D Low-Income Subsidy, SNAP, and housing programs. The proposal also changes how immigration officials would weigh a person’s age, health, financial resources, and skills in deciding whether a person is likely to use certain public benefits in the future.

It specifies certain circumstances that would weigh in favor of being determined likely to become a public charge, including being age 62 or older, having limited English proficiency, having income below 135 percent of the federal poverty level, and having physical or mental conditions that interfere with the person’s ability to care for themselves.

The proposed changes to public charge are already chilling participation in many programs due to the threat —both real and perceived—that seeking benefits could result in being denied a change in immigration status or entry into the U.S. It is critical for advocates working with older adults in immigrant families to know that these changes will not apply to benefits received before the rule takes effect. Before an immigrant decides to stop receiving benefits, he or she should talk to an immigration expert about the specific situation.
Tips for Advocates

• Certain limited public benefits are available to all immigrants, regardless of immigration status, who meet the program’s income and other eligibility requirements. These include emergency Medicaid coverage for limited services necessary for the treatment of an emergency medical condition; public health programs providing immunizations or treatment of communicable disease symptoms; short-term noncash emergency disaster assistance; and in-kind services to protect life/safety such as adult protective services, meals-on-wheels, shelters, disability or substance abuse services.

• “Lawfully present” immigrants are eligible to enroll in Affordable Care Act Marketplace (HealthCare.gov) coverage and may also qualify for federal financial assistance in the form of premium tax credits and cost-sharing reductions. There are no length of residency requirements to be eligible for coverage or for premium tax credits and cost-sharing reductions. Further, lawfully present individuals who are ineligible for Medicaid because of their immigration status can receive federal financial assistance if their income is between 0 and 400 percent of federal poverty level. (The 2019 level for a family of four in the 48 contiguous states is $25,750).

• It is important to consult an immigration attorney to ensure understanding of what an individual’s application for and receipt of benefits means for that person and his or her family. The National Immigration Legal Services Directory lists free or low-cost options.

  o “Mixed Status” families: Oftentimes, a family or household includes both citizens and non-citizens. For example, non-citizen seniors may be living with their citizen children and/or grandchildren. While eligibility for most public benefits is tied to the individual applicant, in some cases the immigration status of other members of the applicant’s household may implicate eligibility or the amount the benefit.

  o Public Charge: The changes to the public charge rule are not final and will not apply to benefits received before the rule takes effect. Moreover, these changes will not directly affect most individuals who already have their green cards as the public charge test is not a factor when applying for citizenship. Public charge can be an issue for a legal permanent resident who leaves the country for more than six months. Therefore, immigrants should talk to an immigration lawyer or expert about their specific situation prior to disenrolling from any programs or making immigration/travel decisions.
Conclusion

Older immigrants are facing increasingly complex rules and circumstances that affect their eligibility for and willingness to enroll in programs that support their basic needs. Advocates play an important role in helping older immigrants navigate their own specific circumstances so that they get access to the programs they need.

Additional Resources & References:

- National Immigration Law Center, Overview of Immigrant Eligibility for Federal Programs: [https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/](https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/)
- 8 U.S. Code §§ 1601 et. seq.; 8 U.S.C. § 1641(b) (listing qualified statuses)
- Program Operations Manual System (POMS):
  - SI 00502.000-00502.550 SSI Alien Eligibility: [https://secure.ssa.gov/apps10/poms.nsf/inx/0500502000](https://secure.ssa.gov/apps10/poms.nsf/inx/0500502000)
- 8 C.F.R. § 1.3.

Natalie Kean is a senior staff attorney in Justice in Aging’s Washington, D.C., office. Justice in Aging is a national organization that fights senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. Since 1972, Justice in Aging has focused its efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ individuals, and people with limited English proficiency.
Flying Without WINGS: Training for Court-Appointed Attorneys and Adult Guardians Ad Litem Piloted in Georgia

By Ellie Crosby Lanier

Because of Georgia’s unique court structure and political challenges, state advocates were unable to secure funding for a spot in the WINGS (Working Interdisciplinary Networks of Guardianship Stakeholders) nest. But there is good news. The bonds we forged over our many years of advocacy on guardianship issues, and our effort to pull together the (unsuccessful) WINGS application, helped a few of our ideas take flight. This article highlights one highly successful and easily replicable effort that can be undertaken for a local court, in a region or at the state level, depending on resources and interest.

Adult guardianship\(^1\) poses unique policy, advocacy, and implementation challenges stemming from the need to strike an appropriate balance between autonomy and protection and the fluid nature of capacity.\(^2\) This author, among others, has long been concerned about the gaps between the promising language in many statutes requiring the consideration of less restrictive alternatives before ordering guardianship -- assuring that guardianships are limited and designed to maximize independence and

\(^1\) In this article, the term guardianship is used in its broadest sense to encompass both financial and personal decision-making authority granted by courts. 
\(^2\) See, for example, the introduction in Judicial Determination of Capacity of Older Adults in Guardianship Proceedings © American Bar Association Commission on Law and Aging – American Psychological Association p.1 https://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging bk_judges_capacity.pdf
choice -- and the actual day-to-day practice in guardianship courts where plenary guardianships are often the norm.\(^3\) After a massive rewrite of our adult guardianship code that went into effect in 2005, Georgia’s General Assembly has steadily made revisions to bring it into closer compliance with the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPPA)\(^4\). However, the underlying practice has not changed substantially in the wake of these reforms. For years we have held continuing legal education programs in conjunction with our State Bar Elder Law Section in an attempt to increase the use of Supported Decision-Making\(^5\), promote the ABA’s PRACTICAL Tool for Lawyers\(^6\) and improve the quality of the representation provided to alleged incapacitated adults.

This spring, in our continuing effort to increase the use of supported decision-making and mediation within the context of a guardianship action, we piloted the first in a series of practical trainings for court-appointed attorneys and guardians ad litem in adult guardianship cases. The program was the product of a collaboration between probate judges and hearing officers, the law school, and guardianship advocates. Participants received free CLE credit and comprehensive materials.

Special attention was devoted to the ethical obligations under our conduct rules and case law for advocates serving in the role of court-appointed attorney (those who are responsible for representing the stated interested of the alleged incapacitated adult) and the guardian ad litem (those who are responsible for conducting an investigation and making a report to the court on what would be in the best interest of the alleged incapacitated adult). We also focused on client communication, mediation and supported decision-making as vehicles for tailoring guardianship or avoiding the need for it altogether. Participants were provided with a manual on how to handle a case from start to finish, inspired in large part by the work of advocates from the Legal Aid Center of Southern Nevada Guardianship Advocacy Program.\(^7\) These materials, rooted firmly in Georgia law, included checklists and best practices from a variety of jurisdictions.

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\(^3\) See, e.g. The Guardianship Clinic, Cardozo School of Law, Guardianship in New York: Developing an Agenda for Change (New York, NY 2012) which notes that “in some cases, guardianship is a blunt instrument, imposed too readily and with excessive powers, when a less restrictive alternative would suffice.” (Acknowledging “widespread recognition that guardians are appointed when less restrictive alternative would address unmet needs”).

\(^4\) https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f7289877-3018-0c5f-a6e1-fb5ad8b3c686&forceDialog=0

\(^5\) http://www.supporteddecisionmaking.org/

\(^6\) https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/

The training was held at a suburban courthouse outside of metro Atlanta and consisted of three segments:

- Part 1 covered court-appointed counsel and guardians ad litem in adult guardianships. Panelists spent time distinguishing the roles, duties, and responsibilities of each, highlighting the ethical responsibilities and implications on confidentiality of each. This section also included material on the skills, knowledge, and rules for representing clients with diminished capacity and how to effectively advocate in a contested proceeding, including pre-trial preparation, the trial itself, and post-trial actions and obligations. Panelists for this section included experienced advocates from the aging and disability communities.

- Part 2 featured a panel of lawyers with a wealth of experience serving as court-appointed counsel and guardians ad litem in adult guardianship matters. They discussed the importance of court-appointed work in probate court, shared practical tips and strategies, and gave insight into unique challenges representing clients with diminished capacity. This part also included the importance of self-care and impact of secondary trauma on advocates, since guardianship cases can be stressful to handle but also incredibly rewarding.

- Part 3 featured a judge’s panel where four experienced probate judges shared perspectives from the bench. This included a candid assessment of what they like to see advocates do, what they wish advocates would not do, and practical matters such as how to get on the appointment list, expectations once appointed, and how payment typically works.

The program was a big success, with standing room only for participants. Plans are now under way to repeat this program in South Georgia.

This program required a few things that are fortunately in good supply in our state, and hopefully in yours, too: committed advocates, judges who support the need for lawyers well-trained to handle guardianship cases, and free resources such as the ABA’s PRACTICAL Tool for Lawyers (which could be used to form the basis of an entire training itself.)

The flyer we created to advertise the session featured a quote from Margaret Mead that captured the spark and energy we felt in delivering the program: “Never doubt that a small group of thoughtful, committed, citizens can change the world. Indeed, it is the only thing that ever has.”

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8 Our statute explicitly prevents the same person from serving in both roles, but we still see instances where the court is confused about the difference and seek to appoint the same person in a dual role. O.C.G.A. § 29-9-3
The videotaped session and accompanying training materials will be available online for other probate courts in the state to share with lawyers who are new to their court. To check for its availability and for other resources, go to http://gaprobate.gov/

If you’re interested in obtaining a copy of the training materials, email me at eclanier@uga.edu.

Eleanor (Ellie) Crosby Lanier is the University of Georgia School of Law’s associate dean for clinical programs and experiential learning. She also is a clinical professor teaching general civil mediation and elder law. She is a member of the American Bar Association Commission on Law and Aging and the State Bar Access to Justice Committee.
Here's something lawyers and other professionals who assist clients with decision-making arrangements will want to know: *Finding the Right Fit: Decision-Making Supports and Guardianship* is a free, new online resource that will help your clients navigate these situations. It's particularly helpful for:

- Friends and family members who wish to provide support for their loved ones who need help making decisions
- Individuals considering what assistance they may need now or in the future
- Named agents in a power of attorney or court-appointed guardians who want to learn more about their role

*Finding the Right Fit* was developed by the National Center for State Courts, with assistance from the American Bar Association Commission on Law and Aging, and funding from the Department of Justice Elder Justice Initiative.

Using engaging, interactive activities, users can choose to explore a variety of exercises and presentations, listen to the conversations between a brother and sister when one is the guardian for the other, and view a comprehensive list of outside resources. There’s even an extensive glossary.
Three Scenarios

The resource highlights the scenarios of three people:

There’s Sam, an 18-year-old with Down syndrome who wants to make decisions independent of his parents. And Edward, an elderly man with dementia, who is being financially exploited by his sister. Then there’s Maria, who recently had a stroke and is in a coma. She has no advance care planning documents to guide her brother in making medical or financial decisions on her behalf.

With clear, plain language, the course provides information about three main tracks of decision-making:

1. Supporting an individual to make decisions
2. Legal options that transfer decision-making authority such as powers of attorney and guardianship
3. Serving as a guardian

Within each of the three tracks, users can explore subtopics in further depth.

For example, Supporting Decisions discusses the basic process of decision-making, and the cutting-edge decision-making model supported decision-making.

Using Legal Options introduces two major categories of decision-making assistance: healthcare and financial. In this track, users will review important information about informed consent and the legal duties of a fiduciary before choosing a specific option to explore, such as power of attorney or representative payee.

Serving as a Guardian includes information about the ethical standards of practice for people serving as guardians and how to end a guardianship.
Balancing autonomy, minimizing risk of exploitation

Finding the Right Fit’s approach to decision-making is nuanced and comprehensive. The course balances two sometimes competing values: (1) protecting the rights of people to make their own decisions and respecting their needs and wants, and (2) addressing the risk of exploitation and harm that comes with all decision-making options.

Using Legal Options begins with a general definition and discussion of legal options, and then prompts the user to review a “pros and cons” list that will apply to all the legal options in the course. Each major legal option has its own pros/cons list. For example, one of the advantages of a financial power of attorney is that the person can revoke or change it at any time. A disadvantage: the financial power of attorney delegates decision-making authority over an individual’s finances to another person, creating an opportunity for exploitation.

The course explains guardianship with the same balanced approach, presenting it as an option when all other options are unavailable. Users who determine guardianship is necessary can move on to Serving as a Guardian. The training emphasizes that even in this restrictive arrangement, a guardian may be able to support the person in developing their decision-making skills and making their own decisions.

Finding the Right Fit educates individuals on all their options, empowering users to make thoughtful decisions that meet their needs. Finding the Right Fit: Decision-Supports and Guardianship will be disseminated widely across the country through a variety of state and federal resources.

[This training is not a substitute for legal advice from a licensed attorney.]
Keeping an Eye on Money

For the Blind and Visually Impaired, the iBill Device Helps Identify Dollar Amounts

What's in your wallet? For the visually impaired, that question may no longer stump them, thanks to a device that identifies the dollar amount on U.S. bills.

In case you haven’t heard, a free currency reader device called the iBill® is being offered by the Bureau of Engraving and Printing (BEP), in partnership with the Library of Congress' National Library Service for the Blind and Physically Handicapped, to qualified U.S. citizens or legal residents who are blind or visually impaired.

The currency reader is a small device that identifies the bill’s denomination by voice, a pattern of tones, or vibrations for privacy and for people who are deaf. The currency reader identifies $1, $2, $5, $10, $20, $50 and $100 denominations.

If you or your clients would benefit from a currency reader, download an application form on the BEP’s website at www.bep.gov/uscurrencyreaderform.html or call the U.S. Currency Reader Program office toll free at (844) 815-9388 and request that an application be mailed to you.

For more information, go to http://www.bep.gov/uscurrencyreaderpgm.html
Don’t Miss Out on the 2019 National Aging and Law Conference

Improve your ability to empower clients to access the programs and services they need for a better quality of life. How? By attending the only national conference on the legal issues that impact low to moderate-income older adults.

With four plenary sessions and 30 workshops, the ABA Commission on Law and Aging’s 2019 National Aging and Law Conference offers everything from the basics to advanced topics and with a mix of proven speakers and new voices. It also is the best event for Continuing Legal Education, skills training, and networking opportunities.

The annual event, from October 31 to November 1, will be held at the Marriott Crystal Gateway, Arlington, Virginia. It’s just one subway stop from Ronald Reagan Washington National Airport.

Registration information can be found at https://www.americanbar.org/events-cle/mtg/inperson/349894122/ Discounted early registration rate for legal aid, public interest, government attendees is $435.

This year’s pre-conference will be on Wednesday, October 30, and will cover Supplemental Social Security Income. The pre-conference requires a separate registration and fee. You can register at https://www.americanbar.org/events-cle/mtg/inperson/372641788/

Catherine Seal, Past President of the National Academy of Elder Law Attorneys, said this about the NALC:

"The National Aging and Law Conference brings together substantive law, policy, and legal service development and delivery practitioners from across the country. The program annually includes sessions on Medicare, Medicaid, guardianship, elder abuse, legal ethics, legal service program development and delivery, consumer law, income security, and other issues. Millions of poor Americans are in need of legal services, and the National Aging and Law Conference is the only annual, national opportunity for legal aid attorneys to build their knowledge and their networks in support of older Americans."
Updated! Adult Guardian Handbooks by State. This newly revised list (as of June 2019) includes state guides for adult guardians concerning the adult guardianship process and duties for both guardians of people and guardians of property (also called conservators). The guides are by state bar associations, state courts, state agencies, universities, guardianship associations and others.

Understanding the Four C’s of Elder Law Ethics. This consumer-friendly brochure helps family members understand the relationship between a lawyer and an older client. 


Checklist for an Elder Friendly Law Office. Tips for accommodating the needs of older adults with disabilities or medical conditions in your business.
https://www.americanbar.org/products/ecd/ebk/217476/

New! Our Elder Abuse Fatality Review Team webpage features background information, a list of existing teams, relevant ABA policy, and resources including the original and updated replication manual, team accomplishments, and more.
https://www.americanbar.org/groups/law_aging/resources/elder_abuse/elder-abuse-fatality-review-team-projects-and-resources/

The Lawyer’s Advance Directive Counseling Guide. Advice to assist lawyers and health care professionals in formulating clear and effective end-of-life health decision plans.
https://www.americanbar.org/groups/law_aging/resources/health_care_decision_making/ad-counseling-guide/

Check out the Commission on Law and Aging website for more resources, tools, events, and other material to keep you informed.
The expertise of the Commission’s staff is unparalleled, particularly in the areas of guardianship and conservatorships. The research, knowledge base, and coordination efforts of the Commission have been critical in the advancement of guardianship reform.

The Commission is a leader in promoting both the expansion of supported decision making as an alternative to guardianship and in efforts to enable individuals to retain or regain legal rights.

--Curtis L. Decker, Executive director, NDRN

In this leadership role, the ABA Commission has fundamentally changed the landscape for the betterment of Americans who are elderly, disabled, or legally incapacitated.

--Terry W. Hammond, Chair, National Guardianship Network

Learn more about our work at americanbar.org/aging

Assessment Of Older Adults With Diminished Capacity: A Handbook For Lawyers

This handbook for lawyers 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.

$25 for members and non-members. Visit Shop ABA to order your copy.