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October 26-27, 2017

Bifocal
A Journal of the Commission on Law and Aging

2016 Year in Review Issue

Funding, Guardianship and Supported Decision-Making, Health Care Decision-Making Research, National Aging and Law Conference & Elder Law Essentials Webinar Series, National Legal Resource Center (NLRC),

National Center on Law and Elder Rights (NCLER), Human Rights of Older Persons, Advanced Illness & Long-Term Care, Elder Abuse, Neglect, and Financial Exploitation, Elder Justice Innovation Grant on Guardianship, and more!
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**Bifocal**
Journal of the American Bar Association
Commission on Law and Aging

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**Bifocal**, ISSN 0888-1537, is published six times a year by the ABA Commission on Law and Aging, 1050 Connecticut Ave. NW, Ste. 400, Washington, DC 20036.

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2016 Year in Review

by Hon. Patricia Banks

The Work and Accomplishments of 2016

In this, its 37th year, the Commission has continued to leverage the cumulative expertise of its members and staff in its pursuit of its mission: to serve as a collaborative, interdisciplinary leader of the Association’s work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons. It is this unique holistic focus on law and aging that enables the Commission’s singular impact.

This issue of Bifocal is our 2016 Year in Review, providing a snapshot of the Commission’s work over the past year. Given the pace required to achieve what we have in the past year, it’s easy to forget to step back and appreciate the breadth and depth of the Commission’s work. In the past 12 months, the work of the Commissioners and professional staff has impacted the legal practitioners and institutions, public policy, and the public at large in several ways.

The Commission’s work has improved the quality of service provided by Legal Practitioners and the Justice System through our:

- Law and practice publications, such as Bifocal, our free bi-monthly e-journal; our PRACTICAL Tool for Lawyers to help lawyers identify less restrictive options than guardianship for individuals with diminished capacity, and the Pocket Guide for Law Enforcement on elder abuse, among many other publications and articles, most of which are available free on our website.
- National Aging and Law Conference in partnership with the ABA Center for Professional Development. Now in its 3rd year under Commission leadership, it continues to grow in attendance with 253 registrants this year compared to 163 in 2015. Attendees included 25 Elder Justice AmeriCorps fellows as part of the U.S. Department of Justice effort to place elder justice attorneys in legal aid offices across the country.
- Partnership in the National Legal Resource Center, funded by the Administration for Community Living, and newly renamed the National Center on Law and Elder Rights.
- Production of quarterly “Elder Law Essentials” CLE webinars and approximately 50 professional education presentations by staff and Commissioners during the past year.
- Support of dialogue and information exchange among advocates in aging through our email list, Elderbar; and the coordination of entities within the ABA working on aging issues via quarterly calls and the Elderlink list.
- Support of programmatic efforts of ABA sections and divisions that seek to target law and aging issues, including cross publication with the Senior Lawyer’s Division and faculty contribution to section and division CLE programs.
- Continuation of the Elder Investment Fraud and Financial Exploitation Prevention Program — Legal, an elder financial exploitation CLE initia-
itive, funded by the Investor Protection Trust and Investor Protection Institute, which is piloting the training of lawyers in six states to identify potential financial exploitation of or by their clients and respond effectively.

The Commission’s work has positively impacted Public Policy Affecting Older Persons and their families through our:

- Successful advocacy, in collaboration with other groups, to convince the Centers for Medicare and Medicaid Services to ban the use of mandatory, pre-dispute arbitration provisions in nursing home contracts.
- Participation in the National Academy of Medicines committee on Family Caregiving for Older Adults, which issued its report in September.
- Technical assistance in response to over a thousand requests per year from multiple disciplines, policymakers, and the media.
- Online tracking charts summarizing the status of state legislation on guardianship, elder abuse, health care decision-making, and other subjects.
- Collaboration with the National Guardianship Network in promoting and supporting interdisciplinary state groups on guardianship reform. These groups, called WINGS, now exist in 17 states, and with new funding from the Administration on Community Living, the Commission will increase that number and evaluate their success.
- Completion of a review of legal capacity restoration policies and practices and a convening of an expert roundtable to identify model policies and best practices. The report of this cutting edge project is forthcoming.
- Consultation and advisory engagements aimed at improving state health care decisions, guardianship, and elder abuse laws, as well as federal policy under the Elder Justice Act, the Older Americans Act, and Medicare and Medicaid.
- Advisory and technical assistance activities with the National POLST Paradigm Task Force, which has been in the forefront of bringing POLST programs (Physician Orders for Life-Sustaining Treatment) to nearly every state.
- Continuing liaison work with the United Nations Open-Ended Working Group on Ageing in its efforts to examine the need for an international convention on the rights of older persons.
- Policy development and advocacy efforts within the ABA and at the state and federal level in conjunction with ABA Government Affairs, particularly the February 2015 adoption by the ABA of the Commission’s resolution to support access to and financing of high-quality, comprehensive long-term supportive services for persons with advanced illness.

The Commission’s work has had a positive Impact on the Public through our:

- Educational self-help materials for the general public, addressing legal education of family caregivers (e.g., Ten Tips for Family Caregivers); financial exploitation (e.g., the Managing Someone Else's Money lay-fiduciary guide series); health care advance care planning; and other topics.
- Promotion of National Health Decisions Day, April 16, including updating of the free publication Myths and Facts About Health Care Advance Directives.
- Collaboration with researchers and consumer groups to develop resources and strategies to empower individuals and their families in accessing the information, care, and services they need.

A recurring word I have used throughout these highlights is “collaboration.” The strength of the Commission is its ability to work with and bring together experts and stakeholders across practice areas, different professional disciplines, and the public and private sectors to examine needs, find solutions, and implement them.

I am proud of our successes and accomplishments and look forward to continuing success in furthering the ABA Commission’s work in meeting the law-related needs of older individuals.

I encourage you to get involved. This may be accomplished through participating on one of our excellent discussion lists, such as Elderbar, subscribing to our bimonthly e-journal Bifocal, interacting with us through our social media accounts, or by contacting us to discuss potential partnership opportunities.

Sincerely,

Hon. Patricia Banks
Commission Chair
2016–2017
Operating Budget

The Commission’s operating budget is made up of core funding from ABA general revenues that currently provide about 40% of the funds needed to run the Commission. The remainder comes from grants, contracts, and donations. The Commission’s funding totaled approximately $1.4 million as of September 2016, although revenues can vary considerably from year to year depending on the number and size of grants in any given year.

Private Donations

Growth of annual funding is a high priority for the Commission. Because of the uncertainty of the grant world, private donations have become an increasingly important leg of the Commission’s financial stool. As a program of the ABA Fund for Justice and Education, a 501(c)(3) charitable organization, the Commission is able to receive tax deductible donations and bequests via check, planned giving, or at https://donate.americanbar.org/cola.
The ABA Commission on Law and Aging is committed to making change in adult guardianship. This means working to protect rights and support self-determination. It means pushing for high fiduciary standards. It means promoting strong court oversight. It means finding help for family guardians. In 2016, the Commission has driven important systemic changes that affect individual lives:

Bringing Stakeholders Together to Maximize Impact

“Large scale social change comes from better cross-sector coordination rather than from the isolated intervention of individual organizations.” That was the message of a landmark 2011 article on social change on entitled “Collective Impact” (Kania, J. & Kramer, M., Collective Impact, Stanford Social Innovation Review, Winter 2011.). To make change in the guardianship system requires exactly this kind of collective impact. It requires pulling together the key stakeholders in an ongoing court-community problem-solving forum, as recommended by the 2011 Third National Guardianship Summit. These multi-disciplinary guardianship consensus groups are called WINGS—Working Interdisciplinary Networks of Guardianship Stakeholders.

WINGS groups exist in 17 states. The ABA Commission has helped to support and promote WINGS since 2013. In October 2016 the Commission, in collaboration with the National Center for State Courts, received an Elder Justice Innovation Grant award from the Administration on Community Living to “establish, enhance and expand” state WINGS. See the announcement in this issue, “Commission Receives Federal Support to Expand and Enhance Court-Stakeholder WINGS Partnerships.” The grant will fund state WINGS, and will help to determine whether WINGS is a sustainable, workable, replicable model to address guardianship and decision-support needs on an ongoing basis.

This year, in March we had the opportunity to participate in the Ohio Supreme Court Guardianship Committee WINGS group, where judges from across the state brought local aging and disability partners to the table to discuss needed improvements. In November, we witnessed the launch of Virginia WINGS in Richmond, in a broad-based meeting opened by remarks of the state Chief Justice.

As part of its work with WINGS, the Commission is in continuing contact with the Social Security Administration, which has designated a regional representative for each of the state WINGS. These representatives are to further coordination between the SSA representative payee system and state courts with guardianship jurisdiction, fostering information exchange and understanding.
Giving Lawyers Tools to Support Self-Determination

The Commission completed its almost two-year collaboration with three other American Bar Association entities this year to develop a tool for lawyers on supported decision-making. The tool aims to spur lawyers to routinely build into their practice the concept of “less restrictive options.” We want lawyers involved in guardianship work to ask what else might be tried first, and how people can get the support they might need for increasing self-determination before going the guardianship route.

We created a tool called PRACTICAL (an acronym for a nine-step process)—including a checklist and an online resource guide with hyperlinks to resources. The tool can readily be used by lawyers either in the interview process or afterward in assessing the case and developing strategy. The PRACTICAL tool was launched in May, and highlighted in a June webinar with speakers from the ABA Section of Civil Rights and Social Justice, Real Property, Trust and Estate Law, and the National Resource Center on Supported Decision-Making, with an audience of over 300. Lawyers who tested the tool said it:

“served as a good reminder to slow down and consider alternatives;”

“resulted in completely avoiding one guardianship;”

“was an excellent way to guide staff in completing appropriate screenings;”

“helped us to come to the conclusion that no guardianship was needed;” and

“caused us to think of alternative ways of dealing with the current issues, and come up with solutions that would not entail guardianship.”

The PRACTICAL Tool and Resource Guide are at: http://www.ambar.org/practicaltool.

Restoring Rights for People Subject to Guardianship

In 2016, the Commission led a ground-breaking effort to look at a key guardianship question: once in a guardianship, how does an individual get out if it is not needed? That is, what is the process for restoration of rights and how is it implemented?

Restoration of rights might occur in three circumstances—a person may have regained the ability to make decisions; developed new decision-making supports; or identified new evidence concerning capacity. An example of the first circumstance was a reported case in which:

An 86-year-old woman had a stroke and her niece was appointed as conservator to manage her financial affairs. The aunt moved to assisted living where her condition improved significantly. She wanted to go home and manage her own finances. She petitioned for termination of the conservatorship. The nieces opposed the petition, but it was granted based on medical records and the woman’s in-court testimony, and the decision was affirmed on appeal.

How often does this occur and under what circumstances? With funding from the Greenwall Foundation, the Commission, in collaboration with the Virginia Tech Center for Gerontology, sought to find out. Using legal research conducted by law fellow Jenica Cassidy (now an elder law attorney) in 2013–2014 as a basis, we undertook the first multi-state collection of data on restoration of rights. We collected restoration data on 275 court cases in four states over a three-year period, and examined recent court files.

Most of our 275 cases involved younger individuals living at home, often with family members as guardian, and with very small or no estates. The petitioner for restoration was generally the individual or the guardian. For nearly half these cases, there was no counsel, but very few were contested. On average, a person was subject to guardianship for almost five years before restoration. This picture is quite different from that presented by the 57 reported cases we analyzed from 1984 to present—in which the restoration was contested and frequently opposed by the guardian.

Building on the empirical and legal research, we conducted a lively Roundtable on Restoration of Rights in September 2016 with additional support from the Borchard Foundation Center on Law and Aging. We heard by video and in person the voices of two individuals seeking or granted restoration. We asked provocative questions that fostered discussion and in some cases recommendations: to what extent are individuals and families aware that restoration of rights is an option? How does the issue come before the court? What about the right to counsel in restoration cases? What should be the role of the guardian when there is a restoration petition? What should be the evidentiary standards? Stay tuned for our Report in 2017.
Targeting Conservator Exploitation

We’ve all seen media stories about guardians taking advantage of those entrusted by court to their care—usually in the form of financial exploitation by conservators (sometimes called guardians of property or guardians of the estate). Recently the Government Accountability Office (GAO) highlighted this shocking problem in Report called “Elder Abuse: The Extent of Abuse by Guardians is Unknown, but Some Measures Exist to Help Protect Older Adults.” Yet we also know that many conservators perform their duties with integrity and dedication. As the GAO confirmed, there is very little data on the scope of the problem—and little is known about the effectiveness of remedies to address it.

This year the Commission worked under a subgrant from the National Center for State Courts (NCSC), and in collaboration with the Virginia Tech Center for Gerontology, with funding from the U.S. Department of Justice Office of Victims of Crime to examine conservator financial exploitation and its effect on victims.

The project is assessing the quality and extent of data on conservator exploitation, and studying efforts underway to prevent, detect, and remedy it. One key resource is the pioneering Minnesota Conservator Account Auditing Program, which analyzes data from the court’s unique online conservator accounting system. The project also has collected media stories on conservator exploitation and is conducting in-depth interviews to spot systemic gaps—what happened and what could have been done?

In March the project will conduct an interdisciplinary Forum to consider the project findings and make policy and practice recommendations. We have invited victim groups and representatives of courts, the legal community, guardianship practitioners, adult protective services staff, law enforcement, and key federal agencies to try to come up with workable solutions.

Collaborating on Uniform Laws

Model laws crafted by the Uniform Law Commission (ULC) (http://uniformlaws.org) offer valuable templates for states grappling with guardianship provisions. For the second year, our ABA Commission has participated in a ULC Drafting Committee to revise the 1997 Uniform Guardianship and Protective Proceedings Act. The Committee was charged with implementing recommendations of the 2011 Third National Guardianship Summit, for which the Commission played a key role in planning.

Today’s thinking about adult guardianship differs markedly from perceptions of 20 years ago, and the proposed Uniform Act will bring important changes in the now outmoded Act. For example, a number of provisions will spotlight less restrictive alternatives and incorporate the concept of supported decision-making. The Act aims to be “person-centered”—stressing individual rights and procedures to activate these rights, creating person-centered plans, and making changes in terminology. The Act will offer clearer guidance to guardians and conservators. It will address procedural rights after appointment; and will amend conservatorship provisions on managing finances, some of which have not changed since the 1982 version of the Act.

The final draft is anticipated in 2017, followed by approval by the ULC and by the ABA House of Delegates. Then the Act will be ready for adoption by states. The Commission will continue to be there at every step.

Tracking State Legislation

The Commission has been tracking and monitoring state adult guardianship legislation since 1982. Each year it compiles an annual update of laws passed, explaining their history and importance. The Commission works closely with the AARP State Advocacy and Strategy Integration Team in identifying and analyzing bills, and assisting AARP state offices.

This year as of September we found 38 state enactments on adult guardianship from 22 states. The right to visitation and communication was a hot topic, with nine bills passed. Florida enacted an important measure expanding the public guardianship office responsibility to include oversight of registered professional guardians. Delaware become the second state to enact recognition of supported decision-making agreements. Three additional states passed the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

We presented highlights from the 2016 update in October at the National Guardianship Association’s annual Legal and Legislative Review. We will check for additional bills passed through December, and will post the final update on the Commission’s website.
Health Care Decision-Making Research

The Commission is more than halfway through a major study of how health care providers make health care decisions for patients in a clinical setting who lack capacity and have nothing in writing naming a person to make health care decisions. This research project is made possible by funding from the Retirement Research Foundation. Joining us on the project are the Society for Hospital Medicine and the Society for Critical Care Medicine.

There are three parts to this project:

The first part of the project was a survey of health care providers asking detailed questions about how they assist patients with health care decision-making. Questions included: who do health care providers ask for consent from, how health care providers resolve conflicting opinions between family and friends regarding health care choices, the incidence of patients with no identifiable family or friends, and how health care providers resolve decision-making for this most vulnerable population. The survey was developed and tested over the first half of 2016, and data was collected over the summer. Data is currently being reviewed from over 500 responses to develop a report, findings, and recommendations.

The second element is the collection of hospital staff policies or guidance on health care decision-making. This element has proven difficult to collect, with only a couple of resources publicly available and only a handful submitted to our initial request. Additional follow-up is needed to create a meaningful collection of policies.

The third part is an expert round table scheduled for March of 2017 to discuss the findings and proposed recommendations. The panel of experts for the round table has been selected and invitations are being extended.

The outcome of this project will be a better understanding of clinical best practices and clinical practice compares to prevailing or emerging laws and policies. The final report will include recommendations for policy and training for health care providers and legal practitioners.
National Aging and Law Conference

2016 marked the third year since the Commission took over hosting the National Aging and Law Conference (NALC). The 2016 NALC was held October 27-28th at the Hilton Alexandria Old Town in Alexandria, Virginia. The agenda included four plenary sessions and thirty workshops around a central theme of “Justice for Elders.” The conference set new records this year, with 252 registered attendees from 42 states. Attendance was up from 163 in 2015 and 143 in 2014. Registration so greatly exceeded projections that we ran out of venue space and were forced to close registration and turn people away.

New to the conference this year was a “Core Essentials” track featuring basics of elder law. This year, NALC hosted 25 Elder Justice AmeriCorps fellows as part of the United States Department of Justice effort to place Elder Justice Attorneys in legal aid offices across the country.

The conference was once again supported by two core sponsors, the Borchard Foundation Center on Law and Aging and the AARP Foundation, which provided the Jerry D. Florence attendee scholarships. These long-term sponsors were joined in 2016 by the Securities Industry and Financial Markets Association and Camilla McRory. The Conference featured five paid exhibitors: The Center for Medicare Advocacy, the Harry and Jeannette Weinberg Center for Elder Abuse Prevention, the National Academy of Elder Law Attorneys, the Consumer Financial Protection Bureau, and the National Guardianship Association. The primary audience at NALC is attorneys who work in legal aid, public interest programs, and government.

Planning is underway for the 2017 National Aging and Law Conference, to be held October 26-27, at the DoubleTree by Hilton, in Silver Spring, Maryland. The larger venue for 2017 will allow the Conference to grow up to 300 attendees.

Elder Law Essentials Webinar Series

The Commission produced six webinars in 2016 as part of our Elder Law Essentials webinar series. These programs reached a record 725 people with the live presentations and continue to sell as recorded sessions. Topics for this year were: Ending Guardianship: Handling Termination of Adult Guardianship Orders and Restoration of Rights; 5@55: The 5 Essential Legal Documents Your Need By Age 55; Wills and Estate Administration for the Small Firm Lawyer: Improving Practice and Increasing Income; Finding and Using Options Less Restrictive Than Guardianship – A New Tool for Lawyers; Basics of Counseling Clients on Social Security Retirement Benefits; and How the Updated CMS Nursing Facility Regulations Impact Your Clients.

We recruit outside experts as speakers for the webinars and Commission staff frequently moderate the programs. The primary audience for most of the webinars is ABA members in private practice. The webinars provide CLE credit in all eligible jurisdictions. The webinar series, which is now in its sixth year, help us to promote our mission of improving the lives of older persons by training lawyers and other advocates on critical issues and generate modest non-dues revenue for the Commission.

Where to Go for Further Information

For the latest on NALC, see the Conference homepage at http://ambar.org/NALC.

To stay in the loop on events and CLE, follow the Commission’s twitter feed at https://twitter.com/ABALawandAging.
The Commission on Law and Aging has received funding under the Older Americans Act to support the development and delivery of legal assistance to persons age 60 and over with the greatest economic or social needs for over 25 years. Over the years, the focus of this work has shifted several times and this year saw the shift from resource development under the National Legal Resource Center (NLRC) to training, materials, and case consultation for the National Center on Law and Elder Rights (NCLER). The change is much greater than the change in name; it is a major change in the structure of the Center.

Since 2008 the Commission had received funding for its role as part of the National Legal Resource Center; our focus has been on resource development and coordination, and web site maintenance. We were one of five partners in this project, with each partner having a distinct function. Over the years it became obvious that there were flaws in this model. While each partner was funded to perform a particular function, it became apparent that what would be more effective would be for each partner to focus on an area of substantive expertise. In addition, the NLRC was a virtual center, having no host organization, resulting in the work being done in the name of each grantee and not in the name of the project. The result was that every grantee was developing and carrying out an agenda of case consultation, training, resource development, and technical assistance, despite being funded in only one of these disciplines. The work also lacked a uniform brand, making it difficult to show how the work of the NLRC was distinct from the work of the host organizations. As a result, the decision was made to end that project at the end of the funding term on June 30, 2016.

In September of 2016, the Administration for Community Living issued a contract for a new project known as the National Center on Law and Elder Rights. The contract was awarded to Justice in Aging, who in turn subcontracted with the Commission to provide training, materials development, and case consultation (expert advice to professionals in law and aging) in our areas of substantive expertise. In collaboration with NCLER leadership, a two-part training agenda is being developed. In the first year, we are responsible for developing and delivering two basics programs and two advanced (or hot topics) programs. Written materials are being developed for each program. The funding also provides staff time for development of the National Aging and Law Conference and speaking at select national programs as requested by NCLER leadership. In addition, we are funded to provide about 250 hours of expert advice to professionals in law and aging on issues within our areas of expertise. All of this work will be branded and delivered in the name of the NCLER.

The NCLER contract is renewable for up to five years. Unfortunately, the funding level for our subcontract on the NCLER is about half of the amount of our funding for the NLRC.
The Importance of Momentum in 2016

This year the Commission continued its participation in the annual meetings of the U.N. Open-Ended Working Group on Ageing in collaboration with the official ABA liaison Professor Bill Mock of John Marshall Law School. The Working Group has continued to engage in extensive inquiry and debate about whether the U.N. should pursue a separate convention on the rights of older persons, or instead, seek to strengthen the enforcement of existing universal international standards as they may apply to older persons. That question has remained a threshold sticking point to consensus.

Not surprisingly, the U.S. has not been a supporter of a convention. The U.S. prides itself on its commitment to innovation in protecting the rights and quality of life of older Americans. However, the U.S. historically has been very reluctant to allow itself to be subject to any laws or rules created and enforced by non-U.S. authorities. Nevertheless, treaties or conventions that are widely adopted by other nations do tend to affect the legal thinking, analysis, and practices under American law, oftentimes in profound ways. Thus, the ABA Commission has continued its work despite U.S. reluctance.

The Working Group met this December 2016, with the most prominent keynote speaker being Rosa Kornfeld-Mattee, “the Independent Expert on the enjoyment of all human rights by older persons,” a position created by the U.N. Human Rights Council in 2013. Her report set forth the findings, conclusions, and recommendations of her 3-year investigation. The core recommendation of her report calls on States to step up their efforts to determine the best way to strengthen the protection of the human rights of older persons and to consider the various proposals that have been made, notably the elaboration of a convention on the rights of older persons. It is also hoped that the Working Group will in due course present to the General Assembly a proposal containing, inter alia, the main elements that should be included in an international legal instrument to promote and protect the rights and dignity of older persons, which are not currently addressed sufficiently by existing mechanisms and therefore require further international protection....

The inspirational chair of the Working Group, Mr. Mateo Estrémé of Argentina, called on member States and civil society to begin the task of defining the elements of a human rights instrument that will respect, promote, and ensure the human rights of older persons. In the ensuing discussion among State representatives and civil society organizations, the Commission offered elements of a right of access to justice that are necessary for the enjoyment of that right by older persons.
In the coming year, we expect much more effort to articulate the nature and scope of human rights as they apply to the unique circumstances of older persons. Oft repeated by speakers during this meeting was the fact that by 2050, for the first time, there will be more older persons than children under the age of 15 worldwide, and it is projected that the number of older persons will more than double from 900 million currently to nearly 2 billion. The pressing demographic shift increases the sense of urgency to act sooner than later.

While the efforts at the U.N. continue, members of the Organization of American States (OAS) stepped up efforts to add signatories to the Inter-American Convention on Protecting the Human Rights of Older Persons, adopted in June 2015, the first ever regional human rights convention addressing older persons. In the coming year, the Commission will be advocating for a resolution to be adopted by the ABA House of Delegates calling on the U.S. president to sign and the Senate to ratify the OAS convention.
The Commission has played an important role in several major advances this past year affecting advance care planning and advanced illness policy and practice.

**Policy Change: Regulatory Requirements for Long-Term Care Facilities**

The Commission played an active role in advocating for changes in the federal regulatory requirements for long-term care facilities that will prohibit the use of mandatory, pre-dispute arbitration provisions in nursing home admissions contracts. The proposed rule by the Centers for Medicare and Medicaid Services (CMS) would have allowed such provisions that met certain basic standards. But in September 2016, CMS released a final rule that expressly bans pre-dispute arbitration provisions in nursing home admissions. This was a major victory for residents’ rights advocates.

However, the battle will continue because the nursing home industry promptly filed suit to challenge the legality of the regulation under the Federal Arbitration Act. The likely duration of the litigation is always hard to predict, but the Commission and other advocates remain optimistic for a positive outcome.

The nursing home industry has always argued that arbitration offers a simpler, swifter and less expensive alternative to litigation, without the headaches and delays of court proceedings. Yet, data on that claim is lacking, because arbitrations are confidential and there is no database that records their outcomes. New York Times reporters undertook a yearlong investigation of nursing home arbitration proceedings, examining the records from more than 25,000 arbitrations between 2010 and 2014. They also interviewed hundreds of lawyers, arbitrators, plaintiffs and judges in 35 states. They found that arbitration proceedings bore little resemblance to the due process rules of court. Arbitrations are generally conducted in the offices of lawyers who represent the companies accused of wrongdoing. More seriously, the Times found many troubling examples where issues of abuse, potential neglect, and even premature death never made it into the public light because they were blocked from court.

**Legislative Culture Change**

The Commission’s continues to support the legislative dialog that has continued to grow on both sides of the aisle on the importance of advance care planning and person- and family-centered care for persons with advanced illness. While Congress has yet to enact major legislation on this topic, seven important bills reflected a growing interest in
addressing the challenge of advanced illness and caregiving:

- The Palliative Care and Hospice Education and Training Act (S. 2748/H.R. 3119)
- Personalize Your Care Act 2.0 (H.R. 5555)
- Compassionate Care Act (S. 2961)
- Medicare Choices Empowerment and Protection Act (S. 2297/H.R. 4059)
- Care Planning Act (S. 1549)
- Removing Barriers to Person-Centered Care (S. 3096)
- RAISE Family Caregivers Act (S. 1719/H.R. 3099)

An example of the direction we support in these efforts above is The Care Planning Act (S. 1549) introduced by Sen. Mark Warner (D-VA) and Johnny Isakson (R-GA). The bill would create a care planning and coordination benefit under Medicare, as well as an advanced care demonstration project. The year ahead will likely see the reintroduction of each of these bills, and despite the political uncertainty of the next administration, they each offer an opportunity for consensus and real progress.

**Collaboration Works!**

Commission staff continue to collaborate with the Coalition to Transform Advanced Care (C-TAC) toward the goal of ensuring that all people with advanced illness receive high-quality, coordinated, and compassionate care consistent with their personal goals and values. The Commission also continues to provide technical assistance to the National POLST Paradigm Task Force and to state groups developing programs modeled on POLST (Physician Orders for Life-Sustaining Treatment). The Commission testified in support of a District of Columbia bill successfully enacted to establish POLST in D.C. (referred to as Medical Orders for Scope of Treatment or MOST in D.C.). Implementation steps began in 2016.

As of the end of 2016, 19 states have programs “endorsed” by the National POLST Paradigm Task Force, and 25 states have developing programs, and 4 states that have programs that are considered non-conforming by the Task Force. See www.polst.org. POLST programs have been established or are under development in almost every state in the nation as of the end of 2016, so the work of the Task Force in setting standards, and providing technical assistance and education has grown in importance.

**Educational Progress**

The Commission’s educational efforts on health decisions and advance care planning are ongoing. This year, efforts included presentations at several professional conferences, media technical assistance, and updating legislative tracking data on advance directive laws posted on the Commission website. Commission staff also collaborated with the expert consultation on legal issues related to people with the RTI National Alzheimer’s and Dementia Resource Center in the production of several of their educational publications targeted to individuals with or working with Alzheimer’s disease and other dementias.

One especially relevant web resource regularly updated by the Commission is our Health Decisions Resources page. It highlights the best resources available to the public and professionals on the subject of advance care planning. Several other health decisions technical resources can be found on that web page, too. Visit http://ambar.org/healthdecisions.

**Shining a Light on Family Caregiving**

The National Academy of Medicine (formerly Institute of Medicine) established a Committee on Family Caregiving of Older Adults in 2015 to which the this author as Commission director was invited to be a member. The Committee issued its report in September 2016, titled *Families Caring for an Aging America*. This timely report examines what is known about the millions of Americans who are providing care and support to an older adult-a parent, spouse, friend, or neighbor-who needs help because of a limitation in their physical, mental, or cognitive functioning. The report calls for a transformation in the policies and practices affecting the role of families in the support and care of older adults, stating that today’s emphasis on person-centered care needs to evolve into a focus on person- and family-centered care. The report recommends, among other steps, that the Secretary of Health and Human Services create and implement a National Family Caregiver Strategy. The full report is available at: https://www.nap.edu/catalog/23606/families-caring-for-an-aging-america.
This year the ABA Commission on Law and Aging (Commission) continued its efforts, begun in 1993, to expand and strengthen the justice system’s role in preventing, detecting, and remedying the devastating and costly problem of elder abuse, neglect, and exploitation (generally referred to as “elder abuse” unless otherwise indicated). Commission activities were concentrated in three areas. New projects addressing the intersection of elder abuse and guardianship cut across all three areas, but are discussed in the update on Guardianship and Supported Decision-Making.

**Educat ing and Providing Tools to Justice System Professionals**

**Elder Investment Fraud and Financial Exploitation Prevention Program Legal**

Our initiative known as the *Elder Investment Fraud and Financial Exploitation Prevention Program Legal* (EIFFE Legal) continued this year. In partnership with the Investor Protection Trust (IPT) and Investor Protection Institute (IPI), we are educating lawyers from diverse practices areas to:

- recognize clients’ possible vulnerability to EIFFE due to mild cognitive impairment,
- identify EIFFE in their clients, and
- report suspected EIFFE to appropriate authorities.

We conducted a pilot test of the EIFFE Legal model national continuing legal education curriculum at the Iowa State Bar Association Annual Meeting in June. Approximately 60 people attended the 1.5 hour program.

Planning is underway for the final pilot programs, which will be in Philadelphia, Pennsylvania on April 6, 2017, and in Missouri, date and location to be determined.

Other EIFFE Legal activities this year included:

- Stiegel presented about the initiative at an IPT-organized workshop titled “Elder Financial Abuse Prevention: Reaching People Where They Live” at the American Society on Aging Annual Conference;
- Commission director Charlie Sabatino moderated a panel session about EIFFE Legal at the IPT Elder Investment Fraud and Financial Exploitation Prevention Program Summit; and
- Stiegel spoke about EIFFE Legal activities and related issues to the ABA Section of Real Property, Trust and Estate Law Elder Law and Special Needs Planning Group.

Where to Go for Further Information

For the latest on the Commission’s elder abuse work, see our web page at: [http://ambar.org/elderabuse](http://ambar.org/elderabuse).
Pocket Guide on Legal Issues Related to Elder Abuse for Criminal Justice Professionals

At the end of 2015, the Commission had disseminated more than 23,000 printed copies of *Legal Issues Related to Elder Abuse: A Pocket Guide for Law Enforcement* as well as PDF versions of the *Legal Issues Related to Elder Abuse: A Desk Guide for Law Enforcement* and of *Template for State Adaptation of “Legal issues Related to Elder Abuse: A Desk Guide for Law Enforcement.”* Those guides and templates, supported by the U.S. Department of Justice’s Bureau of Justice Assistance, were intended for criminal justice professionals (law enforcement and community corrections officials, prosecutors, and judges), but also were useful to and requested by adult protective services and victim services professionals, lawyers, financial services industry professionals, advocates, victims, and others. Seeking to expand dissemination and use of the pocket guide, we submitted an application (in collaboration with Commission member Keith Morris of Elder Law of Michigan) to Georgetown Law Center's Iron Tech Lawyer Program for development of a pocket guide app. Our proposal was selected and a team of students will begin work on the app in January 2017. In the meanwhile, the documents remain available online and free at [www.ambar.org/ElderAbuseGuides](http://www.ambar.org/ElderAbuseGuides).

Elder Abuse on the Agenda of the National Aging and Law Conference

The National Aging and Law Conference, sponsored by the ABA in collaboration with a number of other organizations, devoted a significant portion of its agenda to elder abuse again this year. Three plenary sessions and four workshops either addressed or devoted substantial attention to the problem. The “Justice for Elders” plenary featured Edwin Walker, Acting Assistant Secretary for Aging at the Administration for Community Living of the Department of Health and Human Services, and Andy Mao, Coordinator of the Elder Justice Initiative at the Department of Justice, who spoke about the important elder abuse initiatives underway at their respective federal departments. A plenary session on “Strengthening State Civil Laws on Financial Exploitation” provided information about the forthcoming model civil statutory provisions on elder financial exploitation that the National Center for Victims of Crime (NCVC) and the Commission are developing to help states better define and address the problem, protect victims, facilitate litigation to hold exploiters accountable financially, and enhance the remedies available to victims. Stiegel co-presented with NCVC project director Laura Cook and Matt Andres, University of Illinois College of Law professor and Elder Financial Justice Clinic director.

Other Significant Activities to Educate Justice System Professionals

Supported by the Administration for Community Living through its National Legal Resource Center, Commission staff produced and participated in:

- A webinar titled “Legal Remedies to Financial Exploitation: Let’s Get Grandpa’s House Back” (Stiegel and Denis Culley of Maine Legal Services for the Elderly);
- A four-hour live training program titled “Elder Abuse and IIIB Providers: Reviewing Resources and Our Role,” for Maryland’s Title IIIB legal assistance providers (Stiegel with assistance from two Maryland Legal Aid Bureau lawyers and two Maryland law enforcement officers); and
- A webinar titled “Capacity and Vulnerability to Elder Abuse,” (Stiegel and Erica Wood of the ABA Commission and Dan Marson, professor of neuropsychology at the University of Alabama).

Stiegel co-presented with Oregon Attorney General Ellen Rosenblum and others on a panel titled “Attorneys General Combating Elder Abuse, Neglect and Exploitation: Bringing It Out of The Shadows” at the National Association of Attorneys General Spring Meeting.

Stiegel also presented “The National Perspective and the Role of Capacity in Criminal Cases of Elder Abuse” to Maryland criminal and general jurisdiction judges as part of a half-day Maryland Judicial Institute program on elder abuse.

Educating Other Professionals and Persons about the Law

The Commission continued its efforts to raise awareness among non-legal professionals, older persons and their family members, and lay fiduciaries about the laws relevant to elder abuse and the ways in which the justice system can help victims or punish perpetrators. Key activities this year included:

- Reviewing documents produced by the Research Triangle Institute for providers of services to persons with dementia who live alone to ensure
that the materials accurately and thoroughly impart information about elder abuse and the needs of victims; and

• Writing a chapter titled “Elder Abuse Victims’ Access to Justice: Roles of the Civil, Criminal, and Judicial Systems in Preventing, Detecting, and Remedying Elder Abuse” for the forthcoming book Elder Abuse, edited by former Commission member Dr. Xinqi Dong.

The Consumer Financial Protection Bureau (CFPB) continued to disseminate materials developed for it by the Commission to prevent financial exploitation by lay fiduciaries (agents under powers of attorney, guardians, representative payees and VA fiduciaries, and trustees of revocable living trusts). Those materials include a set of four national, plain English guides, collectively known as the Managing Someone Else’s Money guides. Additionally, CFPB staff, Commission staff, and state legal experts collaborated to produce a set of guides for six states. The guides for Virginia, Florida, and Oregon have been published; release of the Illinois guides is imminent; and the guides for Georgia and Arizona will follow. Additionally, using replication tips and templates that the Commission also wrote for CFPB, Texas Appleseed and AARP Texas have prepared guides for that state and Minnesota’s Elder Justice Center is adapting the power of attorney and guardianship guides. CFPB had disseminated more than one million hard and virtual copies of the national and state guides, which are among its most popular publications, before August 6th when nationally-syndicated personal finance columnist Michelle Singletary wrote about the guides (https://www.washingtonpost.com/business/get-there/how-to-help-when-its-not-your-money/2016/08/04/95734e4e-5904-11e6-831d-0324760ca856_story.html). To access the national and state guides and the replication tips and templates, visit http://www.consumerfinance.gov/managing-someone-elses-money.

Advocating for Stronger Laws and Policies

Supported by ABA policy, the Commission engaged in numerous efforts to strengthen federal and state laws and policies. Activities related to federal laws and policies included technical assistance to Congressional committees and to federal agencies including the Senate Special Committee on Aging, Administration for Community Living/Administration on Aging, CFPB, Government Accountability Office, and Department of Justice. Staff also collaborated with the ABA’s Governmental Affairs Office to send letters to Congress in support of bills that would appropriate funding for and authorize activities related to elder abuse.

We have provided technical assistance to numerous states on topics including power of attorney abuse, remedies for financial exploitation, elder abuse fatality review teams, and court-focused elder abuse initiatives. Much of this work is done through consulting services to AARP’s State Advocacy and Strategy Integration Team. We also continued advising the North American Securities Administrators Association on its efforts to protect older investors from financial exploitation and fraud. Additionally, we assisted the National Center for Victims of Crime staff on a project to develop model civil statutory provisions on elder financial exploitation (see above), which was funded by the Huguette Clark Family Fund for Protection of Elders, a Donor-advised Fund of the New York Community Trust.

Get Connected, Stay Connected, on Elderbar

Join Elderbar, the discussion list that brings together public and private sector legal advocates and the aging network. Elderbar gives you the opportunity to communicate across the boundaries of the law and aging networks and the public and private legal sectors. Share ideas and information about programs, bar section and committee activities, and learn how others are responding to the increasing demand and finite funding for legal services for seniors.

To get connected to Elderbar send your contact information and professional affiliation to david.godfrey@americanbar.org.
Commission Receives Federal Support to Expand and Enhance Court-Stakeholder WINGS Partnerships

The ABA Commission on Law and Aging, in collaboration with the National Center for State Courts (NCSC), has received an Elder Justice Innovation Grant from the federal Administration on Community Living to establish, expand, and enhance state Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS). The new project aims to improve the ability of state and local guardianship systems to develop protections less restrictive than guardianship, advance guardianship reforms and address abuse. The project will be aided by an Advisory Committee drawn from organizational members of the National Guardianship Network and from key judicial, legal, aging, and disability entities.

The ABA Commission will provide funding through a competitive application process for new and existing WINGS as ongoing court-initiated problem-solving entities targeting pressing guardianship issues. Eligible applicants are state court systems, led by the state’s chief justice, in collaboration with key stakeholders—including as mandatory stakeholders the state’s unit on aging under the Older Americans Act, adult protective services agency, and protection and advocacy agency or developmental disabilities council, as well as representatives from the U. S. Social Security Administration and Department of Veterans Affairs. The funding offers the opportunity for state courts to initiate a new WINGS group – or to enhance a WINGS group already underway. The project will send a Request for Proposals to directly to each state chief justice.

Currently 17 states have WINGS. These broad-based, multi-disciplinary groups bring together judicial, aging, disability, legal, health and mental health, long-term care, family members, and individuals affected by guardianship to tackle gaps and promote needed changes. WINGS have produced valuable resources, strengthened court oversight, and explored less restrictive options. But just as important, WINGS have forged communication paths among stakeholders, reducing silos among entities serving the same populations and opening doorways to communication.

Under the new project, the ABA Commission and NCSC will provide the WINGS grant recipients with a multi-layered infrastructure of technical assistance. NCSC’s expertise in court program evaluation will support WINGS efforts on strategic planning, data collection and outcome measurement. ABA Commission staff will develop resources in key areas of guardianship reform and facilitate cross-state exchanges.
Millions of Americans are managing money or property for a loved one who is unable to pay bills or make financial decisions. These financial caregivers may be agents under a power of attorney, guardians of property or other fiduciaries. To help financial caregivers in Illinois, the Consumer Financial Protection Bureau’s (CFPB) Office for Older Americans has published easy-to-understand Managing Someone Else’s Money guides with information and resources specific to Illinois. The guides were written by the ABA Commission with assistance from state experts.

Join a free webinar on January 12 to learn more about these guides and how you can help people acting as financial fiduciaries for older adults and adults with disabilities. Speakers include:

- Honorable Patricia Banks, Presiding Judge, Elder Law and Miscellaneous Remedies Division, Circuit Court of Cook County; Chair of the ABA Commission on Law and Aging
- Jonathan Lavin, President and CEO, AgeOptions
- Wendy Cappelletto, Supervising Attorney, Cook County Public Guardian
- Naomi Karp, Senior Policy Analyst, CFPB, Office for Older Americans

Upcoming webinar:
Tools for Financial Caregivers in Illinois

- January 12, 2017
- 2:00-3:00 p.m. Central Time

To register for this event:


2. Enter the conference number (2339963) and passcode (144022).

3. Provide your information for the event leader and then click submit.

- To join the webinar, please click on the following link at the time of the webinar: https://www.mymeetings.com/nc/join.php?i=PWXW2339963&p=CFPB&t=c (No RSVP required)

- AUDIO PARTICIPATION ACCESS: Toll Free Number: 1-888-795-5920, passcode: 5082358

If you have any questions, please contact Tami Sieckman at tamara.sieckman@cfpb.gov or 202-435-7121.
New Staff Attorney Joins the Commission

Dari Pogach joined the ABA as a part-time staff attorney at the ABA Commission on Law and Aging in September 2016. She specializes in adult guardianship reform and alternatives to guardianship. She has provided direct legal services to indigent clients for several years, including as a staff attorney at Disability Rights D.C. of University Legal Services, the District of Columbia’s protection & advocacy program for people with disabilities, and Quality Trust for Individuals with Disabilities.

She also has substantive experience in policy and legislative advocacy, and has testified at numerous legislative hearings, provided comments to proposed regulations, and written public reports with recommendations for improving local laws and practices. Ms. Pogach received her B.A. from the University of Pennsylvania and her J.D. from Washington College of Law.

Currently, Ms. Pogach is working with a group of Commissioners to draft a new ABA resolution addressing representative payee issues. She is also working with Erica Wood and Lori Stiegel on the ongoing WINGS project and upcoming conservator fraud roundtable.

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We are listed as:
ABA Commission on Law and Aging

Discussion Lists
The Commission provides a forum for legal professionals to communicate and share ideas on two active discussion lists:

- Elderbar, an open discussion list for professionals in law and aging, and
- Collaborate, a discussion list on aging, disability, and dispute resolution.

Visit the Commission’s homepage for more information on how to sign up.

Media Requests
The Commission provides background to the media on a range of issues relating to law and aging, including:

- Guardianship and conservatorship
- Elder abuse, neglect, and exploitation
- Mental capacity, aging, and surrogate decision-making
- Health care decision-making and advance directives
- Medicare, Medicaid, and long-term care
- Elder law and the delivery of legal assistance to older persons

Contact the Division for Media Relations and Communication Services for expert contacts at abanews@americanbar.org or (202) 662-1090.
The Commission's 2016 Legal Interns and Externs

Shayne Bolanos, a Spring 2016 intern, was a fourth-year undergraduate student at the University of California, Irvine. Ms. Bolanos is pursuing a B.A. in Public Health Policy with a minor in Criminology, Law & Society (CLS). After graduation, Ms. Bolanos hopes to pursue an MAS degree in Health Policy and Law at the University of California, San Diego, and to go to law school and pursue a career in health law. Ms. Bolanos worked with David Godfrey to collect data on the Commission's Retirement Research Foundation project on healthcare decision-making.

Scott Perske, a Spring 2016 extern, was a second-year law student at the George Washington University Law School in Washington, DC. Mr. Perske received his B.A. from the University of Hawaii at Manoa, and his M.A. in dispute resolution from the Pepperdine University School of Law in Malibu, CA. After receiving his M.A., Mr. Perske worked as a mediator in the Superior Court of Los Angeles County. While at the ABA, Mr. Perske researched public guardianship statutes with Erica Wood.

Preston Holmes, a Summer 2016 extern, is a third-year law student at Penn State Law in State College, PA. Mr. Holmes received his B.S. from Auburn University. In the summer of 2015, Mr. Holmes worked for the Mecklenburg County 26th Judicial District as a law clerk in the Self-Serve Center in Charlotte, NC, where he taught pro-se clinics and conducted legal research for criminal expunctions. Upon graduation, Mr. Holmes hopes to find work as legislative counsel or an elder law attorney. Mr. Holmes worked with Charlie Sabatino to conduct research on health care decision-making.

Teresa Yao, a Summer 2016 extern, is a third-year student in the JD/MSW program at Washington University in St. Louis, MO. Prior to law school, she received her B.A. in Philosophy-Neuroscience-Psychology from Washington University, where she conducted research on neuropsychological studies for older adults. In summer 2015, she worked on an effort to connect global dementia non-profit groups with law firms that provide free legal assistance. She worked with David Godfrey on a project examining surrogate selection in the context of decision-making for incapacitated patients.

Erica McCrea, a Fall 2016 extern, is a second-year law student at The Catholic University of America, Columbus School of Law in Washington, DC. Ms. McCrea received her B.A. from Charleston Southern University in Charleston, SC. Following her first year of law school, Ms. McCrea worked as an enforcement intern in the Washington Field Office of the EEOC. This fall she worked with Erica Wood to research current privacy and confidentiality provisions in guardianship statutes, creating a chart of statutory provisions and an article discussing her findings.

Sidney Zahabizadeh, a Fall 2016 extern, is a second-year law student at the University of Maryland Francis King Carey School of Law. Ms. Zahabizadeh completed her undergraduate education at the University of Southern California where she discovered her interest in aging at the USC Davis School of Gerontology. At the ABA, she worked with David Godfrey to research durability provisions in power of attorney statutes to create state-wide chart of statutory provisions identifying key elements and where to find them.
Social Security Administration Training for Those Working with Rep Payees

The Social Security Administration (SSA) recently released the “Interdisciplinary Training for those who serve Vulnerable Adults and Seniors.” For over two years, the SSA has worked with attorneys and advocates to develop this training to ensure that their representative payees have adequate tools and resources to serve SSA customers.

In support of the Elder Justice Act and the efforts of the Elder Justice Coordinating Council, the SSA is excited to share this training series. Although this training was developed to support the SSA’s representative payee program, staff soon recognized that this training would be beneficial to all who work with or assist the most vulnerable, providing further insight, broadening community awareness, educating members of the public, and providing key resources related to the growing incidence of elder abuse, neglect, and financial exploitation.

Please click the link to review the training: https://www.ssa.gov/payee/rp_training2.html. The SSA encourages the sharing of this training resource with colleagues and others who serve vulnerable adults and seniors.

Understanding the Four C’s of Elder Law Ethics

This consumer-friendly brochure explains the “Four C’s” of elder law ethics—client identification, conflicts of interest, confidentiality, and competency. It helps family members understand the relationship between a lawyer and an older client.

- Free PDF download
- Purchase hard copies

To learn more, use the links above or visit the Commission’s website at http://www.americanbar.org/groups/law_aging/publications/ethics_pubs.html.
Save the date for next year's National Aging and Law Conference in convenient Silver Spring, Maryland, a short 20-minute metro ride from downtown Washington, DC.

Stay up to date on details for the Conference by following the NALC twitter account or Facebook page!

2016 Follow-Up: 2016 Meeting Materials are available for purchase.

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**Ethical Challenges with Challenging Clients**

**Panelists:** Eleanor Crosby Lanier, Jennifer L. Wright

**Moderator:** David M. Godfrey

**ABA Sponsors:**
- Center for Professional Development
- Center For Professional Responsibility
- Commission on Disability Rights
- Commission on Law and Aging
- Division for Public Services
- Law Practice Division
- Section of Dispute Resolution
- Section of Family Law
- Section of Litigation
- Solo, Small Firm and General Practice Division

This session will use a series of case studies to examine the ethical obligations and options for an attorney faced with a client who insists on ignoring good advice and making bad choices. What choices can only be made by the client? What choices are left up to the attorney? How should the attorney document the presentation of all options, their risks and benefits and the resulting choice made by the client? When must the lawyer withdraw? When must the attorney report the client or initiate protective action? When you should help your client find another attorney and walk away?

Participants will examine:
- Choices that belong to the client and what choices are to be made by the attorney
- Options to address situations where there is conflict between attorney and client regarding the direction of the representation
- Guidance for discussing available options and assuring that the client understands the choice being made and potential consequences
- Examining the tipping point where the lawyer must withdraw
- Exploring when a lawyer may or should withdraw or decline representation
- What to do when helping a client carry out a choice that others see as a bad choice

To learn more or register, visit: [http://bit.ly/2f4Trrv](http://bit.ly/2f4Trrv)