

Judicial Response to Elder Abuse

By Judge Karen Aileen Howze and Jennifer L. White

ABSTRACT

Reported cases of elder abuse are increasing throughout the United States. At the same time, identification of elder abuse issues by courts is considered “fair” or “poor.” To address the increased numbers of reported cases—particularly those where the victim is in an ongoing, trusted relationship with his or her perpetrator—the justice system must develop a concerted approach to resolving elder abuse cases. Along with the identification of the various forms and definitions of elder abuse, the courts face numerous challenges including the lack of reliable data and research on this form of abuse; the lack of laws, legal precedent, or appropriate remedies in elder abuse cases; complex evidentiary challenges; issues of victim capacity and victim choice, as well as assumptions about age and aging, limited resources, and the lack of a coordinated community response to elder abuse.

Michael and Mary Mellman¹ have been married for 52 years. Mrs. Mellman is 70 and in good health. Mr. Mellman is 73, uses a wheelchair, and has AIDS. Their neighbors called Adult Protective Services (APS) and reported that Mr. Mellman was bathing in the yard in 50-degree weather. An APS social worker investigated and found that Mr. Mellman was malnourished and “lived” in a small washroom that had no windows and no bed. The room was filthy and unsanitary. Mr. Mellman had been without his medications for some time. APS also determined that the majority of Mr. Mellman’s retirement check was being used by Mrs. Mellman.

¹ National Judicial Institute on Domestic Violence (NJIDV), A Case Study from the NJIDV’s Enhancing Judicial Skills in Elder Abuse Cases Workshop (developed in 2007). The names of the participants in this case study have been changed.

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The social worker confronted Mrs. Mellman about the use of her husband's income and asked why she did not hire someone to help care for Mr. Mellman, or as an alternative, place him in a care facility. Mrs. Mellman stated, "I've got to live here and not one cent of my money will go to pay for his care." Mrs. Mellman was charged with elder abuse and neglect. At trial, she testified that Mr. Mellman physically abused her throughout their marriage, and that any treatment Mr. Mellman received was deserved for all the pain he put her through.

In the criminal case against Mrs. Mellman, the prosecutor argued that Mrs. Mellman's allegations were fallacious, and that in Mr. Mellman's physical state he could not possibly cause her any harm.

Mrs. Mellman's court-appointed attorney introduced into evidence copies of a civil protection order issued against Mr. Mellman. He was ordered to stay in a separate part of the home even though Mrs. Mellman had requested that her husband be ordered to move.

The court record in the civil protection case shows that the judge found that domestic violence had occurred; however, the judge also found that "due to Mr. Mellman's disability, separating the couple within the home was the safest, and only, solution for both parties." Mrs. Mellman filed three motions for contempt against Mr. Mellman during the period that the civil protection order was in effect for violating the terms of the order. Mr. Mellman was never arrested or removed from the home.

THE DYNAMICS OF ELDER ABUSE AND THE COURT PROCESS

The Mellman case illustrates domestic violence in later life,² one type of elder abuse. In elder abuse cases, many forms of abuse may co-occur. Definitions of elder abuse vary according to state statutes, but broadly defined it may include, but is not limited to:³

- Neglect and self-neglect;
- Physical, psychological, sexual, and emotional abuse;
- Financial exploitation; and
- Abandonment.

This article will focus on cases of elder abuse where the victim has an ongoing, trusted relationship with his or her perpetrator. The elder victim-perpetrator relationship typically includes intimate partners, adult children victimizing their parents, adult grandchildren victimizing their grandparents, and caregivers victimizing care recipients.

The Mellman case and cases like it present difficult and complex issues for the justice system. Among them:

² For purposes of the Abuse in Later Life Grant Program, the U.S. Department of Justice, Office on Violence Against Women defines elder as 50 and older. See <http://www.ovw.usdoj.gov/ElderAbuse2002programbrief.htm>.

³ BONNIE BRANDL, NATIONAL CLEARINGHOUSE ON ABUSE IN LATER LIFE, ASSESSING FOR ABUSE IN LATER LIFE (2004), available at http://www.ncall.us/docs/Assessing_and_Responding.pdf.

- Does an elderly person have the ability to cause real and substantial harm?
- How is dangerousness assessed in this population?
- What accountability is appropriate when one elder is unable or unwilling to care for another elder, particularly when one or both may have failing health or there is a history of domestic violence?
- What dispositions are appropriate and effective in cases where a perpetrator is older, frail, and in poor health, and where limited resources exist to meet the needs of elders?

Consider the disposition in the Mellman civil protection order case: The judge assumed that Mr. Mellman's disability and health problems rendered him incapable of causing serious harm. Mrs. Mellman was told to stay in a separate part of the home from her husband because the judge did not feel comfortable removing an ill and elderly man from the home even though the judge found that Mrs. Mellman's allegations of domestic violence were supported by the evidence. What message did Mrs. Mellman receive when the judge allowed her abuser to remain in the home simply because he was an older adult and a person with a disability? Did the decision to allow Mr. Mellman to remain in the home create safety issues for both the victim and the perpetrator? Ultimately, the message that the judge sent to the Mellmans was clear: Mr. Mellman is not capable of causing harm to his wife.

Revisiting the Mellmans

The judge's decision in the Mellman civil protection case set the stage for the criminal prosecution. In the end, the circumstances that led to the criminal case may have been avoided if certain assumptions about older adult victims and perpetrators had not existed. In a perfect world, a coordinated community response to elder abuse, including a multidisciplinary team, would have been in place to assist the court in fashioning a response to meet the Mellmans' needs in a variety of ways. A few examples:

- The judge could have facilitated access to an advocate who would help Mrs. Mellman create a safety plan.
- The judge could have required Mr. Mellman to participate in a batterer intervention program designed to affect Mr. Mellman's future behavior.
- The judge could have ordered a review hearing to check on Mr. Mellman's compliance with any provisions in the protective order.

Indeed, the judge who issued the civil protection order did have a few options. Armed with information about the couple, the judge could have explored whether there were housing alternatives for Mr. Mellman that would have ensured safety for Mrs. Mellman. The judge could have questioned whether there were resources—personal and community-based—to provide assistance in the home so that the victim, Mrs. Mellman, was not placed in the role of caretaker for a man whom she feared.

Ultimately, the judge could have ordered Mr. Mellman out of the home and allowed Mrs. Mellman to remain there alone. The judge could have linked Mrs. Mellman to services, including the local aging services network or Adult Protective Services (APS) if appropriate. The judge could have provided information to Mrs. Mellman about services from local domestic violence or victim assistance programs. If the judge decided against ejecting Mr. Mellman from the home, he could have issued an order with protective language requiring Mr. Mellman to refrain from abusing or threatening Mrs. Mellman.

ADDRESSING JUSTICE IN AN AGING NATION

The justice system must address the issues raised in elder abuse cases in a methodical and concerted way because the population in the United States is aging at a rate that has been dubbed a “silver tsunami.”⁴

The data:⁵

- In 2008, some 38.9 million U.S. citizens were 65 years or older, representing 12.8% of the population.
- By 2030, some 72.1 million men and women will be over the age of 65, representing 19% of the total population, according to the U.S. Department of Health and Human Services, Administration on Aging.
- Ten million U.S. residents will be over 85 years of age within the next 20 years.

Meanwhile, elder abuse and neglect continues to rise.⁶ Reported cases of elder abuse increased by 62% between 1996 and 1999. In the 1990s, the number of elder abuse investigations by Adult Protective Services across the nation increased by more than 150%, according to the National Center on Elder Abuse.⁷ Consider this:

Our nation is in the midst of three seismic demographic shifts that will put seniors at even greater risk for mistreatment. Older people are living longer, until they're frailer and more vulnerable. They are increasingly alone in old age, given that families are smaller and more

⁴ The term “silver tsunami” was coined by author Mary Finn Maples and referred to the Baby Boomer generation, those 76,000,000 persons who would begin celebrating their 60th birthdays in 2006. See Mary Finn Maples, *Spirituality, Wellness, and the “Silver Tsunami”: Implications for Counseling* (2007) (paper presented at the National Convention of the American Counseling Association, Detroit, MI), available at <http://counselingoutfitters.com/vistas/vistas07/Maples.htm>.

⁵ U.S. CENSUS BUREAU, *65+ IN THE UNITED STATES: 2005* (December 2005) available at <http://www.census.gov/prod/2006pubs/p23-209.pdf>; see Maples, *id.*

⁶ To address this growing issue of personal and community safety, the U.S. Department of Justice, Office on Violence Against Women has provided resources to improve the justice system's response to elder abuse by funding training for law enforcement, prosecutors, and judges throughout the country.

⁷ The National Center on Elder Abuse (NCEA) is a national resource center within the Administration on Aging of the U.S. Department of Health and Human Services. See NATIONAL CENTER ON ELDER ABUSE, *ELDER ABUSE INFORMATION SERIES NO. 3, REPORTING OF ELDER ABUSE IN DOMESTIC SETTINGS* (updated November 1997) available at http://www.ncea.aoa.gov/ncearoot/main_site/pdf/basics/fact3.pdf.

geographically and emotionally dispersed. And the pool of potential caregivers is aging and shrinking. We need 30,000 geriatricians: We have only 9,000.⁸

The growing population of older adults in the coming years allows for a reasonable equation: more older adults = more elder abuse. To date, the justice system's response to the projected tsunami has been fractured and inconsistent, and often reflects the assumptions and misinformation about older adults, the aging process, and elder abuse and neglect.

In the United States, one of the most fundamental principles of our economy is the concept of supply and demand. Consider these facts:

- Less than 2% of federal abuse prevention dollars support elder abuse prevention efforts.⁹
- No major national foundation or corporate philanthropy has designated elder abuse as a priority for funding.¹⁰
- The Elder Justice Act—federal legislation designed to address intervention and prevention of elder abuse, fund coordinating efforts, and support research—has been introduced in Congress, but languished in 2002, 2003, 2005, 2007, and 2009. It was finally signed into law on March 23, 2010 by President Barack Obama.¹¹

Indeed, in terms of services and access to justice for the “silver tsunami,” the market response is failing.

Judges routinely report that they do not see elder abuse cases in their courtrooms. Prosecutors and law enforcement share similar perceptions, or lament the frustrations and challenges of dealing with older witnesses. Even advocacy communities struggle with the issue of elder abuse—including the domestic violence community. For example, many domestic violence shelters do not cater to or easily accommodate older adults. In some cases, shelters are totally inaccessible for older victims with mobility or health problems.

Public awareness is often limited because the media tends to concentrate its focus on financial exploitation of older adults, such as scams and identity theft, rather than cases where the older victim has suffered multiple, co-occurring types of abuse at the hands of someone with whom they have an expectation of trust. The media often portrays elders as feeble, slow, confused, asexual, cranky, or in the alternative, nurturing and

⁸ Marie-Therese Connolly, *A Hidden Crime*, THE WASHINGTON POST, Jan. 27, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/01/25/AR2008012502774_pf.html.

⁹ Marie-Therese Connolly, *Raising the Lens: Why Elder Abuse Remains in Obscurity and Some Thoughts on How to Proceed* (Power Point presentation made at ASA-NCOA Aging in America Conference, March 2009), available at http://www.centeronelderabuse.org/files/Connolly_RaisingtheLens.pdf.

¹⁰ *Id.*

¹¹ The Elder Justice Coalition describes the Elder Justice Act as follows: “It creates a combined law enforcement and public health approach to study, detect, treat, prosecute and, most importantly, prevent elder abuse, neglect and exploitation. After 25 years of congressional hearings on elder abuse without a legislative response, the Elder Justice Act marks the beginning of new horizons in the detection and prevention of elder abuse.” See www.elderjusticecoalition.com.

grandparent-like. The image of a fully competent and capable elder experiencing coercion and abuse at the hands of a loved one is alarmingly missing from public perception.

IS IT ELDER ABUSE?

Judges face numerous challenges in identifying and responding in a comprehensive manner to instances of elder abuse. It is important for judges to understand the complexities of elder abuse, whether they preside over a domestic violence, civil, probate, family, or criminal docket.

The Abuse in Later Life Wheel, below, depicts the most commonly used tactics and the primary motivation for abusers to exploit, isolate, ridicule, threaten, neglect, and physically and sexually abuse older adults: power and control.



Created by the National Clearinghouse on Abuse in Later Life (NCALL), a project of the Wisconsin Coalition Against Domestic Violence (WCADV)
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www.ncall.us/www.wcadv.org

This diagram adapted from the Power and Control/Equality wheels developed by the Domestic Abuse Intervention Project, Duluth, MN

Older women are the victims in two-thirds of all elder abuse cases reported to authorities, but men can also be victims.¹² Elder abuse occurs in heterosexual and gay and lesbian relationships. Victims are from all racial, ethnic, socio-economic, and religious backgrounds. Often victims face abuse while also enduring failing health; loss of vision, hearing, or memory; dementia; limited mobility; incontinence; and other health concerns. Frequently, abuse victims who experience these normal health issues are also embarrassed, depressed, or ashamed about the abuse and their health conditions.

Abusers often exploit these vulnerabilities to inflict humiliation and exert control. The justice system often treats victims like children, or as if they are not competent. In part, these inappropriate responses from the justice system are due to the fact that elder abuse intervention methods are largely modeled on the child abuse response paradigm:

Child abuse law with its mandatory reporting became the model on which elder abuse legislation was based. The weaknesses of this model, including its tendency to treat adults as children, led many to turn to the domestic violence paradigm as a better fit. Recognizing that power and control dynamics existed in some elder abuse situations (even when the abuser was not a spouse or partner) brought a fresh understanding to the dynamics of elder abuse. And yet, while elder abuse incorporates some of the features of domestic violence occurring with younger people, it is especially characterized by increased physical vulnerability due to age, changing mental abilities due to the increased incidence of dementia, undue influence, and financial abuse or exploitation (citations omitted).¹³

In fact, the data show that 90% of elder abuse is committed by family members, usually adult children or spouses.¹⁴ Perpetrators can be intimate partners who continue abusive behaviors that existed over the life of the relationship, or intimate partners with no history of abuse until later in life. Elder abuse may also occur in new intimate partner relationships between older persons.

Elder abuse perpetrators are primarily motivated by greed, and power and control. Much of the coercion and control that has been documented and observed in domestic violence cases occurs in elder abuse cases when the victim has an ongoing relationship with the abuser or an expectation of trust.

While early studies of elder abuse supported the hypothesis that perpetrators were motivated by “caregiver stress,” research has debunked that explanation:

Research has uncovered several key characteristics of elder abuse perpetrators: (1) drug and/or alcohol abuse, (2) impairments such as mental illness and developmental disabilities, (3) financial dependency on the elder, and (4) a bad past relationship with the elder. When

12 NAT'L CTR. ON ELDER ABUSE, AM. PUB. HUMAN SERVS. ASS'N, THE NATIONAL ELDER ABUSE INCIDENCE STUDY 4-3 (Sept. 1998) [hereinafter INCIDENCE STUDY], *available at* http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf; although men are also victims of elder abuse, women comprise the overwhelming majority of victims and thus the authors will use the feminine pronoun to describe victims throughout this paper.

13 Mary Twomey, Mary Joy Quinn, & Emily Dakin, *From Behind Closed Doors: Shedding Light on Elder Abuse and Abuse in Late Life*, J. OF CENTER FOR FAM., CHILD. & CTS., 2005, at 76.

14 INCIDENCE STUDY, *supra* note 12.

applied to family care giving situations, these findings emphasize that, within the stressful context of care giving, most people cope without resorting to violent or exploitive behavior (citations omitted).¹⁵

The acceptance by judges of caregiver stress as a cause of elder abuse results in serious and harmful decision making because:

- It is a theory that is not supported by research.
- It is a theory that ignores the reality that many abusers are actually dependent on the older adult and are not, in fact, caretakers at all.
- It is a theory that sanctions the use of violence against older adults, ignores the reality that most caretakers, though stressed, do not abuse older adults, blames the victim for the abuse, and creates a safe haven for abusers where their behavior is not only excused but met with empathy.

Caretaking may indeed cause stress, but stress is not an excuse for violent behavior. The relevant question for judges: Would a similar theory of the causation of child abuse (i.e., parents abuse their children due to stress)—or even pet abuse—garner support or engender empathy?

CHALLENGES FOR THE NATION'S COURTS

Elder abuse cases pose many challenges for the court system:

- Lack of a system, guidelines, or criteria to identify elder abuse cases;
- Limited reliable data and research;
- Lack of legal precedent and other issues with the law;
- Evidentiary challenges created by the age and health of the victim or the elderly perpetrator;
- Inadequate resources to address services for victims and perpetrators as well as funds to support accommodations within the judicial system for elderly victims, witnesses, and perpetrators;
- Little coordination between justice system professionals and community services for victims of elder abuse;
- Little system assessment of capacity or respect for victim choices; and
- Assumptions based on age and culture.

Identification of Elder Abuse Cases

In a National Center for State Courts survey of court and judicial needs in the area of elder abuse, three-quarters of the respondents reported that the courts' identification of

¹⁵ Twomey et al., *supra* note 13, at 75.

elder abuse issues was either “fair” or “poor.”¹⁶ In the nation’s courts, cases of elder abuse, neglect, and exploitation may not be labeled as “elder abuse cases.” The cases also may appear in a variety of contexts including, but not limited to:

- Criminal cases of assault, battery, sexual assault, theft, neglect;
- Civil fraud or conversion matters;
- Guardianship and conservatorship proceedings or other probate matters;
- Special protective proceedings;
- Health care decisions for an incapacitated adult;
- Domestic violence proceedings;
- Delinquency proceedings;
- Criminal or civil cases regarding institutional matters.

Regardless of the case type, the victim is required to face a justice system that can be confusing and unwelcoming at best, and at worst, inaccessible. The victim is faced with the dilemma of whether to continue to live with the abuse or report a loved one, often the victim’s adult child who may be the only consistent person in the victim’s life. Their concerns: Where will I go? Who will care for me?

In the courtroom, elder abuse victims may appear reluctant to testify. They may recant or ask to have protection orders dismissed. They may lie to protect the abuser. Victims may also appear confused, angry, depressed, inconsistent, and unable to make decisions. They also may appear fearful or distrustful of the court system.

Because elder abuse cases often are not designated or categorized as such by the court, it is imperative that judges learn to recognize a few tell-tale signs that an older adult is—or may be—a victim of abuse. The following victim behaviors compiled by the National Clearinghouse on Abuse in Later Life may assist judges in determining whether there may be an issue of elder abuse no matter what type of case is before the court. Judges may consider the following questions:

- Does the elder appear isolated?
- Does he or she express fear or hint at being afraid?
- Has the elder considered or attempted suicide?
- Does he or she have a history of alcohol or drug abuse (including prescription drugs)?
- Does the elder present as “difficult”?
- Does he or she have vague, chronic, or non-specific complaints?
- Is the elder unable to follow through on treatment plans or medical care?
- Has he or she had repeated “accidental” injuries?

16 BRENDA UEKERT, NATIONAL CENTER FOR STATE COURTS, RESULTS FROM A NEEDS ASSESSMENT SURVEY: COURT AND JUDICIAL NEEDS IN THE AREA OF ELDER ABUSE (2006), *available at* <http://www.ncsconline.org/famviol/elderabuse/pdf/FinalAssessmentReport.pdf>.

- Does the elder miss appointments?
- Has the elder delayed seeking medical help?
- Does the elder exhibit signs of depression (mild or severe)?

Judges who have received education on elder abuse recognize these behaviors as signs of potential trouble. Judges who have received such education understand that the behaviors are not necessarily indicative of incapacity, mental health issues, or infirmity. Instead of dismissing or misinterpreting such signs, these judges have the tools needed to effectively determine the actual condition of the older adult while providing a basis for suggesting additional supports or resources to help the older adult navigate the system. Ultimately, education will lead to better outcomes for older adults and facilitate elder abuse cases to safe and effective resolutions.

Lack of Reliable Data and Research

Researchers and professionals who work with older adults agree that progress toward a promising justice system response, legal reform, community awareness, and coordination of services is 20 years behind awareness and coordination in domestic violence or child welfare cases. Reliable data on elder abuse is difficult to find because so many elder abuse cases go unreported since there is no uniform or agreed-upon definition of elder abuse. For instance, abuse of older adults perpetrated by persons with whom there is an expectation of trust is referred to as “abuse in later life” by some, as domestic violence or elder abuse by others.

A study prepared for the California court system provides a clear picture of the impact of the lack of data and research:

Statistics related to the nature and prevalence of elder abuse are limited at best, for a number of reasons. Several different agencies receive reports of elder abuse. Some agencies serve more than just the elderly population, so whatever statistics they collect often cannot be broken out by the age of the individual receiving the service. For example, APS data may not distinguish between reports concerning elders (ages 65 and older) and dependent adults (ages 18 to 64). Among agencies that do collect data specifically on elders, there may be inconsistencies in the way data are reported or in the types of data that are tracked. Definitions of elder abuse or the different types of abuse may vary. . . . Another factor affecting the availability and quality of data on elder abuse is that some types of elder abuse are criminal matters and some are civil; therefore, not all instances of elder abuse will be reflected in crime statistics. . . . Finally, elder abuse is severely underreported. The National Elder Abuse Incidence Study (NEAIS) used reports from “sentinels”—in this case, professionals who come into contact with the elderly population—to account for underreporting of elder abuse reflected in official statistics and combined them with official reports to paint a more comprehensive picture of elder abuse. This study found that 84 percent of elders who were abused or neglected did not have their cases reported to APS.¹⁷

17 JUDICIAL COUNCIL OF CALIFORNIA, EFFECTIVE COURT PRACTICE FOR ABUSED ELDERS: A REPORT TO THE ARCHSTONE FOUNDATION (2008), available at <http://mnvac.pbworks.com/f/Effective+Court+Practices+for+Abused+Elders.pdf>.

Lack of Laws, Legal Precedent and Appropriate Remedies

Elder abuse cases require courts to navigate some difficult terrain filled with inconsistent definitions, health and mental health considerations, issues of capacity and consent, often complex medical matters along with disagreement among different professionals as to what interventions are appropriate. In addition, local laws may be inconsistent across case types, and remedies may be inadequate to address the victim's needs or to hold perpetrators accountable.

Many laws can impact elder abuse victims, including:

- *The Older Americans Act* (42 U.S.C. § 3001 et seq., as amended) provides definitions of elder abuse. The Act also authorizes the use of federal funds for the National Council on Elder Abuse, as well as some community awareness on elder issues including elder abuse, and coordination of activities in the states and in local communities.
- *State Statutes*. Statutes have been enacted in many states, the District of Columbia, and the territories to address domestic and institutional abuse of the elderly. Some statutes classify elder abuse as a separate criminal offense; others provide only civil remedies including civil protection orders and protections through guardianships and conservatorships in probate court. In certain states, a civil protection order statute may not apply in certain elder abuse cases depending upon the abuser's relationship to the older victim. In some states, criminal acts against an older adult result in sentencing enhancements against perpetrators. In others, crimes against older adults are charged under existing criminal acts, i.e., assault, sexual assault, etc.
- *Adult Protective Services (APS) Laws*. APS laws vary from state to state and each identifies threshold eligibility requirements. Broadly, APS can provide services to adults 18 years of age or older who are unable to protect themselves from abuse, neglect, or exploitation due to physical or mental impairments, and adults over a specified age (usually 60 or 65). APS statutes may define adults eligible for services as "vulnerable," "incapacitated," or "persons with a disability or impairment." Other statutes allow APS to provide services based on age alone.¹⁸
- *Institutional Abuse Laws*. Individual states handle the issue of abuse of persons residing in nursing homes and other long-term care facilities in varying ways. Some states extend authority to investigate abuse in institutional settings to APS in laws designed to address institutional abuse. Others place the duty to investigate as a component of the APS agency's responsibilities. Some states designate state agencies other than APS to investigate allegations of abuse of persons under institutional care.
- *Guardianship and Conservatorship Laws*. Guardianship or conservatorship is a legal process utilized when a person can no longer make or communicate safe

¹⁸ AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING, STATUTORY PROVISIONS AUTHORIZING AND DEFINING THRESHOLD ELIGIBILITY FOR ADULT PROTECTIVE SERVICES BY STATE (2006), available at <http://new.abanet.org/aging/Pages/elderabuse.aspx>.

or sound decisions about his or her person or property or has become susceptible to fraud or undue influence.¹⁹ The laws are applicable only when the subject of the judicial intervention is found to be incapacitated by a qualified mental health professional. Guardianship and conservatorship orders can be tailored to meet the specific circumstances of the person, and the orders should be drafted to ensure the protected person is as involved in decision making as possible under the circumstances of the case.

- **Mandatory Reporting Laws.** Mandatory reporting of elder abuse is in place in most states and the District of Columbia. Among the professionals who may be designated as mandatory reporters are health professionals, human service workers, the clergy, law enforcement, long-term care facility employees, persons who work in the financial sector, or, in a few jurisdictions, any person who has knowledge of or witnesses abuse, neglect, or exploitation. In some states, judges are mandatory reporters of elder abuse.

Despite the existence of laws designed to address the needs of older victims, elder abuse cases are often not prosecuted for various reasons, including assumptions that are made about victims or witnesses who are of a certain age. If the cases are prosecuted, the length of time between charging the case and trial may result in the unavailability of older victims or witnesses due to failing health or even death. Limited case law exists to guide judicial decision making on these matters. Courts are urged to improve identification and designation of cases as “elder abuse” when cases are first filed as a first step toward improving court practice and the development of a body of law in this arena.²⁰

Evidentiary Challenges

Elder abuse cases are difficult to prove. Physical evidence may not be available because of delays that may occur in reporting or investigating instances of abuse, neglect, or exploitation. Often, signs of abuse or neglect are misinterpreted as normal due to increased age, immobility, or the use of certain medications such as blood thinners that cause the user to bruise easily. Victims may be afraid or reluctant to testify due to fear, love for the abuser, or a host of other reasons.

Evidentiary challenges in cases involving elder abuse are myriad no matter which case type is before the court. The elderly victim’s capacity to testify may be questioned. Physical or other limitations or challenges that the victim may have are often exploited by defendants or defense counsel.²¹ Expert witnesses, particularly those qualified to testify on issues of capacity and undue influence, are critical in these cases, but persons who can qualify as experts may be difficult to identify.

19 NATIONAL GUARDIANSHIP ASSOCIATION, INC., GUARDIANSHIP: AN OVERVIEW, *available at* <http://www.guardianship.org/pdf/guardianshipConservatorship.pdf>.

20 UECKERT, *supra* note 16.

21 For instance, older adults may have a temporary but marked increase in confusion as daylight wanes, known as “sundowning.” A simple accommodation: Schedule elder cases in the morning.

In addition, the standard of proof in cases involving older adults ranges from beyond a reasonable doubt in criminal cases, to clear and convincing evidence or a preponderance of the evidence in civil cases. In many cases, the standard is hard to meet, particularly when the victim is unwilling to testify due to fear, intimidation, or distrust of the system; is unable to testify because of capacity issues; or has failing or diminished memory of the events that may have occurred months or years earlier.

In criminal cases, the Sixth Amendment right to confrontation and the Supreme Court holdings in *Crawford v. Washington* and its progeny present additional challenges in elder abuse cases when reluctant witnesses, recanting witnesses, witnesses who have failing physical or mental health, or witnesses who die during the pendency of the proceedings create additional obstacles to the effective prosecution of elder abuse cases.²²

In guardianship and conservatorship cases, the subject of the petition must be afforded the right to explain his or her wishes and desires with respect to the appointment of a guardian or conservator. When necessary, accommodations should be made to provide an environment in which the subject can exercise the right to present his or her wishes, which will assist the judge in determining whether there is a factual basis to determine whether the subject has been abused or coerced.

Additionally, the court must have access to facts that will supply important historical context to the subject's life. The court must be able to hear from those who are knowledgeable about the subject's beliefs, values, and patterns of decision making to assist in determining if recent, suspicious, and disconcerting life decisions indicate a loss of capacity versus abuse or coercion by third parties—including the proposed guardian. Appropriate witnesses may be professionals from nursing homes, hospitals, APS, the police, as well as family members, friends, religious leaders, and neighbors who can testify about the subject's past choices and provide the court with some context to examine the subject's current situation and condition.

To assist in providing a record with the full participation of victims, courts should provide victims with the opportunity to speak to advocates or provide a referral to a resource that can provide support and advocacy throughout the court proceedings.

To maximize the ability of the victim to participate as a witness and provide a factual record that will allow the judge to make a decision, the court can:

- Adjust the hearing times to ensure that the older person is available during the hours of the day when he or she functions best;
- Provide frequent breaks to allow the older person to refresh and return able to follow the proceedings, complete testimony, and assist his or her legal representative where there is one;
- Minimize delays and expedite hearings;
- Utilize depositions and conditional examinations, where appropriate; and
- Ensure accessibility to the courthouse for older adults.²³

22 *Crawford v. Washington*, 541 U.S. 36 (2004).

23 Courts are encouraged to think about accessibility in a holistic manner; accounting for the design of environments as well as accommodations tailored for individual elders. See www.vera.org for more information on how to enhance accessibility for older adults and persons with disabilities.

Vertical prosecution, where jurisdictionally possible, may assist in eliminating multiple court proceedings revolving around the same incident. Establishment of multidisciplinary coordinated community response teams that include professionals in the health and aging fields can provide invaluable access to experts who can reliably provide testimony in court cases.²⁴

Assessment of Capacity and Victim Choices

Until the contrary is proven, each elder is presumed to have the capacity to make decisions regarding health, personal care, and legal and financial matters. When an older adult appears before the court, sometimes with major injuries or evidence of pain and humiliation at the hand of a trusted loved one, the initial judicial response may be to protect the victim and punish the abuser. When victims, for a myriad of reasons, do not wish to see their abuser punished, judges often express discomfort, frustration, anger, and distrust of the victim's choices. Despite any judicial discomfort, if an older adult has capacity, he or she has the same right at 65 to make "bad"²⁵ decisions that he or she had at 40.

The appointment of a guardian or other third person to assume decision-making responsibility over a person is a major step that must be supported by the evidence. In every state, a judge must determine whether an adult is incapacitated²⁶ before the court can appoint someone to make decisions for the person. The court cannot appoint guardians to older victims simply because the person is a victim, though the understandable desire to protect the victim may be the motivating factor. Such appointments—or orders that appear to protect a victim by taking away their decision-making ability without proof of incapacity—may be a violation of the victim's civil rights.

Determining whether a person is incapacitated can be difficult. Capacity is complex. It can be task specific. It may fluctuate. It may be situational. Indeed, capacity cannot be assessed in a brief test or question-and-answer session. Capacity is also contextual. An individual may need some assistance but not necessarily with decision making in all realms of life. For example, a person may be able to care for herself physically but may need someone to handle her financial affairs because she is no longer able to make decisions regarding finances.

There are cognitive assessment tools that range from simple screening instruments at one end of the spectrum to comprehensive, but expensive and time-

24 For more information, visit the Elder Abuse Forensic Center of Orange County, California, at <http://www.centeronelderabuse.org/page.cfm?pgid=11>.

25 The use of "bad" is meant to illustrate the system's *value* judgment of an elder person's decisions that are often made for safety or strategic reasons and based on a variety of factors that the justice system and community may not know or fully understand.

26 Each state defines incapacity slightly differently, but an example found in D.C. Code § 20-2011 states:

"Incapacitated individual" means an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator.

consuming tests that must be administered by psychologists or psychiatrists. Many of these tools have imperfect results. It is important for judges to consider the type of test or screen that has been used to assess capacity as well as the qualifications of the person who administered it.

Judges also must consider the motives of the person who petitions for the appointment of a guardian or conservator, particularly in cases with some evidence of abuse. Judges should screen the case, gather information, and make decisions that will least restrict the subject's rights. Judges should determine what has brought the case before the court and probe for evidence that the medical cause of the alleged incapacity is abuse-related. For additional discussion, the American Bar Association published a useful bench book for judges on the subject of decision making in guardianship cases.²⁷ The book is instructive but does not specifically address elder abuse. A comprehensive guide to help judges identify the presence of abuse in guardianship cases is sorely needed.

Indeed, judges have a unique leadership role in ensuring that qualified professionals are available in communities to perform legitimate, sound, and reliable capacity assessments. A multidisciplinary coordinated community response team can offer a vehicle for judges to exercise that unique role. Judges also can mobilize the courts to develop standards of practice as well as training to court-appointed guardians and guardians *ad litem* in probate cases. These efforts will improve the administration of justice, reduce the potential for victimization, and minimize fraud and abuse of elders.

Age and Assumptions Based on Age

Aging begins at birth and is a normal continuum of the life process. Normal and common changes, such as graying of hair, do not denote illness but simply occur as one ages. Aging also slows our biological systems, resulting in declines in hearing, vision, skin elasticity, regulation of body temperature, and hair loss. Aging is generally feared and maligned in our society, and often misunderstood.

Aging complicates elder abuse cases because differentiating between signs of abuse and unintentional injuries can be difficult. Normal and common changes related to age, such as those that affect gait and balance, can leave an older adult more susceptible to unintentional bruising. Certain medications also increase bruising. One study that compared abuse-related injuries on older adults to incidental injuries found that injuries caused by intentional abuse are often large (about 2 inches at their widest point) and can be anywhere, but are often found on the face, lateral right arm, or back of the torso.²⁸

Everyone does not age at the same rate, nor does aging affect everyone in the same way. There are two common misconceptions about aging that, if believed and perpetu-

27 AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING AND AMERICAN PSYCHOLOGICAL ASSOCIATION, *JUDICIAL DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS* (2006), available at <http://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf>.

28 Aileen Wigglesworth, Current Elder Mistreatment Research, University of California Irvine, Program in Geriatrics, Presentation at the ASA-NCOA: Aging in America Conference (March 2009).

ated, can significantly harm victims of elder abuse and older adults in general. The first is the idea that normal aging equals incapacity (see discussion on capacity and victim decisions, above).

The second misconception deals with an older adult's ability to cause harm. Society attributes certain characteristics to older adults. They may be perceived as frail, weak, feeble, or slow. An older perpetrator causing serious, even lethal harm to another does not logically fit into the "boxes" that society tends to place older adults. Society also typically depicts older adults as cranky and difficult, or sweet, loving, and "grandparent-like." Consider the reality: An older adult with health problems who uses a wheelchair or a cane is still capable of inflicting injury. Older adults, like anyone, can and do cause serious harm.

Judges are charged with difficult tasks in every elder abuse case. They must fact-find, make credibility assessments, craft orders, and make decisions in cases where there is often limited information, limited resources, and few options. Despite the complexity of elder abuse cases, it is incumbent on judges to recognize the assumptions they may hold about older adults and consciously evaluate each case based on the individual facts and circumstances before the court. Most importantly, judges must assess dangerousness in every case, no matter the age of the perpetrator or the victim.

Very little research has been done to date on the dangerousness of older perpetrators. However, the dangerousness assessment research and the assessment tool developed by Dr. Jacquelyn Campbell in domestic violence cases, along with the research of Dr. Donna Cohen on elder homicide-suicides, share some common risk factors:²⁹

- Overwhelmingly male perpetrators;
- Access to firearms as a major lethality factor;
- History of domestic violence;
- Increased risk of harm associated with separation or some challenge to the integrity of the relationship;
- Victim isolation; and
- An overbearing, controlling personality of the male in the relationship.

Furthermore, researchers acknowledge there is no tool that is reliable, valid, and generalized to assist in identifying³⁰ at-risk elders. Indeed, assessing dangerousness is challenging for all. Judges are not experts in danger assessment and should not be expected to conduct comprehensive and formal danger assessments from the bench. Yet, the court's failure to consider evidence of risk when crafting orders in civil cases or sentencing defendants in criminal cases can have lethal consequences for elder abuse

²⁹ Donna Cohen, *Homicide-Suicide in Older People*, PSYCHIATRIC TIMES, Jan. 2000; also see www.dangerassessment.org.

³⁰ Rosalie Wolf, *Risk Assessment Instruments*, NATIONAL CENTER ON ELDER ABUSE NEWSLETTER, Sept. 2000, available at http://www.ncea.aoa.gov/ncearoot/main_site/library/Statistics_Research/Research_Reviews/risk_assessment.aspx.

victims. In each case, no matter the case type, victims should receive referrals to elder advocates, if available, or domestic violence advocates for comprehensive safety planning.

In the end, judges must hold the perpetrator accountable despite the age of the perpetrator and/or the victim. The judge must consider the victim's needs and wishes, and service providers and the community should be involved when appropriate to facilitate interventions that will support the older adult's health, safety, and overall well-being.

Limited Resources

Judicial education on elder abuse has been difficult. Financial support has been lacking due to inadequate understanding of the issue's enormity. Despite limited resources available to courts today, it is imperative that judges become involved in determining what can be done with limited resources to ensure access to justice for older adults. In fact, many access issues can be addressed without additional financial resources. For example, accommodations for elderly victims with hearing or vision problems who are filing for protection orders may be as simple as adjusting the lighting in the clerk's office, printing forms with a larger font, or providing places for people to sit to complete pleadings rather than at a standing counter.

Other accessibility options might include making sound amplification devices available in the courtroom so that witnesses and victims can participate fully in the proceedings or scheduling hearings to ensure that witnesses can testify when they are most alert and able to communicate effectively. Judges can inquire in each case what accommodations would be helpful for an older witness or victim.

Access also includes eliminating physical barriers that make it more difficult for elders to navigate the courthouse. If the barriers cannot be removed, moving the courtroom to a more accessible location in the building may be an option even if such adjustments are on a case-by-case basis.

Lack of Coordination

Elder abuse cases are complex and demand that professionals identify solutions that are least restrictive and that promote victim autonomy. Multidisciplinary collaborations can prove most effective because of the increased array of resources, the coordination of efforts, and shared knowledge of the professionals. According to the National Clearinghouse on Abuse in Later Life:

A coordinated response that includes many disciplines usually provides the best support for older victims of abuse. We encourage community collaborations that include representatives from: domestic violence and sexual assault programs; aging and adult protective services; health care; law enforcement; the justice system; the faith community; mental health and substance abuse programs. In addition, such collaborations should include members of the community who come in contact with elders on a regular basis, the elder

community and other stakeholders in the community. Educating the community about abuse in later life and creating services for older victims is the best way to help older victims live free from abuse.³¹

Judges are in a unique position to influence the creation of multidisciplinary teams in their community in order to help the courts improve the response to victims and enhance victim safety.³² Judges have demonstrated the influence they have in the community when judicial leadership sparks the development of systemic responses to such issues as domestic violence, child protection, delinquency, and substance abuse.

As courts and judges grapple with the issues of access to justice for elder abuse victims, it is the perfect opportunity to provide leadership that addresses the issue of the community's response to elder abuse. Indeed, there is a strong and immediate need for a coordinated judicial response in communities across the nation similar to the coordinated response that was developed to address child abuse and neglect and domestic violence. A coordinated response will help courts navigate more effectively many of the issues involving elder abuse, including the assessment of capacity and dangerousness, access issues, advocacy resources for victims, and perpetrator accountability.

Implementing a Coordinated Response

Step one: Begin at the courthouse. Convene judges from the various divisions within the court system to discuss the issue of elder abuse. What are judges seeing in their courtrooms? What are the challenges they face? Include discussions with court administration regarding how older adults are served when they come to the court.

Step two: Within the bounds of ethics, judges may initiate a meeting that includes prosecutors, defense attorneys, victim advocates, representatives from Adult Protective Services, law enforcement, representatives from local nursing homes, senior centers, and hospitals, and other community stakeholders—including elders—to discuss the community's current response to elder abuse and brainstorm methods to enhance that response.

Step three: Identify persons who are willing to lead the effort to develop an Elder Abuse Coordinating Council, similar to the groups developed to coordinate community responses to domestic violence. Remain involved! Development of a coordinated community response spearheaded by judicial leadership will assist in creating access to justice for seniors and safety for elders in our communities.

The U.S. Department of Justice's Office on Violence Against Women has provided funding to sites across the country to improve prosecutorial, law enforcement, and

31 National Clearinghouse on Abuse in Later Life Web site, <http://www.ncall.us/index.php>.

32 Judges should consult their state ethics codes, but in general, providing leadership to encourage the formation of multidisciplinary coordinated community response teams fits within a judge's allowable activities. See ABA Model R. of Judicial Conduct 3.1 (2007):

- Reversal of emphasis—judge may engage “except as prohibited by law”
- Comment: Judges “encouraged to engage”
- Comment: Participation in both law-related & other activities helps integrate judges into their communities

judicial responses to elder abuse.³³ Additional funding may be available for communities to create coordinated community response teams on elder abuse.³⁴ Court participation is not mandatory but it enhances the team's strength and influence in the community and sends a positive message to the public that the courts have a strong investment in safer and more just communities.

CONCLUSION: WHAT CAN JUDGES DO?

With the population aging at a rapid pace, judges can expect to see increasing numbers of elder abuse cases. In addition, enhanced training of law enforcement and prosecutors likely will lead to more cases reaching the bench. Judges can take a number of actions to promote awareness of elder abuse, effectively address elder abuse in court, and enhance the administration of justice in elder abuse cases. Judges can:

In the court system:

- Provide leadership to create or expand an existing multidisciplinary coordinated community response team on elder abuse.
- Inquire whether the court's facilities, processes, and forms are accessible to elders.
- Ascertain whether the court identifies and designates elder abuse cases as such, and if not, provides leadership to improve the tracking of elder abuse cases.

In the community:

- Determine whether elder advocates are available in the community and ascertain what is needed to ensure advocates are available to provide services to elder abuse victims.
- Determine whether domestic violence advocates are trained to provide services that meet the needs of elder victims.
- Determine whether the local domestic violence shelter is accessible for older victims.
- Get to know your local Adult Protective Services agency and the services they provide.

In each elder abuse case:

- Recognize assumptions and perceptions that are based on age.

³³ The National Judicial Institute on Domestic Violence, funded by the U.S. Department of Justice, Office on Violence Against Women, conducts a three-day training program on elder abuse, called the Enhanced Judicial Skills in Elder Abuse Cases Workshop. For more information, visit <http://www.njidv.org>.

³⁴ For more information, visit the Office on Violence Against Women's Enhanced Training and Services to End Violence and Abuse of Women Later in Life Program at <http://www.ovw.usdoj.gov/ElderAbuse2002programbrief.htm>.

- Respect victim wishes.
- Facilitate victim access to advocates who are trained to assess dangerousness and to work effectively with the cultural issues that may be at play in a case.
- Consider alternative methods for obtaining and preserving victim testimony.
- Ensure that guardians and conservators are knowledgeable about elder abuse.
- Ensure that periodic reviews occur to monitor the progress and continuing need for a guardianship or conservatorship.

Finally:

- Attend the National Judicial Institute on Domestic Violence's three-day workshop, "Enhancing Judicial Skills in Elder Abuse Cases."³⁵

³⁵ *Supra* note 33.