

Working With Protection and Advocacy Programs to Identify and Combat Elder Abuse



**KELLY BAGBY, SENIOR
ATTORNEY,
AARP FOUNDATION LITIGATION**

**CONSUMER VOICE
CONFERENCE,
NOVEMBER 2014**

What Will We Cover:



- I. P&A elder abuse advocacy and why we need it to supplement other elder abuse investigators**
- II. Definitions of abuse, neglect and exploitation**
- III. Confluence of aging & disability**
- IV. Elder justice policy, resources and opportunities**
- V. Potential impact litigation to address elder abuse**

P&A Work on Elder Abuse Matters: Jurisdiction to Investigate & Prevent Elder Abuse



- Psychiatric hospitals
- ICF/DD
- Nursing facilities
- Assisted living facilities and other Residential Care Facilities (RCF)
- Group homes
- Homeless shelters
- Jails

Ombudsman Jurisdiction



Nursing Facilities

Assisted Living

Some Residential Care Facilities (depending on state)

Other areas in your state?

Residential Care Facilities



- Assisted living facilities
- Adult congregate care facilities
- Homes for the aged
- Adult care homes
- Domiciliary care homes
- Shelter care homes
- Personal care homes
- Residential care facilities for elderly

Many Older People Live in RCFs (licensed and unlicensed)



- Some 50,000 facilities nationwide house a mainly older population in between 900,000 and one million beds;
- An unknown number of unlicensed homes;
- RCFs house a mixed population of poor older persons and individuals with mental illness;
- By contrast, there are about 17,000 nursing homes with 1.6 million residents.

Older Population Isolated in RCFs



- extremely vulnerable population resides in RCFs, advanced age, chronic disease and disability, and social isolation;
- estimated 87 percent of residents are not married;
- 27 percent have no living family members;
- many residents are poor;
- some exhibit challenging behaviors; and
- difficult for residents to safeguard their own interests.

Elder Abuse

Increasing at Epidemic Rate



- About one in ten people age 60 and older in the general population living at home is victimized by elder abuse, and those rates rise sharply among people with dementia.
- Yet one state study found fewer than five percent of cases come to light.

Elder Abuse Causes 300% Increase in Morbidity



Also, elder abuse:

- **disproportionately victimizes African American and Latino elders,**
- **reduces independence of older people, and**
- **and causes untold suffering.**

P&A Skill Set: Perfect For Many Elder Abuse and Neglect Investigations



- Medical expertise
- Fatality review skills
- Document review
- Overcome resistance
- Quality assurance expertise
- Understand systems
- Consumer centric
- Access to information
- Community reporting

Institutional Elder Abuse Not Meaningfully Tracked



- P&As track abuse and neglect in manner that makes it hard to quantify in institutions
- APS authority varies by state; no uniform national data collection
- Ombudsman track data, but only one part of the issue
- State Licensure and Survey and Cert does not track abuse allegations by age

P&As Can Help Develop Prevalence Numbers on Elder Abuse in Institutions



- Break down the abuse and neglect numbers by age group;
- Do this in consistent way for PADD, PAIMI, PAIR, TBI and other grants;
- Consider a pilot project that focuses on elder abuse as an unmet need for one year to collect relevant data;
- Collect narratives for several elder abuse cases each year;
- Contemplate creating a subcategory of abuse called elder abuse in case selection criteria.

Definitions of Abuse in State and Federal Law



Federal laws

- Older Americans Act
- Ombudsman program (in OAA) (confidentiality issues)
- Nursing home survey and certification statutes and regs
- Federal criminal laws
- OIG laws

State laws

- APS laws (cite to compendium on next slide)
- NH survey and cert laws
- State MFCU laws
- Other state criminal laws
- Guardianship laws

Common Types of Elder Abuse

Some types of elder abuse:

- Physical abuse and neglect
- Psychological/emotional/mental/verbal abuse
- Sexual abuse
- Domestic violence
- Financial exploitation and identity theft
- Abandonment
- Placement in locked ward without due process
- Chemical restraints
- Restraint in bed or chair

Restraint can be hard to detect after the fact so look for:



- Incontinence and Urinary Tract Infections
- Dehydration and Malnutrition
- Accidents from attempting to get free
- Contractures, brittle bones
- A record of multiple falls can mean the wrong prescription or bad drug side effects – multiple falls are often resolved by chair restraint- instead of checking for these factors

Chemical Restraints



- Most common form of “treatment” in nursing facilities is medication– some of which is terribly dangerous for patients with dementia
- *Levine v. Ventura Convalescent Hospital:*
 - ✦ Class Action in CA against nursing facility
 - ✦ Failure to secure informed consent of residents
 - ✦ Brought under state law that allows for private rights of action

CA Study: 47% of people with dementia cared for by family members are abused or neglected

- 47% of participants with dementia mistreated by caregivers
 - Psychological abuse 42%
 - Physical abuse 10%
 - Caregiver neglect 14%
 - Did NOT include or ask about financial exploitation
- Findings corroborated in other studies (34 – 63%)

Elder abuse in institutions



In another study interviewing nursing home staff:

- 36% had seen at least one instance of physical abuse,
- 81% had seen at least one instance of psychological abuse,
- 10% acknowledged they themselves had committed one or more physically abusive acts, and
- 40% reported committing one or more acts of psychological abuse. (Pillemer, et al. 1989)

Huge Societal and Financial Costs of Elder Abuse



- **Victims of elder abuse are four times more likely than non-victims to be admitted to nursing homes and three times more likely to be admitted to hospitals.**
- **Residents of nursing homes with insufficient staff are 22 percent more likely to be admitted to hospitals –**
- **Costs of which are paid for primarily by Medicare and Medicaid.**

Other issues of concern



- Understaffing: (CMS Staffing study, 2002) 50 – 90% of NHs understaffed at levels harm residents
- In non-NH residential care facilities, widespread breakdown in quality oversight systems and significant concerns about abuse and neglect (Hawes, 2009)

More Nursing Home Issues



Long hours, lack of training, and low pay for aides

Resident-on-resident aggression (Lachs, et al, ongoing)

Culture accepts discrimination and devaluation, so many elders are reluctant to admit abuse

Who are the Players in EA With Ombudsman and P&As ?



- APS
- LTC Ombudsman
- Legal Services
- Law Enforcement
- Prosecutors (local, state AG, MFCU, AUSAs, DOJ)
- Health care and mental health professionals & aides
- Forensic professionals (MEs and coroners)
- State and federal regulators
- Public and private guardians
- Providers and administrative staff
- Advocates
- Financial experts

Protective Agencies: Not Enough



- ◆ Adult Protective Services (APS) understaffed and underfunded
- ◆ Law Enforcement
 - ✓ Respond only to “serious crimes” involving risk of death or great bodily injury.
 - ✓ DA will consider legal standards, harm, and credibility of victim in deciding whether to prosecute.

Some types of teams addressing EA



- Elder Abuse Forensic Centers
- Elder Abuse Fatality Review Teams
 - <http://www.americanbar.org/content/dam/aba/migrated/aging/about/pdfs/fatalitymanual.authcheckdam.pdf>
- Financial Abuse Specialists Teams
- Elder Abuse Councils

P&As involvement; potentially a critical partner



- P&As should be at the table; critical skill set to add (in some jurisdictions P&As already are part of the team)
- Some P&As have worked closely with Ombudsman, State's Attorneys and been included ever since
- Working with the State OIG if they have a protection of vulnerable people statute is another great avenue

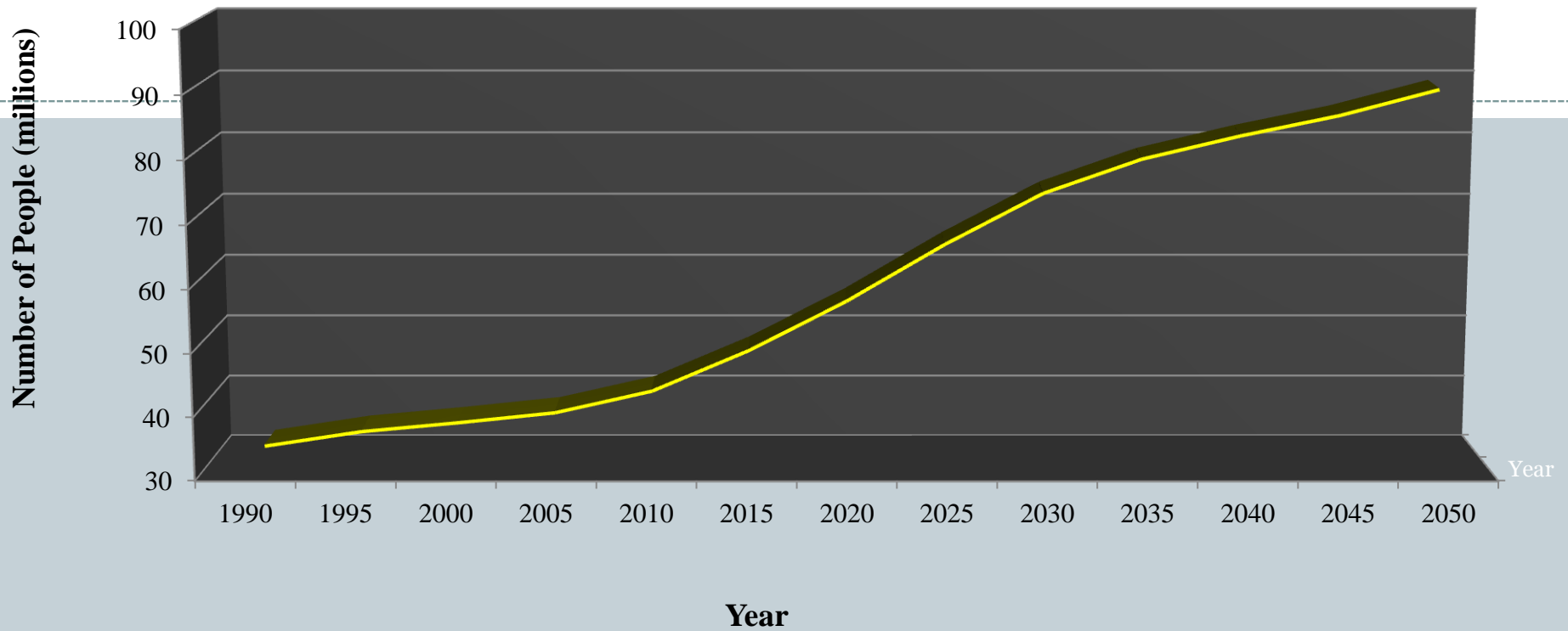
THE CONFLUENCE OF DISABILITY AND AGING



GAO recognized the intersection between aging and disability is especially relevant for elder abuse:

“Physical and cognitive impairments, mental problems, and low social support among victims have been associated with an increased likelihood of elder abuse. Elder abuse has also been associated with negative effects on victims’ health and longevity.” GAO Rpt., 2011.

U.S. POPULATION AGE 65 AND OLDER IS ON THE RISE 1990-2050



Source:
U.S. Census Bureau population estimates.

Confluence of Disability and Aging



- Inability to perform activities of daily living (ADLs), means more vulnerable to abuse and financial exploitation because of reliance on caregivers.
- Less participation in the workforce so culture sees them as less valuable and this can lead to abuse.
- More likely to be institutionalized - Elder abuse victims placed in NHs 4x as often as non-victims (Lachs, 2002)

Common Vulnerabilities to Abuse



- Difficulty defending oneself;
- May be more dependent on others;
- Fear of losing independence if a report is made, so more susceptible to threats;
- Failure to ask probing questions even if abuse is suspected;
- Shortage of care providers so put up with seemingly “minor” neglect.

Elders May Have Different Cultural Reactions to Disability



- Grew up pre- ADA so more acceptance of disability as equal to loss of rights;
- Lack a lifetime affiliation as person with disability, so less emphasis on consumer control and more acceptance of paternalism;
- More deference to medical professionals;
- More likely to accept loss of function is normal changes of aging;
- Since newly disabled it is easier to “hide” extent of cognitive, vision or hearing loss by staying silent or nodding to questions not really heard, seen or understood.

Elder Justice Policy Landscape



Federal laws

- *Elder Justice Act* (2010) (**No appropriations to date**)
- *Older Americans Act* (2006) (reauthorization, 2011)
 - 2006 OAA elder justice provisions (**Never funded or implemented**)
 - Scarce funding for OAA's other elder abuse related sections
- *Violence Against Women Act* (reauthorization, 2011)
 - ✦ \$3.1 million for elder abuse provision (coordinated community response teams)

State laws

- A great hodge podge; little consistency

Implementation; Regulation; Discretionary spending

- Elder abuse a low priority with low visibility across the board

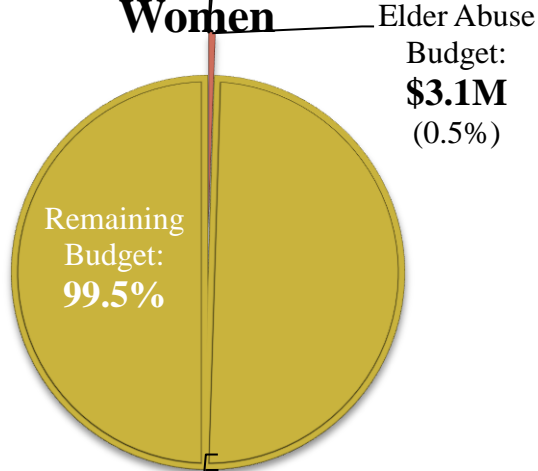
Challenges to Advancing Elder Justice Policy



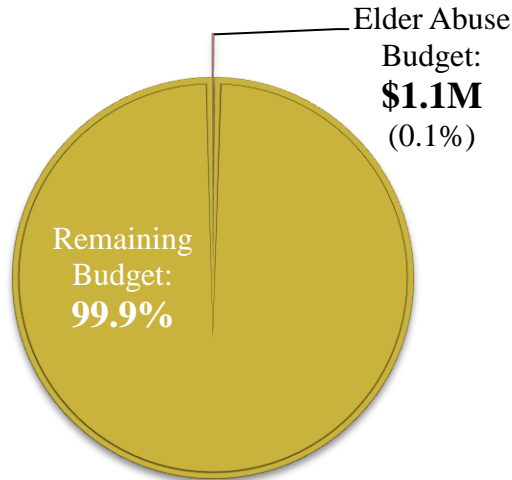
- Low priority issue; invisible; scant data
- Ageism, apathy and denial
- Complexity of the issues
- Chronic paucity of resources (federal and other)
 - 1/1000th of NIA funds go to EA research; less at CDC
 - DOJ has the only ongoing federal research program
 - Scant philanthropic, corporate or other funding

EXPENDITURES BY FEDERAL AGENCIES TO ADDRESS ELDER ABUSE, NEGLECT AND EXPLOITATION

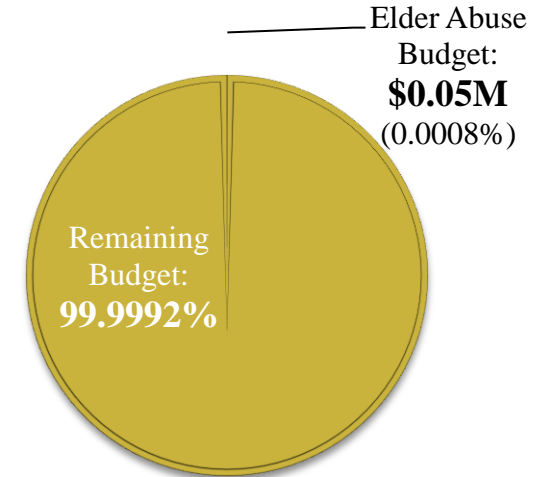
Office on Violence Against Women



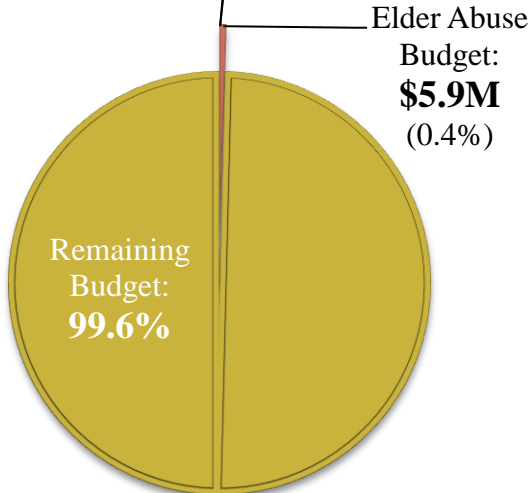
National Institute on Aging



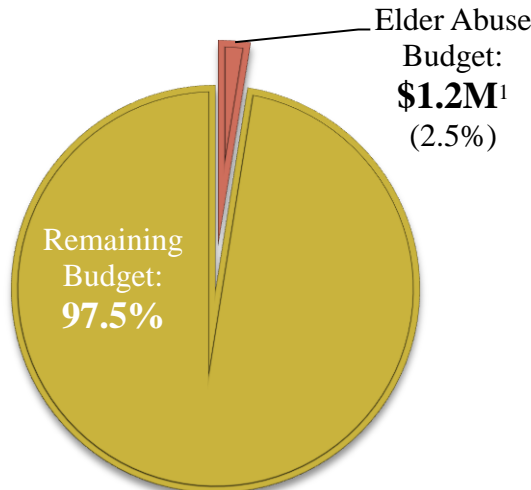
Centers for Disease Control



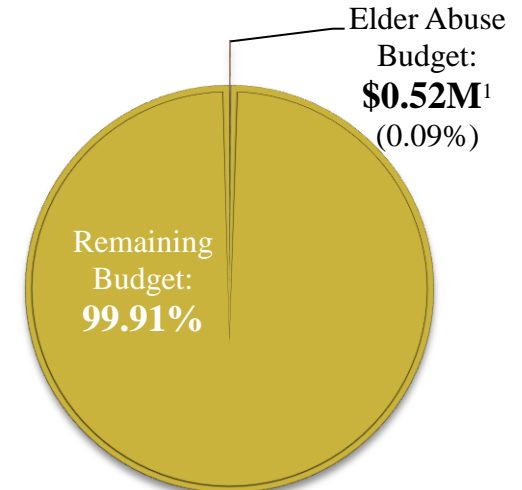
Administration on Aging



National Institute of Justice



Office for Victims of Crime



Notes:

Expenditures from FY 2009, as reported by GAO, March 2, 2011; see <http://www.gao.gov/products/GAO-11-208>.

¹Includes \$650,000 from DOJ Elder Justice Initiative, housed in DOJ's Civil Division, which also funded other efforts.

Advocacy Strategies



- Ask for an interdisciplinary care conference and attend with resident, family, or other appropriate support. Care conferences are critical ways to resolve problems.
- Concentrate Efforts on: Special Focus Facilities—supposed to be the most troubled in each state; and homes on the CMS Watch List for restraint usage and pressure ulcers. Look at www.nursinghomecompare.gov and State survey reports (Form CMS-2567).
- File a complaint with state Health Care Fraud unit, and CMS regional office, as well as APS
- Issue a report to the Media- after first giving state time to review report and respond

Types of Potential Impact Litigation for P&As where Ombudsman Can Help A LOT



- **Guardianship abuses**

- Medical basis for imposing guardianship erroneous
- Conflict of interest or worse in individual seeking it
- Conflict, ineptitude or abuse by guardian
- Little monitoring or oversight
- Little meaningful due process at any point, including right of appeal
- No due process before placing someone with dementia in a locked ward;
- Discrimination in end of life decision making;

ALF Looking for Cases



- Where nursing facilities have violated patient rights statutes
- Administered drugs against the will of nursing resident or without informed consent
- Other cases brought to address inadequate staffing
(*Skilled Healthcare in CA*)

Opportunities and Resources



- Elder Justice Roadmap/Concept Mapping– DOJ released in 2014
- Life Long Justice Legislative Map and CRS chart
- ABA Commission on Law and Aging, compendia and resources http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html
- More visibility from Medicare Fraud Units, ADRC's, Guardians
- Funding from Administration for Community Living

Resources through National Center on Elder Abuse



- • Elder Abuse: Defining This Issue – June 2012 (sub-grantee: RCI)
- • Elder Abuse in Asian Pacific Islander Communities – August 2012
- • Misuse of Anti-Psychotic Drugs in Nursing Homes – September 2012 (sub-grantee: The Consumer Voice)
- • Victim Services and Elder Abuse Coalitions – November 2012 (sub-grantee: NCPEA)

My Contact Information



KELLY BAGBY

KBAGBY@AARP.ORG

(202) 434-2103