WHITE PAPER ON THE JUDICIAL SYSTEM
FOR THE ELDER JUSTICE COORDINATING COUNCIL

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OVERVIEW

Growth of the older population, increasing detection and/or incidence of elder abuse, state legislative action, and growing emphasis on legal remedies for elder abuse are combining to expand the role of the judicial system in addressing the problem.[2]

In 1993, the State Justice Institute funded the American Bar Association (ABA), Commission on Law and Aging to conduct a groundbreaking study and develop recommended guidelines to enhance the ability of the state courts to handle elder abuse cases. Nearly 300 professionals (judges, court administrators, private and publicly-funded lawyers, prosecutors and attorneys general, Medicaid Fraud Control Unit staff, state legal services developers, and adult protective services and other non-legal professionals) identified barriers that inhibited entry of cases involving elder abuse into the state courts. Among the problems identified were:

- The lack of knowledge about and sensitivity to elder abuse by judges was seen as inhibiting prosecutors, civil lawyers, and abused persons from bringing court cases;
- The failure of court staff to explain the judicial process to older abused persons, particularly to those who have a mental or cognitive disability or who may be intimidated or confused, was considered to be a barrier to victims' pursuit of legal remedies;
- The courts' failure to recognize that older persons who are homebound or bedbound may be incapable of traveling to the courthouse even though they are capable of testifying;
- Court delays—typical or otherwise—were thought to be particularly onerous to older abused persons who are nearing the end of their life span, and who may be losing their capacity to remember the abuse and testify about it; and
- Lack of knowledge about elder abuse among prosecutors, law enforcement officers, and civil lawyers.[3]

To address these and other barriers the ABA Commission promulgated 29 recommended guidelines for state courts, which were adopted as policy by the ABA House of Delegates in August 1996.[4] In March 2006 the Center on Aging at Florida International University produced recommendations for adapting the U.S. Department of Justice Bureau of Justice Assistance's *Trial Court Performance Standards with Commentary* to an aging society in three contexts, including criminal cases involving elder abuse and domestic violence.[5] These guidelines and standards contributed to the development of five "court-focused elder abuse initiatives"[6] that the ABA Commission recently assessed with funding from the Department of Justice's National Institute of Justice.[7] This history informs the ideas presented in this white paper, which focus on practical Federal government steps over the short-, medium, and long-term to improve the ability of the State courts[8]—both civil and criminal—to:

(1) Provide leadership within the community;
(2) Provide education to the public and the bar;
(3) Handle cases involving elder abuse; and
(4) Collect pertinent data and evaluate court practices.

GAP #1 – Courts have provided leadership and education of the public and of the bar within their communities on similar problems such as child abuse and domestic violence, but rarely have done those things on the issue of elder abuse. Within the confines of State judicial ethics codes, courts can, for example:

- Encourage and support development or continuation of multidisciplinary initiatives on elder abuse or the inclusion of elder abuse in initiatives addressing other topics;
- Include professionals knowledgeable about elder abuse, such as civil lawyers or adult protective services personnel, on court advisory councils or other means of informing courts about the needs and issues of its jurisdiction;
- Encourage and support development and continued operation of elder abuse multidisciplinary teams; and
- Speak at public awareness events and at bar association meetings or continuing legal education programs about the role of the courts in elder abuse cases.

IDEAS FOR FEDERAL GOVERNMENT ACTION ON GAP #1 – Federal leadership on this issue through speeches, publications, media events, and other means could encourage the leadership of the State courts to make elder abuse a higher priority issue. The chief judges and court administrators of the State courts are increasingly cognizant of the impending impact on the courts of the burgeoning population of older persons, but they need guidance and other resources to help them act on that awareness and focus on elder abuse. Federal support for training, technical assistance, and materials on the opportunities for and abilities of State courts to provide leadership and education on elder abuse could have a significant impact.

GAP #2 – Judges and court staff need training and practical tools such as bench cards on myriad issues related to elder abuse, including but not limited to manifestations, dynamics, State laws, services (e.g., adult protective services, long-term care ombudsman, aging and disability), decision-making capacity, undue influence, case management issues and procedural innovations, and crafting and implementing effective orders in these cases. They need to learn about the recent—and hopefully ongoing—developments in scientific research about decision-making capacity, physical abuse, and neglect to inform their judgments in many civil and criminal cases, and about any research on the effectiveness of interventions that may occur in the future.

IDEAS FOR FEDERAL GOVERNMENT ACTION ON GAP #2 – The State Justice Institute funded the ABA Commission on Law and Aging to develop curricula on elder abuse for judges and State courts. Lack of resources to implement the training and lack of interest in the issue by the courts hindered use of those curricula. More recently, the National Center for State Courts has, with a combination of Federal and foundation funding, developed a new curriculum and is making the training available online. But Federal leadership is still needed to enhance the State courts' recognition of the importance of the issue. Ongoing technical assistance and the development and dissemination of additional practical materials for judges and court staff are

necessary, requiring Federal support. The Department of Justice could place a high priority on using existing Federal agency programming, grant funding, and training to encourage the State courts to focus on elder abuse. The Violence Against Women Act supports some training for family court judges on elder abuse, but many other types of judges hear cases involving elder abuse and could benefit from training, technical assistance, and practical tools and materials. Continuing support of scientific research on decision-making capacity, on physical abuse, and on neglect is critical, as is the translation of that research to aid judges, as well as lawyers and other professionals, in understanding what the research means and how it is relevant to elder abuse victims.

GAP #3 – Courts need to learn about and consider implementing different ways of handling elder abuse cases to meet the need of older litigants who often have substantial difficulty accessing and navigating the court system. Examples that we recently assessed for our National Institute of Justice-funded project include elder protection courts, elder justice centers, and processes for handling protection order cases by telephone for people who are homebound. As these ideas are expanded and adjusted, or as new ideas are created, courts also need to learn about those developments. Nevertheless, while specialized courts and other focused initiatives have significant benefits, there are many things that courts can do to enhance access to justice for victims of elder abuse without creating court-focused elder abuse initiatives. The ABA's recommended guidelines for state courts handling cases involving elder abuse and the Florida International University standards provide other ideas, and there also is much to learn from the judicial system's approach to child abuse and domestic violence.

IDEAS FOR FEDERAL GOVERNMENT ACTION ON GAP #3 – Training and technical assistance resources supported by the Federal government need to address systemic issues that may limit access to justice by or for elder abuse victims, as well as substantive legal issues and scientific knowledge about decision-making capacity, physical abuse, and neglect. Judges and court administrators who are considering whether to establish court-focused elder abuse initiatives don't have access to or time to read lengthy journal articles about research and therefore could benefit from simple, practical tools about research findings.

GAP #4 – Data collection by and evaluation of the court-focused elder abuse initiatives the ABA Commission just assessed and new initiatives developed subsequently, such as the Cook County, Illinois Elder and Miscellaneous Remedies Division that Judge Banks discussed, is needed. That suggestion raises complex issues about whether courts are interested in undergoing evaluation and whether they are capable of producing data that can be evaluated. The Federal government has supported evaluations of other types of specialized courts, including drug courts and domestic violence courts, thus demonstrating that such evaluation is possible when courts are provided with guidance to deal with the challenges of collecting relevant data and researchers are provided with the necessary financial support to undertake the necessary evaluations. Elder abuse cases pose some additional challenges, however.

The five initiatives studied were doing very little to self-assess their impact and outcomes. Only two of the initiatives had developed a client satisfaction survey, and they had received very few responses. None of the initiatives were making any formal attempt to obtain feedback from their professional stakeholders. Court case files in all five study sites contained very little information about the victims and perpetrators beyond the most basic demographic-

type data. There was very little information about the circumstances and outcomes of the case that would be needed for an evaluation. Indeed, in four of the five study sites it was usually impossible to tell from the court's data cover sheet that a case involved elder abuse, and that is the data reported to and by the State court administrative offices. This finding reflects the reality that judges see elder abuse in a variety of contexts: criminal cases such as assault, battery, forgery, fraud, murder, rape, theft; civil fraud or conversion matters to regain misappropriated property; personal injury actions; guardianship or conservatorship; mental health commitment; special protective proceedings initiated through adult protective services; cases involving health care decisions for an incapacitated patient; petitions for civil orders of protection from victims of elder abuse; and criminal or civil cases regarding institutional care in nursing homes or other long-term care facilities. In other words, these cases are not "counted" as elder abuse cases. Clearly these limitations pose significant policy and practice implications.

IDEAS FOR FEDERAL GOVERNMENT ACTION ON GAP #4 – This lack of an "evaluation gestalt" indicates that the courts need to change their current mindset about collecting data that supports program evaluation and basic counting of the number of cases related to elder abuse. Federal provision of technical assistance, training, and other support could help the courts in general, as well as the existing and new court-focused elder abuse initiatives, to understand why and how to create plans to collect critical data and support program evaluation. Federal support could also increase the likelihood that data collection and evaluation will be conducted in ways that are meaningful and have potential for national, multi-state, or multi-jurisdiction comparability.

This gap also illustrates a problem that cuts across most of the testimony provided at the Elder Justice Coordinating Council meeting but that was never articulated. What are the consequences of the current spotlight on evidence-based practices on efforts to address elder abuse when interventions and initiatives have not yet undergone rigorous evaluation? None of us want to see our tax dollars wasted, but Federal agencies need to be very careful in their messaging and in funding, whether directly or through State or local agencies, to ensure that they don't unintentionally choke off new ideas or impede the development of issues that are currently under-resourced and under-researched.

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[1] This white paper presents ideas rather than recommendations, and is based on the author's professional experience. Ms. Stiegel is not a spokesperson for the ABA.

[2] Stiegel, L. "The Changing Role of the Courts in Elder-Abuse Cases," *Generations* (Summer 2000); Heisler, C. J. and Stiegel, L.A., "Enhancing the Justice System's Response to Elder Abuse: Discussions and Recommendations of the 'Improving Prosecution' Working Group of the National Policy Summit on Elder Abuse," *Journal of Elder Abuse and Neglect* 14(4) (2004).

[3] Stiegel, L. (1995). *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse*, Washington, DC: American Bar Association.

[4]The recommended guidelines may be found online at http://www.americanbar.org/content/dam/aba/migrated/aging/PublicDocuments/rec_cts_hlg_eac_w.authcheckdam.pdf

[5] Bureau of Justice Assistance, *Trial Court Performance Standards with Commentary*, NCJ 161570, (1997), http://www.ncjrs.org/pdffiles1/161570.pdf; Max B. Rothman, Burton D. Dunlop, and Laura R. Seff, *Adapting Trial Court Performance Standards to an Aging Society: Guardianship, Self-Service, and Criminal Cases Involving Elder Mistreatment and Domestic Violence*, (2006), http://www.fiu.edu/~coa/downloads/elder%20justice/SJI4-03-06.pdf.

[6] The ABA Commission developed and defines the term "court-focused elder abuse initiative" to mean an initiative that serves victims or potential victims of elder abuse through either a court or a court-based program, or a program conducted in partnership with a court

[7]Stiegel, L.A. and Teaster, P.B. (2011) *Final Technical Report to the National Institute of Justice on "A Multi-Site Assessment of Five Court-Focused Elder Abuse Initiatives*. http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_ea_multi_assess.authcheckdam.pdf

[8] This paper is focused on state courts as that has been the subject of my work, but it is worth observing that Federal courts also handle cases involving elder abuse and face many of the same issues.