

**Panel Presentation by Charles P. Sabatino, Director**  
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**before the**  
**U.N. Open-Ended Working Group on Ageing**  
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**ACCESS TO JUSTICE**

Thank you. It is a pleasure and honor to share this panel with Professor Martin and Ms. Adkins. I should note up front that, although I am director of the ABA Commission on Law and Aging, I am not a spokesperson for the ABA on this panel. I am speaking from my own professional and academic experience in the United States.

I would like to start with a reference to an Access to Justice Initiative begun in 2010 by the U.S. Department of Justice. Its goal has been to improve access to justice in the criminal and civil justice systems. It set forth three principles of access to justice that are relevant here:

- Promoting Accessibility — eliminating barriers that prevent people from understanding and exercising their rights.
- Ensuring Fairness — delivering fair and just outcomes for all parties, including those facing financial and other disadvantages.
- Increasing Efficiency — delivering fair and just outcomes effectively, without waste or duplication.

These are core principles that can serve as a guide in any discussion of access to justice. With respect to the circumstances and needs of older persons, it is especially important to understand these principles in a broader context. Otherwise, one can focus too narrowly merely on increasing access to legal counsel and legal assistance to people who are unable to afford lawyers. Examining the topic requires much more than that. It requires (1) having knowledge and awareness of the full range of rights of older citizens-- civil and political, as well as economic and social rights; (2) having reasonable pathways to exercise those rights inside and outside the courtroom; and (3) having reasonable legal resources and self-help avenues of redress to remedy and prevent loss of those rights.

In the US, older persons experience a similar range of legal problems that adults of all ages experience. In addition, there are a number of benefits and legal issues specifically age-related. On first glance the underlying task of providing access to counsel and legal assistance may appear relatively indistinguishable from the task of providing access to anyone else. However, the legal profession in the US found that it had to think in a whole new way to provide meaningful access to justice to this population. This realization had its roots in the experience of legal aid attorneys in the 1970's who for the first time served primarily older low-income clients, thanks to funding flowing from the federal Older Americans Act, which today supports a broad range of services to older persons, and supplements funding from the Legal Services Corporation (LSC) which is the primary funder of public legal services to low-income clients of all ages.

What we learned in those first years is that the legal problems of older persons seldom occurred as one-dimensional, discrete legal issues. They almost always involved multi-faceted challenges that went beyond traditional “legal” matters, to more global concerns about their quality of life, dignity, and autonomy. Addressing them required a more holistic approach to advocacy, special skills in communication and counseling, and it typically involved collaboration across multiple disciplines, including health and social services, financial services, housing, transportation, others. The reality is that the civil, political, economic and social rights of older persons are intimately intertwined in a unique way, requiring a new way to approach access to justice.

What evolved is a concentration in the law, now commonly called “Elder Law” in the United States. Early on, the American Bar Association established a Commission on Law and Aging in 1979 to examine the range of law-related needs of older persons and to consider ways to address them effectively. That Commission, which I presently direct, is very active today as the challenges we see continue to grow, not shrink. In 1988, a National Academy of Elder Law Attorneys was founded and is today the primary specialty association of practicing lawyers concentrating in the field. Through an affiliated foundation, it also created a certification program for elder law attorneys. Among state bar associations, some 39 have created elder law sections or committees to provide peer support to lawyers practicing in the aging field.

The field of elder law today is dynamic and still evolving. If thought of as a practice specialty, it turns the notion of “specialty” on its head. Instead of a narrowly targeted and laser-focused expertise, elder law cuts across a multitude of legal matters. One paradigm of elder law that I use to explain what elder law is rests upon the underlying **values or goals** of older persons that in turn drive the nature and direction of legal assistance. Three core goals are essential -- the preservation and enhancement of:

- Autonomy,
- Dignity, and
- Quality of life

These goals are represented in the circle in the middle of Figure 1. The goals apply to adults of all ages, but, not surprisingly, they become particularly important and acutely stressed in the face of old age, chronic disease, frailty, or disability. In addition, this framework brings together a focus on civil and political rights with economic, social, and cultural rights in the context of access to justice.

Arising directly from these core goals is a baseline set of legal issues relating to autonomy and personal decision-making. These issues involve decision-making tools and protections, shown as item #1 in Figure 1 and include decision-making capacity, surrogate decision-making, and the support or protection of those with diminished capacity. Core legal tools of elder law in this area include planning tools such as durable powers of attorney, trusts, advance directives for health care, and, when judicial intervention is needed, guardianship and conservatorship, and protective services.

Beyond these immediate issues of personal decision-making, elder law issues tend to concentrate around three broad, but concrete focal points connected to these underlying goals:

- Housing issues (or, more broadly speaking, one’s entire living environment);
- Financial well-being; and
- Health and long-term care.

When you populate the myriad subtopics of these issues, you have a very full picture substantively of what issues elder law encompasses. The more detailed representation is provided in Figure 2.

An advantage of this paradigm is that it avoids defining elder law merely by the chronological age of the clients it serves. Indeed, it is increasingly common for elder law attorneys to serve younger generations of clients who seek to do their own planning and, especially, parents with an adult or minor child having special needs. In addition, the paradigm is necessarily flexible. While the core goals and general challenges remain the same over time, the particular benefits, options, and specific legal issues are likely to change over time.

The reason I emphasize this paradigm and the development of the field of elder law in the U.S. is that it demonstrates how the legal profession has come to recognize the need for a holistic, integrated approach to addressing the rights of older persons as a vulnerable population. That is a realization that needs to be considered in determining how best to strengthen the rights of older persons on an international level. In other words, is it enough to say that existing norms and processes that derive from an aggregation of existing instruments are sufficient, or is a new integrated, holistic strategy necessary to strengthen and secure the rights of this growing population adequately? The experience of elder law suggests the latter.

While this approach in addressing the legal needs of older persons the U.S., as I have described it, may appear far-sighted and innovated as you listen to these comments, there is another much darker side of the access to justice picture.

- Let me turn first to the field that I am in, improving the delivery of legal assistance to lower-income persons. The primary funder of civil legal assistance to low-income persons of all ages in the US is the congressionally created Legal Services Corporation (LSC). Funding from the Administration on Aging under the Older Americans Act supplements that funding with limited dollars that specifically target elders who are most economically and socially in need. A 2009 in-depth analysis done by the LSC found that found that, on the average, only one legal aid attorney is available for every 6,415 low-income people. By comparison, there is one private attorney providing personal legal services to private individuals and families for every 429 people in the general population who are above the LSC poverty threshold.<sup>1</sup> That is a 15-fold difference. The report also documents that less than one in five legal problems experienced by low-income people are addressed with the assistance of a legal aid lawyer or a private attorney (pro bono or paid). Legal aid programs serve low-income persons of all ages, so what do we know about access to lawyers for older persons? Our own analysis of LSC data and Administration on Aging data, both of which are extremely limited at best, indicate that the overall public legal service delivery system at current

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<sup>1</sup> Legal Services Corporation, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1, (September 2009).

funding levels meets less than one-quarter of the lowest estimated legal need of America's lowest income seniors.<sup>2</sup>

These figures take into account a substantial amount of pro bono services provided by the private bar. A 2009 ABA national survey found that during the twelve months preceding the survey, 73% of practicing attorneys provided free legal services to persons of limited means or to organizations that address the needs of persons of limited means. The study also found that the average attorney reported providing 41 hours of service during this time period.<sup>3</sup> Organized pro bono programs have grown from approximately 83 in 1980 to close to 1000 such programs today.<sup>4</sup> Nevertheless, we are meeting less than one-quarter of the estimated need.

Without that access to legal assistance, this population lacks reasonable pathways to fully exercise their rights to autonomy and dignity, to financial benefits, health and long-term care, and housing. The reality is that this population is tasked with navigating very complex rules to obtain and retain access to essential programs and services. Indeed, the sicker you are, the more complex the benefits system becomes to navigate.

- Examples of the impact of this shortfall are many. On the subject of adult guardianship, the National Center for State Courts estimated that about 1.5 million adults are under guardianship or conservatorship in the US, although data are so poor, they point out that the actual number could range from fewer than 1 million to more than 3 million.<sup>5</sup> In the great majority of those cases, we know from other studies that the alleged incapacitated person is usually not even present for the hearing. Most guardianship petitions today still result in plenary guardianships rather than limited, despite the emphasis on limited guardianship in our laws, resulting in the wholesale loss of one's legal standing as an adult. On laws vary considerably by state, although most look fairly protective of the rights of persons who may become subject to guardianship, but practice falls far behind. Our own research of state guardianship laws shows that less than half the states mandate that counsel be appointed to represent the alleged incapacitated person in all cases. All others qualify that right. And conceptually, the underlying paradigm of guardianship which provides for taking over decision-making for persons with diminished capacity falls far behind the concept of supported decision-making that is recognized in the Convention on the Rights of Persons with Disabilities.

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<sup>2</sup> David Godfrey, "In Search of Adequate Funding for Legal Assistance For Low-income Seniors," 32 *BIFOCAL* 1 (Sept.- Oct. 2010).

<sup>3</sup> The ABA Standing Committee on Pro Bono and Public Service, *SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS* vii (February 2009).

<sup>4</sup> *Id.*, at 30.

<sup>5</sup> Brenda K. Uekert & Richard Van Duizend, "Adult Guardianships: A 'Best Guess' National Estimate and the Momentum for Reform," in National Center for State Courts, *FUTURE TRENDS IN STATE COURTS 2011* (2011).

- In the area of elder abuse and exploitation, the US General Accountability Office released a report to Congress in 2011 on the status of elder abuse in this nation and on efforts to address it. Citing a recent study of the extent of elder abuse, it estimated that over 14 percent of non-institutionalized older adults had experienced physical, psychological, or sexual abuse; neglect; or financial exploitation in the past year. But, given the inadequacy of available data, it concluded that this figure likely underestimates the full extent of elder abuse.<sup>6</sup> Most existing studies did not ask about all types of abuse or include all types of older adults living in the community, such as those with cognitive impairments. One consistent finding across studies is that reports have increased each year. The U.S. justice system is significantly under equipped to respond to elder abuse and exploitation in that, for the most part, prosecutors lack training and expertise, the courts are already straining under the numbers of other cases it must handle, and it does not necessarily see these cases as a priority. Government agencies like Adult Protective Services on the state and local level play a vital role but are chronically underfunded and understaffed.
- Turning to age discrimination, our age discrimination laws appear quite strong on the books with respect to elders who are employed. However, the exceptions that permit discrimination based on age have not changed with changing demographics, medical science and the economy. And, the lived experiences of elders are troublesome, despite the statistical fact that the rate of unemployment is lower among older workers relative to prime age workers. A harsh reality is that older workers are more severely impacted by layoffs, because they are less likely to find new employment, and when they do find new jobs, their job search takes longer than any other age group.<sup>7</sup> Age discrimination complaints made to the federal Equal Employment Opportunity Commission numbered 23,465 in 2011, close to the (24,582) all time record reached in 2008; and they constitute close to a quarter of all complaints received by the EEOC.<sup>8</sup> Most age discrimination cases in the EEOC or the courts involve terminations of work or benefits. Few age-related discrimination charges in hiring are filed. That's not surprising, because it is generally easier to prove age-related discrimination in dismissal-related cases than in hiring-related cases. When an elder is passed over in the hiring process, the reasons are typically neither known nor easily discoverable anywhere.
- With respect to justice issues other than legal representation, enormous challenges face the courts and prisons. As far back as 1991, our Commission worked with groups such as the National Judicial College and the State Justice Institute to develop and promote recommendations on improving access for both the elderly and persons with disability to the

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<sup>6</sup> General Accountability Office, ELDER JUSTICE: Stronger Federal Leadership Could Enhance National Response to Elder Abuse, GAO-11-208 (March 2011).

<sup>7</sup> U.S. Bureau of Labor Statistics, U.S. Department of Labor, "Record Unemployment Among Older Workers Does Not Keep Them Out of the Job Market," ISSUES IN LABOR STATISTICS (Summary 10-04/March 2010); *see also* Maria Heidkamp, Nicole Corre, & Carl E. Van Horn, THE "NEW UNEMPLOYABLES" -- OLDER JOB SEEKERS STRUGGLE TO FIND WORK DURING THE GREAT RECESSION, The Sloan Center on Aging & Work, Boston College, Issue brief 25 (Nov. 2010).

<sup>8</sup> U.S. Equal Employment Opportunity Commission, CHARGE STATISTICS: FY 1997 THROUGH FY 2011, accessed on 8/10/12 at: <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm>

courts. Recommendations that were developed address a wide range of issues – physical and communications access, linkages to services, dispute resolution, stereotypes, education, case processing, court data, victim and witness assistance, juror accommodation, and capacity issues.<sup>9</sup> Unfortunately, we have not seen great progress in implementing these recommendations across the land, although there are some promising exceptions.

- In the criminal justice system, US corrections systems are confronting a flood of aging prisoners, not just because of the aging of the population in general, but because of stricter mandatory sentencing legislation enacted decades ago. According to Human Rights Watch, the number of sentenced state and federal prisoners age 65 or older increased by 63 percent between 2007 and 2010, while the overall population of sentenced prisoners grew less than one percent in the same period.<sup>10</sup> Prison officials are hard-pressed to provide conditions of confinement that meet the needs and respect the rights of their elderly prisoners. Providing medical care to older prisoners comes with a steep price tag because of their greater medical needs. Older prisoners develop mobility impairments, hearing and vision loss, and cognitive limitations including dementia. They are also more likely to have chronic, disabling, and terminal illnesses. We face an impending crisis in balancing respect for the human rights of all prisoners with what is required to respect those rights in the face of frailty and advanced illness.<sup>11</sup>
- Finally, I would like to mention the area of voting rights, because it is such a fundamental civil right and medium for participation in society. It is usually presumed that older Americans fare very well because the rate of voting among older persons is higher than that of other age groups. But the picture is different for older persons living in long-term care settings such as nursing homes and assisted living facilities. Residents in such settings often lack meaningful access to the ballot because of a number of internal and external barriers.<sup>12</sup> There are viable strategies that enhance access, such as the process referred to as “mobile polling” in which trained election officials bring the ballot to long-term care residents and assist with both registration and voting if needed. I was directly involved in a study in 2008 demonstrating the viability and benefit of this approach in one State, but it is used today in relatively few places.<sup>13</sup> Moreover, recent state law trends to require photo identification, to shorten early voting periods, and to eliminate same-day registration diminish the feasibility of mobile polling.<sup>14</sup> There is a great concern that these laws may result in a major

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<sup>9</sup> American Bar Association & National Judicial College, COURT-RELATED NEEDS OF THE ELDERLY AND PERSONS WITH DISABILITIES: RECOMMENDATIONS OF THE FEBRUARY 1991 CONFERENCE (1991).

<sup>10</sup> Human Rights Watch, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 6-7 (2012)

<sup>11</sup> *Id.*

<sup>12</sup> See, Nina A. Kohn, “Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity,” 38 McGeorge Law Review 1065 (2007).

<sup>13</sup> Jason Karlawish, *et al.* “Bringing the Vote to Residents of Long Term Care Facilities: A Study of the Benefits and Challenges of Mobile Polling,” 10(1) Election Law Journal 5 (February 2011).

<sup>14</sup> Wendy R. Weiser & Lawrence Norden, Voting Law Changes in 2012 (Brennan Center for Justice, 2012), accessed on 8-14-12 at: [http://brennan.3cdn.net/92635ddafbc09e8d88\\_i3m6bjdeh.pdf](http://brennan.3cdn.net/92635ddafbc09e8d88_i3m6bjdeh.pdf)

disenfranchisement of the elderly, persons with disabilities, and socially isolated, poor citizens.

These examples are in no way exhaustive but merely intended to be illustrative of inadequacies in both normative law and implementation. Access to justice principles cut across every topic we have discussed for the last three days, because in every case, we are dealing with barriers that prevent older people from understanding their rights. Indeed, it is often not even clear what those rights are in concrete terms. And, we are dealing with barriers to reasonable means for exercising their rights, and barriers to seeking redress when those rights are denied. This is the challenge of access to justice.