

Exploring Ethical Challenges of Legal Services Working on Elder Abuse Issues



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- <http://www.nlrc.aoa.gov/>
- Collaboration developed by the Administration for Community Living/Administration on Aging between the National Consumer Law Center, National Senior Citizens Law Center, American Bar Association Commission on Law and Aging, Center for Elder Rights Advocacy, and the Center for Social Gerontology
- See upcoming trainings, conferences, and webinars
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- Request consulting
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- Access articles and resources



Presenter – Penny Hommel

- Penny is the Co-Director, The Center for Social Gerontology. She was one of the first to specialize in legal rights of older persons and to develop a university-based law and aging program.
- She established TCSG in 1985 and has guided it to prominence as a national legal support center. She is the national leader in supporting state legal services developers and has particular expertise in legal services delivery systems for vulnerable elders.

Presenter – Jaye Martin

- Jaye is Executive Director of Legal Services for the Elderly in Maine. LSE is a statewide legal services organization focused on meeting the unique legal needs of disadvantaged seniors. LSE is actively involved in elder abuse litigation and developing state, regional and local efforts to improve the response of the legal system to elder abuse.

Presenter – Denis Culley

- Denis Culley works as a Staff Attorney for Legal Services for the Elderly in the Augusta office. He represents Maine residents sixty and older before courts and in administrative hearings before state agencies along with providing other civil legal services to Maine's elderly.
- He began his work with Legal Services for the Elderly in the fall of 2004. Since that time he has represented hundreds of elders in state and federal administrative appeals and in all divisions of Maine's State Courts.




**EXPLORING ETHICAL CHALLENGES
OF LEGAL SERVICES WORKING ON
ELDER ABUSE ISSUES**



OVERVIEW OF THE WEBINAR

1. ABUSE IN THE CONTEXT OF AGEIST SOCIETY:
HISTORY AND THREE CAUTIONS
(PENNY HOMMEL)
1. CRITICAL NEED FOR DEVELOPER TO ENSURE
POLICIES & PROCEDURES ARE IN PLACE BEFORE
PROVIDERS GET INVOLVED
(JAYE MARTIN)
1. HANDS-ON CHALLENGES FOR PROVIDERS ONCE
CASES COME THROUGH THE DOOR
(DENIS CULLEY)



**ELDER ABUSE IN THE
CONTEXT OF AN
AGEIST SOCIETY:
HISTORY OF ELDER ABUSE
– THREE CAUTIONS**

PENELOPE (PENNY) HOMMEL
*CO-DIRECTOR,
THE CENTER FOR SOCIAL GERONTOLOGY*



BACKGROUND / IMPETUS FOR THE WEBINAR

- **RECENT RESURGENCE OF ACTIVITY IN BROAD AREA OF ELDER ABUSE, NEGLECT AND FINANCIAL EXPLOITATION.**
- **A PUSH FOR GREATER INVOLVEMENT OF LEGAL SERVICES, PARTICULARLY IN FINANCIAL EXPLOITATION.**



POSITIVE DEVELOPMENT, BUT...

POSITIVE BECAUSE:

- AFTER FIRST TWO DECADES OF INTENSE ACTIVITY, (1980s AND 90s), FADED INTO BACKGROUND;
- RECENT YEARS, ATTENTION AGAIN BEING GIVEN AND GREATLY INCREASED
FEDERAL LEVEL: AoA/ACL, ELDER JUSTICE ACT/ COALITION, CONSUMER FINANCIAL PROTECTION BUREAU, ETC;
- STATE & LOCAL LEVELS: SUAs, LEGAL SERVICES DEVELOPERS, AAAs, OMBUDSMEN, LEGAL SERVICES PROVIDERS, ETC.



**BUT EXTREME CAUTION NEEDED –
REMEMBER THE HIPPOCRATIC
OATH; “FIRST, DO NO HARM.”**

THREE REASONS FOR CAUTION...



REASON #1: AGEISM STILL RAMPANT IN AMERICA


DR. ROBERT BUTLER, ONE OF THE FIRST TO PUT SPOTLIGHT ON “AGEISM,” DEFINED IT AS: *A FORM OF SYSTEMATIC STEREOTYPING AND DISCRIMINATION AGAINST PEOPLE SIMPLY BECAUSE THEY ARE OLD.*

IMPORTANT CONSEQUENCES –

- ELDERS NOT TAKEN SERIOUSLY, ARE PATRONIZED.
- OTHERS MAKE DECISIONS FOR THEM
- OVERRIDE THEIR EXPRESSED WISHES/DESIRES.

VERY SERIOUS IMPLICATIONS FOR LEGAL SERVICES PROGRAMS

- REQUIRES EXTREME CAUTION IN GETTING INVOLVED IN ABUSE & EXPLOITATION CASES.
- MUST ESTABLISH PROTOCOLS/POLICIES PRIOR TO GETTING INVOLVED.



**REASON #2:
AGEIST ATTITUDES REFLECTED
NOT ONLY IN STATES' ABUSE
LAWS, BUT EVEN IN LANGUAGE
WE USE, E.G. --**

AGING NETWORK

- ELDER ABUSE
- CASE MANAGEMENT
(THOUGH BEGINNING TO CHANGE...)
- VICTIMS

DISABILITY COMMUNITY

- DISABILITY RIGHTS
- PERSON CENTERED
PLANNING
- PERPETRATORS



REASON #3: HISTORIC EVOLUTION OF STATES' ABUSE LAWS

PASSED VERY RAPIDLY

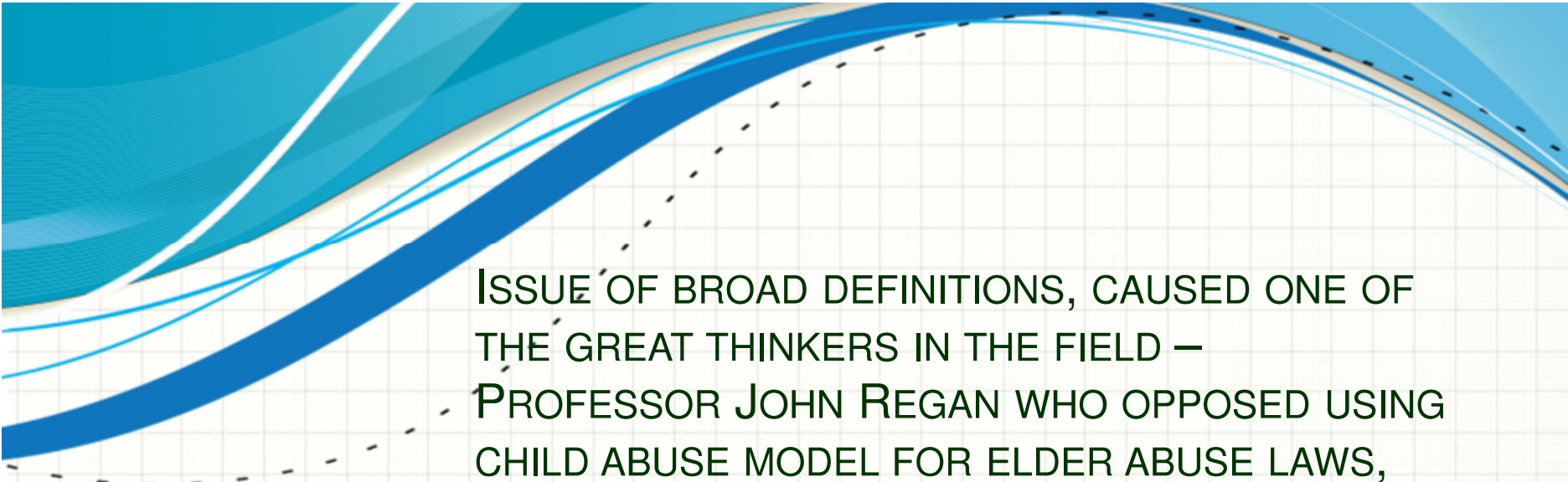
- FIRST NATIONAL ATTENTION IN 1979 – JUNE HEARING BY CONGRESSMAN DRINAN (MA). BASED ON VERY EARLY RESEARCH BY A VERY FEW.
- STATES VERY QUICKLY BEGAN TO PASS LAWS – FROM 4 STATES IN 1976 TO 30 BY EARLY 1983
- IN MOST STATES, INADEQUATE MONEY TO IMPLEMENT; IN SOME STATES NO ADDITIONAL MONEY (E.G. MICHIGAN).
- INADEQUATE CONSIDERATION OF DIFFICULT BALANCE OF INDIVIDUAL RIGHT OF ADULTS TO AUTONOMY/SELF DETERMINATION VS POWER OF STATE TO INTERVENE TO “PROTECT.”



REASON #3: HISTORY OF LAWS (CONT.)

RESULTS:

- MOST IMPORTANT, ALMOST ALL STATE LAWS PATTERNED AFTER CHILD ABUSE LAWS. EARLY FOCUS ON MANDATORY REPORTING & INVESTIGATING. UNDERLYING ASSUMPTION THAT, AS A CATEGORY OF THE POPULATION, ELDERLY NEED PROTECTION LIKE CHILDREN.
- SOME STATES EVEN ALLOWED INVOLUNTARY INTERVENTION, E.G. “SHORT TERM” INSTITUTIONALIZATION OF SELF-NEGLECTING ELDERERS.
- ISSUE OF BROAD DEFINITIONS - MOST LAWS DEFINED ABUSE VERY BROADLY – PHYSICAL/EMOTIONAL ABUSE, NEGLECT BY OTHERS, SELF NEGLECT AND EXPLOITATION. SOME APPLIED SPECIFICALLY TO ELDERS; OTHERS TO ALL VULNERABLE ADULTS. CASTS A VERY WIDE NET.



ISSUE OF BROAD DEFINITIONS, CAUSED ONE OF THE GREAT THINKERS IN THE FIELD – PROFESSOR JOHN REGAN WHO OPPOSED USING CHILD ABUSE MODEL FOR ELDER ABUSE LAWS, MANDATORY REPORTING OF ELDER ABUSE WITH ITS PATERNALISTIC UNDERPINNINGS – TO REMARK:

“... THE UNDERLYING POINT IS WORTHY OF YOUR REFLECTION, THAT A MANDATORY REPORTING LAW, TAKEN SERIOUSLY, NOT ONLY IMPOSES SIGNIFICANT OBLIGATIONS ON PROFESSIONALS AND SERIOUS PENALTIES ON THOSE WHO BREACH THAT DUTY, BUT MAY DEFINE THAT DUTY IN TERMS SO BROAD AS TO MAKE IT MEANINGLESS.”

PROF. JOHN J. REGAN, UNPUBLISHED PAPER,
ELDER ABUSE PREVENTION & INTERVENTION POLICY: A WORKING CONFERENCE,
CHICAGO, JULY 1985



IMPLICATIONS FOR LEGAL SERVICES ATTORNEYS WORKING IN THE AREA

FOR ALL THREE REASONS, EXTREME CAUTION IS ADVISED, AND IT IS CRITICAL TO EVALUATE THE CAPACITY OF THE LEGAL SERVICES PROGRAM TO HANDLE THESE COMPLEX, CHALLENGING CASES, AND TO PUT IN PLACE CLEAR PROGRAM PROTOCOLS/PROCEDURES BEFORE GETTING INVOLVED.

NOW ON TO JAYE MARTIN'S DISCUSSION OF THAT EVALUATION AND THOSE PROTOCOLS...



HANDLING ELDER ABUSE CASES

Ethical Challenges and Solutions

Jaye Martin and Denis Culley
Maine Legal Services for the Elderly



Overview—Getting the Basic Office Procedures Right

- Evaluate your program's capabilities
- Identify and fill service gaps
- Set up formal intake and referral policies that get the right calls through the door
- Anticipate and plan for common intake challenges




Why Establishing a Formal Approach Matters

- Advocacy programs that serve seniors are already getting a high volume of calls from victims
- These calls will often present very challenging ethical issues
- Must decide: proactive vs reactive approach
- Also--these are very vulnerable seniors—so any gaps in resources and services should be faced and addressed



Evaluating A Program's Capabilities

- Critically evaluate your ability to serve potential victims
 - Do staff know how to identify potential victims?
 - For example, POA revocation requests and affirmative eviction requests versus just self-identification by a caller
 - How quickly can your program respond where a senior is at physical risk? Financial risk?
 - What level of service can you provide versus what is needed?
 - What training is needed to ensure staff are comfortable and competent working with elder abuse victims?
- Are there any legal service needs your program can't meet directly? Are there referral resources in place to meet those needs?



Facing System Gaps vs the Ostrich Approach

- Is providing some information entirely via telephone better than doing nothing at all for a victim?
- Do the circumstances surrounding the victim change the answer?
- How about the victim's ability to engage in self help?

Taking Ownership and Action

- Referral resources should be identified to fill all gaps in the program's abilities and resources
- Connecting with and creating external referral resources:
 - If your program is unable to provide full/extended representation to some or all victims, you must determine how these needs will be met
 - Referral panels are an option for some case types
 - Formal referral relationships should also be in place with adult protective services, long term care ombudsman, area agencies, etc.



Establish Comprehensive Intake Protocols

- Once you know the needed services are in place, whether internal or external, you must make sure your intake procedures are adequate
- Programs should anticipate certain intake challenges associated with elder abuse/exploitation cases and establish systems to deal with the common challenges

Callers with Diminished Capacity

- Caller only able to request service and give permission to speak with someone else
 - Get caller through the door (flagging the capacity concerns in the intake note) and allow an attorney to determine next steps
 - Best approach even where third party is obviously coaching senior to make the request
 - Allows attorney to later determine if a relationship is possible
 - Very challenging situation if in-person meeting with senior is not ever going to be an option

Who is the Client?

- Calls from Powers of Attorney or Guardians
 - Always determine if contact with the senior is possible
 - If not, flag file from the start as raising conflict concerns
 - Determine in advance when/how your program will get involved, if ever, with financial exploitation allegations involving a senior who is not able to communicate with his or her attorney
 - Also establish approach for situations where it appears POA may be the one taking actions adverse to interests of client/senior

Who is the Client?

- Calls from spouses
 - Always determine if contact with potential client/victim is possible
 - Distinguish contact reported as difficult from contact reported as not possible
 - If spouse is age eligible, consider services that might be provided directly but pursue this with caution

Other Third Party Callers

- Callers will include professionals, family members and others
- If an intake is done, these calls should involve very thorough intake notes that clearly describe the interactions and issues of concern

Third Party Callers

- If a caller reports contact with the senior is not possible, determine why person thinks contact is not possible
- Refusing to seek help? Afraid to seek help? Unable to seek help due to medical reasons or physical restrictions by abuser? (OR Person could call with assistance)
- If call with assistance is possible, help caller plan for that to happen
- If caller maintains no contact is possible, determine if someone holds Power of Attorney or is guardian

Third Party Callers

- If there is a POA or guardian who may be willing to seek help for senior, direct the caller to have that person call for assistance (and proceed with caution)
- All other third party callers where no contact with senior is possible should be referred to APS and law enforcement



Support and Training for Intake Staff

- Third party calls are among the most challenging for intake staff, especially ones involving allegations of abuse or exploitation
- Programs should provide clear procedures and ongoing training in these areas
- Programs should provide intake person with an option to transfer difficult callers to another person

Putting it All Together

- Evaluate your program's capabilities
- Establish referral relationships to fill service gaps
- Plan for the known intake challenges
 - Set policies in advance
 - Train, train, train
 - Provide supports
- Expect “gray area” intake situations
 - Staff should be encouraged to raise questions and concerns
 - There should be an established method for resolving these situations



Now, on to the really hard part . . .

The case is through the door, and it should be, now
what . . .

Challenges and Pitfalls

- “Who is the client” is a question that can present repeatedly, in shifting forms, throughout representation.
- This is especially true in cases with clients with diminished capacity.
- Persons related to or in affinity with the elder may vie for the title of client, becoming, functionally, shadow clients.
- These persons may include exploiters.



What the Shadow Client seeks

1. Control of the actual client and counsel
2. To use counsel as cudgel to gain advantage or settle scores (elder as battlefield)
3. To undermine efforts at relief for elder
4. To aid further exploitation or cement the financial gains already made




Some Practical Considerations

- Competence is a legal state and is presumed
- Capacity describes an individual's ability to make decisions
- Capacity resides in frontal lobe and is really executive function
- Competence is the black hole of legal ethics – that reality often intensifies in diminished capacity representation

What to do

- Again, make certain to meet with client alone (if at all possible)
- Power down Powers of Attorney
- Hold on to (and honor) your doubts regarding those around the client
- Beware the feeding frenzy



The Marginally Competent (and vacillating) Client

- A double minded man is uncertain in all his ways – John 1:8
- Hazel's Story
 1. Family dynamic
 2. Starts and stops
 3. The problem of evidence
 4. Time
 5. Trial and postscript



A Litigation Strategy

- The same things that make so many of our clients easy victims makes them poor witnesses
- Intensified need for a great paper trail
- Summary Judgment should be the aim **from the outset** if at all feasible
- Lengthy scheduling orders are a challenge
- Don't forget Medicaid issues in settlement

Questions?

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Next Series of Webinars



- Next webinar will be held on **February 11, 2015** “Involuntary Transfer and Discharge from Nursing Homes: Prevention, Advocacy, And Appeals.
- Email us your ideas for speakers and topics to trainings@nclc.org



Just a Reminder

- Please fill out the evaluation when you sign-out
- I will email you the PowerPoint and recording in a few days
- Thank you to our speakers!



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