



Seeking Out the Quietest Voices: Advocacy for Vulnerable Older Adults and People with Disabilities

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Many vulnerable older adults and people with disabilities have little or no access to legal services despite the Legal Services Corporation (LSC) directive that grantees assist underserved populations. These underrepresented groups include those who reside in long term care facilities; those with cognitive and/or physical disabilities; and those who are victims of abuse, neglect, and exploitation. According to LSC data, in 2013, only .2% of cases concerned long term care facilities or home and community based care.² And although legal services programs serve some older adults and people with disabilities who have been victimized in various ways, LSC does not specifically track cases involving ill treatment of these populations. A combination of factors, including isolation, lack of transportation, limited or no access to telephones or internet resources, disabilities that complicate communication and travel, and dependence on or interference from others make it harder for these clients to seek legal help and more challenging for overburdened legal services offices to reach out to them. However, both the Aging and Disabilities Unit at Community Legal Services in Philadelphia (CLS) and the Michigan Elder Justice Initiative (MEJI) have focused on meeting the needs of these vulnerable populations.³

This article focuses on our advocacy regarding long term care and elder abuse. These and other critical elder law issues are the same concerns that legal services providers have been addressing since elder law was born in legal services programs forty years ago. Jonathan Asher, then the director of the Legal Aid Society of Metropolitan Denver, noted in a 1997 keynote address that elder law evolved after the 1975 adoption of legal services as a priority in the Older Americans Act⁴ and the subsequent requirement that an “adequate proportion” of Title IIIB funds be provided for legal services targeted for “older individuals with the greatest

economic and social needs.”⁵ Although CLS and MEJI have different models and roles, both continue to engage in this advocacy for a burgeoning population of older adults and people with disabilities.

The Aging and Disabilities Unit at Community Legal Services of Philadelphia

When vulnerable older adults and people with disabilities in Philadelphia are threatened with devastating problems, the Aging and Disabilities Unit at CLS provides representation to ensure their security, and to meet their basic needs.⁶ The unit focuses on access to health care, particularly long term care and income-related public benefits, and originally served older adults exclusively. Over the years, staff began taking cases for younger people with disabilities because there was often nowhere else for these individuals to turn. Our current model is born out of the reality that legal issues facing these vulnerable populations often overlap.

Our unit has a Title IIIB contract with our Area Agency on Aging to represent older adults. Many of the unit’s individual cases concern long term services and supports, including nursing home and personal care home residents’ rights or quality of care issues, and denials of home and community based services (HCBS). Since many of our clients are homebound, we often meet with clients in their homes or in facilities. We also handle Medicare-related issues and appeals. We are expanding our work in the guardianship area, including representation of alleged incapacitated persons (AIPs) and individuals who have been adjudicated incapacitated but who allege violations of their rights. These cases feel particularly important because AIPs are frequently unrepresented in guardianship proceedings, despite the fact that they stand to lose most of their rights, and there are inadequate safeguards to ensure that individuals receive quality

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guardianship services.

We have a close working relationship with our local long term care ombudsman programs. We provide training and work together on individual cases as well as impact advocacy concerning personal care, home and nursing home quality of care and state oversight.

CLS' practice model is to identify systemic issues underlying our individual clients' cases, when they exist, and to address those issues through impact advocacy. To this end, we advocate with state administrative agencies for policy changes to improve the accessibility and scope of HCBS and to improve state oversight of long term care facilities. We often partner in these efforts with other legal services programs and aging advocacy and disabilities rights organizations. Since CLS does not receive LSC funding, we are also able to bring class action litigation, which we have pursued primarily in the areas of Medicaid and Medicare.

The Michigan Elder Justice Initiative

The Michigan Elder Justice Initiative (MEJI) is part of the Michigan Poverty Law Program, the state-wide back-up center for legal services programs.⁷ MEJI focuses on issues that affect the most vulnerable older adults and people with disabilities. We litigate a limited number of cases and provide support to legal services lawyers, other advocates, and private attorneys on a variety of issues related to long term care, guardianship, elder abuse, individual rights, access to health care, Medicaid and Medicare. We participate in numerous systemic advocacy efforts on these issues. We have forged a productive relationship with state Medicaid officials and coordinate activities with other advocates for older adults and people with disabilities. We provide frequent training for advocates and client groups on issues of primary concern to vulnerable adults.

Like CLS, many of the challenges we address for older adults also concern people with disabilities. Through close collaboration with the disability community, we strengthened advocacy for both populations and expanded our representation of younger people with disabilities. We eagerly pursue opportunities for all individuals to live in their homes and communities with the supports they need and we seek to improve the programs that provide these critical services. We also share CLS's goal of ensuring our clients in long term care facilities receive high quality care and benefit from the full range of state and federal rights designed to

protect and empower them. Finally, we have sought to raise awareness of elder abuse, to support legal services providers in their representation of abuse victims, and to train and collaborate with multidisciplinary advocates and providers working to respond to elder abuse.

MEJI serves as counsel to the State Long Term Care Ombudsman. We engage in systemic advocacy that benefits residents and provide legal support and training statewide to the long term care ombudsman. We were recently selected to serve as the ombudsman for Michigan Health Link, a demonstration project we worked with the state to develop that provides health, mental health, and long term care services to individuals eligible for Medicaid and Medicare. MEJI has also been involved in national efforts to promote and provide training for elder abuse work in legal services.

Long Term Care Advocacy

Because of physical and/or cognitive disabilities, long term care consumers are at risk of neglect, institutionalization, and even death. They are often isolated and homebound or housed in substandard institutions. Sadly, serious quality problems and rights violations in facilities are commonplace and government agencies charged with regulating facilities often fail to ensure residents enjoy quality care and quality of life.

Legal services programs can make a difference on these issues at both the individual and systemic level. For example, legal services advocates can provide tremendous benefit to clients through representation in appeals of increasingly common involuntary nursing home discharges. Federal law strictly limits the circumstances in which nursing facilities are permitted to discharge residents. It also provides powerful procedural protections for residents, however, nursing homes regularly violate these requirements when they discharge residents who have difficult behaviors or who become eligible for Medicaid or have payment issues.

These cases are very similar to landlord-tenant eviction cases which are generally a high priority for legal services. Indeed, the stakes are even higher in nursing home cases since, in addition to losing housing, clients lose access to essential health care and have little control over where they are sent. Powerful legal protections and available defenses make these wonderful cases to defend. Moreover, the hearings are generally handled through the Medicaid agency administrative "fair hearing" system, a familiar setting for many legal services lawyers.

In a typical case, CLS intervened when a nursing facility attempted to discharge a man who was

cognitively incapacitated, unable to walk, and in need of extensive care. The discharge was precipitated by a payment issue beyond the resident's control and the facility failed to issue advance written notice. The facility sought to send the client to the home of his 77 year old mother who was unable to care for him. CLS also sees discharges to homeless shelters or unlicensed facilities. After CLS filed a complaint with the state licensing agency, the nursing home agreed not to discharge the client. In another case, MEJI's local ombudsman worked with the legal services staff to stop the discharge of a cognitively impaired resident who engaged in inappropriate sexual behavior. The client had already been discharged from two facilities for the same issue. At the hearing, the legal services lawyer cited numerous procedural flaws in the nursing facility's discharge efforts and argued that the facility was capable of supervising the resident to monitor his behaviors. The Administrative Law Judge found in favor of the resident. When the facility subsequently transferred the resident to a local hospital in another illegal effort to discharge him, MEJI worked with the licensing agency to ensure he was readmitted.

Legal services programs can also offer effective systemic advocacy on long term care issues. In recent years, CLS observed that the state almost never substantiated complaints about nursing home quality or residents' rights violations. The complaint investigations appeared cursory. During the same period, enforcement actions against nursing facilities for licensing violations dropped to almost nothing. Indeed, CLS learned that in Philadelphia from 2012 through 2014, a whopping 92% of complaints were deemed unsubstantiated. Complaints were generally substantiated only when residents had died, been seriously injured, or wandered away from facilities. The state agency minimized the severity of deficiencies it found, resulting in minimal or no penalties. Among the violations categorized as having caused only minimal harm was a resident left unattended who set her head on fire.

CLS compiled this information into a report, presented it to state officials, and later released it publicly, garnering statewide attention.⁸ Simultaneously, the state attorney general sued a nursing home chain for providing poor quality care. Within weeks, the state agency announced initiatives to address these issues, including the formation of a Nursing Home Quality Improvement Task Force, and a request for the state Auditor General to review the state's nursing home licensing functions. The state has also revised its complaint intake process, increased and reassigned

inspector staff, and instituted new training. In the six months since then, there has been a 200% increase in the imposition of fines. There is still much work to do, but CLS staff feel encouraged by this progress.

Addressing Elder Abuse

Recently, increasing attention has been paid to the "tsunami" of elder abuse. While these efforts were often initiated by law enforcement, domestic violence advocates, Adult Protective Services staff, and the aging network, legal services providers were often left on the sidelines. Some advocates mistakenly believed that abuse prevention and remediation was primarily the province of the criminal justice system. This misperception was unfortunate since the vast majority of elder abuse cases are not prosecuted and many victims do not want to pursue criminal remedies. Moreover, prosecution often does little to restore what the victim has lost or protect the victim from future abuse.

We believe that legal services are the missing link in the effort to respond to elder abuse. Legal services can play a huge role in preventing clients from being victimized in the first place and in restoring clients' financial security, physical safety, and peace of mind if they have been victimized. And legal services staff can be a resource to front line advocates who work with victims but often have little access to legal information.

Legal services' elder abuse work can be varied and often utilizes the same skills casehandlers employ to assist other clients. For example, educating clients about prudent financial planning can protect them from being victimized. Helping a person in need of long term supports become eligible for Medicaid home and community based services can mean that the client does not need to live with an abusive family member. Assisting an older person in obtaining a protection order against or a divorce from an abusive spouse can provide a more peaceful future. Litigating claims to recover assets that were misappropriated can help the client regain financial security. And for individuals whose situation is irreversibly altered by financial exploitation, assisting the clients in applying for public benefits for which they may not previously have been eligible can assure a minimal level of financial support.

Despite the extraordinary prevalence of elder abuse, legal services programs may not appreciate they are already serving many abuse victims. Lawyers representing clients in a variety of substantive areas may not realize that the cause of the client's crisis was some form of exploitation. They are therefore unable to help protect the client from the frequent snowball effect

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when a victim of one kind of abuse or exploitation also becomes vulnerable to other types of abuse.

Legal services providers may also reject elder abuse work because they believe they are not sufficiently knowledgeable or there is little they can do. Elder abuse is rarely on the legal services training agenda. While training on these issues is extremely important, many legal services staff already possess the substantive expertise required to address victims' most pressing needs.

Legal services programs may also unwittingly create barriers to serving abuse victims. Intake protocols requiring that the client initiate contact, long waiting times before assistance is provided, and limited ability to make house calls may compromise clients' ability to seek assistance, especially if the abuser controls or monitors the victim's access to the telephone and transportation. In addition, many critical potential referral sources may not be aware that legal services has much to offer victims or potential victims.

MEJI has tried to raise awareness of these issues. We suggest that legal services programs adopt flexible intake policies to accommodate victims and incorporate standard intake questions that might elicit information about whether the client is at risk, just as physicians routinely inquire whether a patient is a victim of domestic violence. Moreover, MEJI encourages programs to participate in the many multidisciplinary efforts across the country to combat elder abuse.⁸ Doing so can educate legal services providers about the issue, offer opportunities to support the work of non-legal advocates, and ensure referrals. Finally, providing community education to clients about how to protect themselves from abuse reinforces the understanding that legal services programs should be key players in addressing elder abuse.

Conclusion

Elder law is a deeply rewarding area of legal services practice in which clients' needs correspond to legal services' priorities: access to essential health-related care and benefits, housing preservation, and the right to live free of abuse, neglect and financial exploitation. This compelling work involves protecting the most fundamental rights—freedom to control one's own life instead of having a guardian; the ability to be at home instead of in an institution; and the right to live in peace and dignity. It offers the opportunity to be fully engaged in interdisciplinary work

with professionals from healthcare, social services, law enforcement and other fields.

The urgent stories of our individual clients point to much important impact work still to be done. With the population of older adults projected to increase dramatically, it is crucial that legal services programs stand ready to serve this at risk population.

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2 Legal Services Corporation, "2013 LSC By The Numbers: The Data Underlying Legal Aid Programs," <http://www.lsc.gov/media-center/publications/2013-lsc-numbers>

3 Although neither CLS nor MEJI are LSC-funded programs, almost all the work discussed in this article is permissible for LSC-funded programs.

4 The Older Americans Act of 1965 (OAA), 42 U.S.C. § 3001 et seq., funds services to keep older adults healthy and independent, including legal assistance. OAA funding is administered through state aging agencies and, within each state, a network of area agencies on aging.

5 42 USC §3027(a)(2)(C). Because the Older Americans Act requires these services be provided without any means test, programs have flexibility in serving individuals with incomes or assets that exceed their usual eligibility requirements. See 45 C.F.R. §§ 1321.16(f)(3), 1321.61(c), and 1321.67(c).

6 Founded in 1966, CLS provides direct legal representation, community education, and systemic advocacy in order to alleviate poverty and increase access to justice for all. When Congress imposed the federal legal services funding restrictions in 1995, CLS declined LSC funding to retain the ability to litigate class actions and engage in important policy work. At that time, CLS worked with the Philadelphia Bar Association to create a new sister agency, Philadelphia Legal Assistance (PLA), to receive the LSC funds. Twenty years later, PLA and CLS work together as closely as possible to serve clients and fight poverty.

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- 7 The Michigan Poverty Law Program (MPLP) provides support to legal aid programs and other advocates. MPLP engages in systemic advocacy to alleviate barriers faced by low income individuals. Since 2008, MPLP has created additional statewide programs, including MEJI, to respond to emerging legal needs in Michigan.
- 8 For state-by-state information about agencies involved in responding to elder abuse and efforts to combat elder abuse, see the National Center on Elder Abuse website, http://www.ncea.aoa.gov/stop_abuse/index.aspx.