

Elder Abuse Introduction for Estate Planners

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1. The Boomers are upon us

There will be a dramatic increase in the 60+ population over the next 20-30 years. According to the U.S. Department of Health and Human Services Administration on Aging, in 2009 there were 39.6 million Americans age 65 or older, but by 2030 there will be about 72.1 million people in the category — more than twice the number in 2000.

2. Racine / Kenosha Aging Population Projection - increases in 20 years.

- a. Racine Population 65+ in 2020: 34,830 = 19%
- b. Racine Population 65+ in 2040, 52,250 = 24.4%
- c. Kenosha Population 65+ in 2020: 26,885 = 14%
- d. Kenosha Population 65+ in 2040: 43,380 = 20.7%

Source: <https://www.dhs.wisconsin.gov/aging/demographics.htm>

3. Hand in Hand with increase in aging, is increase in Dementia

- a. Dementia is the sixth leading cause of death in the United States,
- b. Approx. 5.8 million people 65+ living with Dementia in 2020
- c. Projected to grow by 42% increase by 2050.

Source: <https://www.alz.org/alzheimers-dementia/facts-figures>

4. Dementia Affects our Clients' Legal Affairs

- a. Businesses – Management and Successions
- b. Contracts – capacity issues
- c. Finances – Long Term Care, mismanagement, abuse
- d. Housing – changing need for care
- e. Health Care Decisions – effectiveness of standard POA
- f. Estate Planning – Capacity and management issues
- g. Abuse and Neglect – Next slides
- h. Criminal Justice System – aging offenders and victims

5. The Problem of Elder Abuse

- a. **Types of Abuse:** These are defined in Wisconsin's Elder Abuse statute, Wis. Stat. §46.90.
 - i. Physical abuse,
 - ii. Emotional abuse,
 - iii. Sexual abuse,

- iv. Treatment without consent,
 - v. Unreasonable confinement or restraint,
 - vi. Neglect. (Actually a separate category)
- b. **“Elder Adult at risk” 46.90(1)(br)** is any person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.
- c. **Reporting – 46.90(4)** Distinguishes between mandatory and voluntary reporters, sets protections for reporters. Attorneys are voluntary reporters.
- d. **Prevalence:** According to the Wisconsin Department of Health Services, a total of 10,018 cases of suspected elder abuse and neglect were reported in 2019, which is triple the amount reported in 2001. Of the substantiated cases: The largest type of abuse reported was self-neglect (49.7%), followed by financial abuse (20%). Most of the victims were female (58.8%) and white (66.33%).

Source: <https://www.dhs.wisconsin.gov/publications/p00124-19.pdf>

- e. **“Iceberg Theory”:** The results of the National Elder Abuse Incidence Study, which was completed in 1998 and measures the incidence of elder abuse in 1996, indicate that for every substantiated case of elder abuse that is reported, four cases go unreported.
- f. **Under the Radar:** A more recent study from New York indicates that for every case referred to enforcement, 24 more exist “under the radar.” Lifespan of Greater Rochester, et al., *Under the Radar: New York State Elder Abuse Prevalence Study*, May 2011.
- g. **Who are the Abusers?** The biggest groups of abusers are daughters, sons, and spouses, respectively.
- h. **What Does Abuse Feel Like?** Mickey Rooney Testifies as a victim.

6. The Hidden Nature of Abuse

- a. Elder abuse, neglect, and exploitation may be an underlying factor in a variety of court cases involving older persons.
- b. Cases often do not present as “elder abuse” cases.

7. “Red Flags”

- a. **Physical Abuse**
 - i. Bruises. Welts, unexplained injuries, slap marks, non-consensual sexual or physical contact
 - ii. Concern: Prior abuser may now be victim.
- b. **Emotional Abuse:**
 - i. Withdrawal from activities, change in behavior, aggressive or controlling relationship.

- ii. Often a tool to accomplish other types of abuse: physical abuse, neglect, and financial exploitation.
- iii. Creates an environment of “shame” and helplessness that plays a role in the hidden nature of abuse.
- iv. Can be gradual or sudden.

c. Elder Neglect

- i. Lack of hygiene, lack of basic medical needs or equipment, pressure sores, malnutrition or dehydration.
- ii. Neglect versus honoring victim’s wishes. (Christopher Wise case)
- iii. Victim’s cognitive impairment and history of seeking medical care must be considered.
- iv. Defendant may have ulterior motives (e.g., relying on victim’s social security checks).
- v. Ability to provide adequate care may be an issue.

d. Financial Exploitation

- i. Change in finances, unusual withdrawals, unexplained gifts, unpaid bills, loss of property.
- ii. Financial exploitation alleged to be most common form of abuse.
- iii. Exploitation occurs within the family (children, grandchildren, and relatives.)
- iv. Defenses often based on the defendants’ perceptions that they are entitled to funds or acting in victim’s best interest.
- v. Solutions complicated: Financial Institutions not the best to deal with abuse, and can create more problems.

8. Implications for Estate Planners

- a. The identification of elder abuse can be difficult.
- b. Elder abuse may be an underlying factor in a variety of court cases involving older persons.
- c. Transactions involving older persons may need additional scrutiny.
- d. More cases will involve complex issues of capacity and consent.
- e. Practitioners need to take precautions and be aware of the possibility of abuse.
 - i. “Why am I left in the Waiting Room” Brochure
 - ii. Multiple meetings
 - iii. Know the history
 - iv. Keep your eyes open
 - v. Listen to the language
 - vi. Document
 - vii. Be ready to stand behind your documents

9. Capacity, Undue Influence, Consent – could be another presentation!

- a. Capacity is the “Legal Holy Grail.”
- b. <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>

- c. Take Precautions in the Estate Planning Process:
https://www.americanbar.org/content/dam/aba/administrative/law_aging/20-elderlaw-ethics-brochure.pdf
- d. Eyes wide open.

10. Legal Remedies for Elder Abuse

- a. Restraining Order: Wis. Stat. §813.123
- b. Petition for Review of Agent's Conduct: Wis. Stat. § 155.60 (Health Care) and Wis. Stat. § 244.16 (Financial)
- c. Civil Actions: Breach of Fiduciary Duty, Conversion, theft, conspiracy, battery, false imprisonment, etc.
- d. Guardianship under Wis. Stat. Ch. 54 and (if needed) Protective Placement under Wis. Stat. Ch. 55.
- e. Criminal Prosecution
- f. Eviction and other real estate actions.

11. Handouts

- a. An Elder Friendly Office
- b. Why am I left in the waiting room?
https://www.americanbar.org/content/dam/aba/administrative/law_aging/20-elderlaw-ethics-brochure.pdf
- c. Lawyer's Guide to Assessing Capacity:
<https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>

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