ELDER ABUSE AND NEGLECT COMMITTEE REPORT

COMMITTEE REPORT

Elder Abuse and Neglect

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Elder Abuse and Neglect Committee
Findings and Recommendations

Introduction

The findings and recommendations of this Committee identify strategies to prevent the abuse, neglect, and exploitation of older adults in Pennsylvania, and focusing on following topics:

1. Reporting and preventing financial abuse and exploitation of elders;
2. Training, information, and collaboration;
3. Developing effective court practices to address elder abuse and promote access to justice for Pennsylvania elders.

I. Financial Abuse and Exploitation of Elders

A. Issue Statement - Power of Attorney and Financial Abuse

According to the Pennsylvania Department of Aging ("Department of Aging"), aside from self-neglect and caretaker abuse, financial abuse is the most frequent type of abuse against Pennsylvania elders. In Fiscal Year ("FY") 2012-2013, 16.1% of abuse cases investigated by Area Agencies on Aging ("AAAs") in Pennsylvania involved substantiated complaints of financial abuse against elders.¹ According to some estimates, 30% of elder abuse cases may involve some type of financial exploitation.² A recent study published by MetLife Mature Market Institute estimates that the annual financial loss by victims of elder financial abuse in the United States exceeds $2.9 billion dollars annually.³

Frequently, financial abuse of elders involves the use (or misuse) of a power of attorney ("POA").⁴ As seen in countless news reports, abuse through a POA can have devastating consequences.⁵


B. Committee Findings

1. Powers of Attorney
   a) Standing

In considering how best to combat elder financial abuse/exploitation in connection with the use of a POA, the Committee began by considering the issue of standing – namely who has the legal authority to question POA transactions and whether standing should be expanded to allow more interested parties to challenge actions taken on behalf of a principal.⁶ Pennsylvania law currently affords standing to principals, guardians, and government agencies acting under the Older Adults Protective Services Act, ("OAPSA"), 35 P.S. §§ 10225.101—10225.5102, and other individuals as determined on a case-by-case basis.⁷
The Committee considered both the benefits and detriments of expanding standing. Expanding standing would make it easier for concerned family members, friends, and other interested parties to seek court review and intervention when abuse is suspected. In addition, the Committee recognized that often an elder may sign a POA that grants broad powers, without understanding what authority it confers. An elder principal may unknowingly grant very broad powers, leaving him or herself susceptible to abuse. Expanding standing to challenge an agent’s actions may help prevent such abuses.

Countervailing concerns were also contemplated, including the right of privacy and the right of a principal to authorize an agent to act on his or her behalf without interference. The Committee recognized that these concerns may outweigh even well-intentioned interference by family members. Moreover, the Committee recognized a key benefit of using a POA, is that court involvement is usually not required. Expanding standing may increase the possibility of litigation, which in turn could impair the utility of a POA. It was argued that if an individual has concerns about actions taken by an agent, those concerns should be reported to the local AAA or the Department of Aging, which have authority to investigate and, if necessary, have standing to bring an action through the OAPSA. If it is determined that the elder may be incapacitated, the AAA may also petition for guardianship.

The Committee considered the position of the JSGC’s Advisory Committee’s March 2010 Report at pages 39-41, (which reviewed the UPAA), as well as other proposals, and after considerable discussion, endorsed enactment of Section 116 of the UPAA.

The authors of the 2006 UPAA included Section 116 to address standing to request judicial review of an agent’s actions under a POA. This section provides as follows:

Section § 116. Judicial Relief:

(a) The following persons may petition a court to construe a power of attorney or review the agent’s conduct, and grant appropriate relief:

(1) the principal or the agent;

(2) a guardian, conservator, or other fiduciary acting for the principal;

(3) a person authorized to make health-care decisions for the principal;

(4) the principal’s spouse, parent, or descendant;

(5) an individual who would qualify as a presumptive heir of the principal;

(6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal’s death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal’s estate;

(7) a governmental agency having regulatory authority to protect the welfare of the principal;

(8) the principal’s caregiver or another person that demonstrates sufficient interest in the principal’s welfare; and

(9) a person asked to accept the power of attorney.

(b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent’s authority or the power of attorney.

In addition to providing a means for detecting and redressing financial abuse by agents, this section protects the self-determination rights of principals. Subsection (b) states that the court must dismiss a petition upon the principal’s motion unless the court finds that the principal lacks the capacity to revoke the agent’s authority or the power of attorney. Contrasted with the breadth of Section 116 is Section 114(h) which narrowly limits the persons who can request an agent to account for transactions conducted on the principal’s behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal’s financial privacy. See Section 114 Comment. Section 116 operates as a check-and-balance on the narrow scope of Section 114(h) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

UPAA § 116, comment. As noted in the first paragraph in the comment, even before Section 116 was drafted, at least nine states had laws allowing individuals with a sufficient interest in the welfare of the principal, and upon good cause shown, to petition the court to review an agent’s actions and grant appropriate relief. (The nine states include: California, Colorado, Illinois, Indiana, Kansas, Missouri, New Hampshire, Washington and Wisconsin). Since 2006, the following additional fifteen states adopted UPAA § 116: Alabama, Arkansas, Colorado, Hawaii, Idaho, Iowa, Maine, Maryland, Montana, Nebraska, New Mexico, Ohio, Virginia, West Virginia, and Wisconsin.8

Thus, nearly one half of the states in the country explicitly provide standing to parties interested in the welfare of a principal to seek judicial review of an agent’s actions undertaken on behalf of a principal. Alabama extends standing even further, granting it to “any other person who demonstrates a sufficient legal interest in the construction or validity of the power of attorney or the agent’s conduct in connection with the power of attorney, such as to give that person standing.” Ala. Code 1975, § 26-1A-116(a)(10).

In addition, the UPAA authors intended Section 116 to provide an important protection for principals. Another provision of the UPAA limits the categories of persons who can demand an agent account for actions taken on behalf of a principal. UPAA § 114 (Agent’s Duties). Subsection (h) provides:

“[e]xcept as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare
of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal’s estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.”

UPAA § 114(h). The comment to UPAA § 114(h) explains the rationale for this limitation:

Subsection (h) codifies the agent’s common law duty to account to a principal (see Restatement (Third) of Agency § 8.12 (2006); Restatement (First) of Agency § 382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h) states that the agent is not required to disclose receipts, disbursements, or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal’s personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (b)(4) does create a default duty to keep records.

The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. If a principal becomes incapacitated or dies, then the principal’s fiduciary or personal representative may succeed to that monitoring function. The inclusion of a governmental agency (such as Adult Protective Services) in the list of persons that may request an agent to account is patterned after state legislative trends and is a response to growing national concern about financial abuse of vulnerable persons. See 755 Ill. Comp. Stat. Ann. 45/2-7.5 (West Supp. 2006 & 2006 Ill. Legis. Serv. 1754); 20 Pa. Cons. Stat. Ann. § 5604(d) (West 2005); Vt. Stat. Ann. tit.14, § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228). See generally Donna J. Rabiner, David Brown & Janet O’Keeffe, Financial Exploitation of Older Persons: Policy Issues and Recommendations for Addressing Them, 16 J. Elder Abuse & Neglect 65 (2004). As an additional protective countermeasure to the narrow categories of persons who may request an agent to account, the Act contains a broad standing provision for seeking judicial review of an agent’s conduct. See Section 116 and Comment.

UPAA § 114(h), comment. (emphasis added). Accordingly, UPAA § 114(h) and § 116 were designed to work together, protecting privacy by limiting the number of people who could demand an accounting by an agent, but explicitly expanding the list of individuals who could seek judicial review of an agent’s actions if a principal is incapacitated. As noted in the comment to UPAA § 116, “[s]ection 116 operates as a check-and-balance on the narrow scope of § 114(h) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.” (emphasis added).

Importantly, Pennsylvania Act 95 of 2014, Act of July 2, 2014, P.L. 855, No. 95, (“Act 95 of 2014”) includes language substantially identical to UPAA § 114(h), but does not contain the corresponding language from UPAA § 116. The Committee believes this omission should be corrected in subsequent legislation.

As noted above, in Pennsylvania, standing to challenge the actions of an agent acting under a POA is currently limited to principals, guardians, and government agencies acting under the OAPSA, and individuals who are granted standing on a case-by-case basis.

The Committee recommends that standing be expanded for the following reasons: (1) government and private studies note that financial exploitation in the country is epidemic; (2) nearly half of the
states in the country have expanded standing to challenge actions by agents far beyond what currently exists in Pennsylvania in an effort to prevent abuse; (3) as noted in the comment thereto, Section 116 of the UPAA “may be the only means to detect and stop agent abuse of an incapacitated principal;” and (4) Pennsylvania has already enacted section 114(h) of the UPAA, but has not yet adopted the important corollary provisions of Section 116.

Statutorily authorizing additional interested parties to seek court review of an agent’s actions taken on behalf of an incapacitated principal is a critical step in the detection and prevention of elder abuse. Accordingly, the Committee recommends that the General Assembly enact a statute consistent with section 116 of the UPAA.12

b) POA Registry

The Committee discussed a POA registry as a possibility for deterring and preventing abuse through a POA. It was suggested that POAs could be registered either statewide or in county offices, thereby providing a mechanism to ensure they are legitimate.

However, the Committee members expressed several concerns over a registry. First, if POAs were filed as part of a county or statewide registry, it could expose elders to “scammers,” as their assets and otherwise private affairs would become a matter of public record. Second, it may infringe on an individual’s right to privacy. Third, the registry, without more, may give rise to an unfounded presumption that a POA is legitimate. These same concerns were noted in a policy monograph by the National Center for State Courts addressing POA abuse. See Nat’l Ctr. for State Courts, Addressing Power of Attorney Abuse: What Courts Can Do to Enhance the Justice System Response, 8. While possible benefits of a POA registry were recognized, the Committee ultimately decided to not recommend a POA registry.

c) Accountings

The Committee considered recommending a requirement that agents file regular accountings (as is done with guardianships). Such a requirement may allow for earlier detection of, and possibly prevention of, misdeeds, since an agent may be deterred from acting improperly if the transactions are subject to public scrutiny. However, for many of the same reasons noted in rejecting a POA registry, the Committee did not adopt this recommendation.

2. Financial Abuse

a) Assistance from Financial Institutions: Reporting and Training

The Committee was asked to consider other measures that may help prevent elder financial abuse. It was suggested that banks are often “on the front lines” of attempted elder financial abuse and exploitation and, as such, are powerful allies in the fight against such crimes. While the Committee recognized that many banks and financial institutions take steps to prevent elder exploitation and abuse, it was agreed that more can be done. In this regard, the Committee considered whether banks and other financial institutions should be required to train employees to spot potential abuse, and be designated as mandatory reporters of suspected abuse.

Initially, a question was raised whether reporting suspected abuse could potentially expose an individual or institution to liability. However, under 35 P.S. § 10225.302(d), immunity exists for reporting suspected abuse or exploitation.13

The Committee learned that at least eight states and the District of Columbia have mandatory reporting requirements by financial institutions if financial abuse is suspected.14 These jurisdictions include: Arkansas, California, Colorado, the District of Columbia, Florida, Georgia, Hawaii, Kansas, and Maryland.15 Maryland also has a mandatory training requirement.

The Committee considered three arguments in opposition to mandatory reporting. First, mandatory reporting requirements could be onerous to banks and other financial service providers that constitute “financial institutions.” Second, defining what constitutes a financial institution may itself be challenging.16 Third, mandatory reporting would result in AAAs being inundated by reports.
As an alternative to mandatory reporting, the Committee considered an information sharing and identification proposal. Specifically, (a) authority could be sought from the Pennsylvania Office of Attorney General (“OAG”) to enable sharing of “Suspicious Activity Reports” (“SARs”) with the Pennsylvania Department of Aging; (b) financial service providers could work with the Department of Aging on recommended protocols and training for identifying suspicious financial activity; and (c) financial service providers could be given statutory authority (and immunity) to delay for five days suspicious financial transactions attempted by or for elder customers (similar to the law in Washington).\footnote{17}

A brief explanation of the SAR Initiative is informative. It has been described as “a joint collaborative effort by the United States Department of Homeland Security, the Federal Bureau of Investigation, and state, local, tribal, and territorial law enforcement partners. This initiative provides law enforcement with another tool to help prevent terrorism and other related criminal activity by establishing a national capacity for gathering, documenting, processing, analyzing, and sharing SAR information.”\footnote{18}

Pursuant to federal regulations, banks, bank holding companies, and their subsidiaries are required to file a SAR with respect to:

- Criminal violations involving insider abuse in any amount.
- Criminal violations aggregating $5,000 or more when a suspect can be identified.
- Criminal violations aggregating $25,000 or more regardless of a potential suspect.
- Transactions conducted or attempted by, at, or through the bank (or an affiliate) and aggregating $5,000 or more, if the bank or affiliate knows, suspects, or has reason to suspect that the transaction:
  1. May involve potential money laundering or other illegal activity (e.g., terrorism financing).
  2. Is designed to evade the [Bank Secrecy Act (“BSA”)]) or its implementing regulations.
  3. Has no business or apparent lawful purpose or is it not the type of transaction that the particular customer would normally be expected to engage in, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.

12 C.F.R. § 21.11.\footnote{19} SARs are confidential, and the reports or the information contained therein may only be shared with: the criminal investigative services of the armed forces; the Bureau of Alcohol, Tobacco, and Firearms; an attorney general, district attorney, or state’s attorney at the state or local level; the Drug Enforcement Administration; the Federal Bureau of Investigation; the Internal Revenue Service or tax enforcement agencies at the state level; the Office of Foreign Assets Control; a state or local police department; a United States Attorney’s Office; Immigration and Customs Enforcement; the U.S. Postal Inspection Service; and the United States Secret Service.\footnote{20}

The Committee considered that sharing information in the SARs could benefit the Department of Aging insofar as patterns may be more easily seen. In addition, the Department of Aging could use the information provided to initiate investigations, when warranted. However, after considerable deliberation, the Committee decided the SAR sharing proposal is not sufficient, in itself, to address or stop exploitation and financial abuse.

The Committee noted that SARs are not required to be filed until 30 days, and in some cases, up to 60 days, after the suspicious activity occurs, and therefore may have limited utility in preventing financial abuse. The Committee determined that stopping transactions at the time of occurrence, and prompt reporting to local agencies, is critical to combating elder financial abuse and exploitation. Moreover, the Committee was concerned that, given federal confidentiality requirements, AAAs may not fit within the federal definition of agencies eligible to receive SARs. Nevertheless, seeking additional collaboration and requesting that the Department of Aging receive a copy of SARs may be a worthwhile inquiry for that agency to pursue. The Committee decided that this determination is best left to the discretion of the Department of Aging.
As noted above, at least eight states and the District of Columbia require mandatory reporting by financial institutions when financial abuse or exploitation of an elder is suspected. This seems to be a growing trend, with Maryland and Hawaii becoming the latest states to mandate reporting in 2012 and 2013 respectively. State legislatures appear convinced that financial institutions play an important role in curbing and preventing elder financial abuse. As noted in one recent publication:

Banks have the potential to play a critical role in preventing the financial abuse of older people by reporting suspicious activity to protective services agencies and local law enforcement. A bank teller, for example, who sees and interacts with bank customers on a regular basis, is in a position to spot the signs of financial elder abuse.

The author also noted “[s]ome states are including banks in their efforts to combat elder financial abuse, recognizing that banks are usually the first line of defense against elder abuse because they are in the best position to spot the signs of such abuse.”21

Education and training are also important to enable banks to detect and prevent financial exploitation. To assist banks with education and training, for example, the Maryland Bankers Association issued a “Member Alert” in September 2012, following that state’s passage of mandatory education and reporting laws for financial institutions. Among other tools, this document includes guidance for members on an “elder abuse training and reporting program,” a link to an “elder financial abuse reporting protocol chart,” and an “elder financial abuse reporting form.”22 These tools were developed with input from the Bankers Association members, legal counsel, and Maryland’s Department of Aging and Adult Protective Services. The Committee therefore decided to recommend that a similar publication be developed for Pennsylvania financial institutions.

The Committee found Maryland to be a good model, which should help alleviate concerns that AAAs will be inundated with reports. The Department of Aging should work with financial institutions, and with the Pennsylvania Bankers Association, to develop protocols on what activity should be reported, how it should be reported, and develop a uniform reporting form for use by all financial institutions. The Committee suggests that carefully specifying what information should be reported and developing a uniform reporting template will help the AAAs in focusing on credible reports of suspected financial abuse.

The Committee believes that strong steps need to be taken to help prevent elder financial abuse and exploitation. Mandatory reporting laws for those “on the front lines” (i.e., financial institutions) can go a long way toward addressing the problem of financial exploitation of elders. Mandatory training requirements, such as those in Maryland and other states, can help ensure that all employees of financial institutions in the Commonwealth have a base of knowledge and are better able to identify, and promptly report, elder financial abuse and exploitation to authorities.23

As a further measure, providing financial service providers with the authority to stop suspicious transactions before they occur will give the financial institutions time to inquire into the transaction and, when appropriate, notify the AAA or law enforcement. The Committee learned that often bank employees suspect a transaction may be improper, but feel powerless to stop the transaction. Because it is critically important to stop fraudulent, abusive, and exploitive transactions as they occur or risk permanent loss of the funds, the Committee decided to recommend statutory authorization for financial institutions to delay and report transactions that appear to involve financial abuse of an elder. Delaying these transactions for five days and reporting to AAAs and/or law enforcement would allow for an investigation to confirm the legitimacy of the transaction – before funds are released. Financial institutions should be afforded immunity from liability for good faith efforts undertaken in this regard.

Accordingly, the Committee recommends that the General Assembly statutorily require all financial institutions conducting business in Pennsylvania to be mandatory reporters of suspected financial abuse and exploitation against elder customers.24 In addition, a state mandated training program to help identify elder financial abuse and exploitation should be established for all employees of financial institutions who process transactions for elder customers.25 The specific training curriculum should be developed under the leadership of the Department of Aging, with input from relevant stakeholders,
including the banking industry and the Office of Elder Justice in the Courts (“OEJC”). Furthermore, financial institutions should be given statutory authority to delay for five days suspicious transactions and to report these to the local AAA and/or law enforcement.

b) Increased Funding for State and Local Prevention Efforts

The Committee discussed other steps that could help prevent or mitigate the damage caused by financial abuse against elders. It was noted that AAAs and local district attorneys provide the best resources for responding to suspected abuse. However, there was concern that AAAs and even district attorneys in Pennsylvania may lack sufficient resources to thoroughly investigate allegations of suspected financial abuse, particularly when complex financial audits are necessary. There was a general consensus that many AAAs and district attorneys do not have the personnel, funds, or technical ability to conduct complex forensic audits in elder financial abuse cases.

The Committee recommends increased funding for the Department of Aging, to enable the 52 AAAs to more thoroughly investigate allegations of financial abuse. Currently, the Department of Aging has only one forensic accountant providing statewide support to the AAAs. To assist, the Pennsylvania Commission on Crime and Delinquency (“PCCD”) provided a two year grant to the Department of Aging’s Institute on Protective Services at Temple University for a project entitled “Central Pennsylvania Multi-County Elder Theft Investigation Collaboration Project.” This initiative provides an additional part-time fraud examiner/financial analyst to investigate complex elder theft cases occurring in six counties in central Pennsylvania. The Committee recommends that additional funds be made available to expand the scope of this and similar projects statewide to provide financial auditing services to all counties in need of assistance.

c) Additional State-Level Assistance

i. Assistance From other Commonwealth Departments

The Committee recommends that the OAG and the Pennsylvania State Police (“PSP”) make their financial investigators available to assist local prosecutors and AAAs with especially complex cases.126

ii. Comprehensive Collaboration

The Committee learned that some financial institutions charge AAAs fees to obtain copies of financial records of individuals, and often these fees can pose a barrier to a thorough investigation. The Committee agreed that AAAs should, and must, have access to bank records as referenced under the OAPSA and other regulations.127 At the same time, the Committee members appreciate that copying and staff time imposes a cost on financial institutions. The Committee believes it may be prudent for the Department of Aging and representatives of financial institutions to collaborate and explore the possibility of a standard records request (and cost) for an initial review of complaints. If additional information is needed, an AAA should work with the financial institution to determine the most efficient and cost-effective way of obtaining the required information.

Finally, the Committee recommends that funds be made available to enable AAAs to obtain all records necessary to conduct a thorough evaluation. Financial institutions should be encouraged to provide this service at a reduced cost, given the shared interest in protecting elders from financial exploitation. If necessary, legislation should be enacted limiting the amount financial institutions may charge AAAs for records production.

d) Use of Court Procedures to Preserve Assets

The Allegheny County District Attorney’s Office reported it has successfully used 42 Pa.C.S. § 9728(e) and (f) allowing the Commonwealth to freeze assets simultaneously with the filing of a criminal complaint, or even earlier, upon a showing of probable cause to believe the assets will be needed to satisfy an anticipated restitution order.128 The Committee believes this mechanism should be used by prosecutors statewide in cases involving elder financial abuse. The Committee encourages the Pennsylvania District Attorney’s Association (“PDAA”) to educate prosecutors about the existence and application of this statute, particularly in elder abuse cases. The Administrative Office of Pennsylvania
Courts’ (“AOPC”) Judicial Education Department should provide similar education to members of the judiciary.

e) Assistance from the Bar

The Committee believes access to legal services for elders is critical. Elders often have limited means, but a great need for competent legal assistance - not only in drafting estate-planning documents such as POAs but also in pursuing civil suits to recover funds improperly taken.

The Committee requests that the Supreme Court of Pennsylvania (“Supreme Court”) consider authorizing a limited practice for pro bono service by retired and voluntarily inactive lawyers to work with elders and members of the aging network, such as legal service providers, to better ensure elder Pennsylvanians have access to legal counsel.

In addition, the Committee recommends that the Supreme Court consider an even more expansive program to encourage all attorneys (approximately 64,000 active and 11,000 inactive attorneys) to engage in pro bono work for elders. As an incentive, it is recommended that continuing legal education (“CLE”) credit be given for the work.

The pro bono work by retired attorneys and by active attorneys in exchange for CLE credit could be part of an ambitious program in which attorneys would be authorized to counsel elders in drafting POA or other estate planning documents. Attorneys could also represent elders who have been victimized by financial exploitation in civil actions to recover their assets from perpetrators. See Section III.B.3.a. Soliciting pro bono attorneys to draft POA instruments might facilitate efforts to detect or deter misuse and misunderstanding of the POA. Both of these innovative initiatives could serve as models for other states.

f) Consistent Insurance Requirements

The Committee learned of a possible anomaly in Pennsylvania with regard to insurance requirements for personal care homes, assisted living residences and home health care agencies. As of June 13, 2013, the Pennsylvania Department of Human Services (“DHS”) (formerly known as the Department of Public Welfare) identified 1248 licensed personal care homes in Pennsylvania and 22 licensed assisted living residences. The Pennsylvania Department of Public Health identified 491 licensed home health care agencies. Currently, these entities are not required to have liability insurance. This is in contrast to physicians, hospitals, birthing centers, nursing homes, and midwives, all of which are required to maintain liability insurance pursuant to the Medical Care Availability and Reduction of Error Act (“MCARE Act”), 40 P.S. §1303.101 et seq.

Committee members noted that most of these facilities do carry liability insurance, but some do not. Without facility or agency insurance, individuals who are injured as a result of negligent conduct may have no recourse to recover for damages suffered. These damages often include major medical expenses, which must be borne by the individual. However, since many of those injured as a result of negligent conduct are already the most vulnerable Pennsylvanians, and because many injured are elders, payment of these medical expenses oftentimes falls to the Commonwealth in the form of Medical Assistance payments by DHS. The failure to require insurance not only places unnecessary burdens on individuals, but also results in a financial burden to the Commonwealth.

Some Committee members expressed that the General Assembly should require all personal care homes, assisted living residences and home health care agencies to carry a minimum of liability insurance; however, others urged caution, noting the imposition of insurance requirements may force some entities out of business. The Committee recommends that the General Assembly consider this issue more fully.

C. Committee Recommendations

1. The General Assembly should adopt the provisions of Section 116 of UPAA to statutorily broaden and specify those individuals and entities who have standing to request judicial review of actions of agents operating under a POA document.
2. With regard to preventing or mitigating damages caused by financial abuse against elders, the following is recommended:

a. Financial Abuse and Exploitation

i. Financial institutions should be statutorily required to be mandatory reporters of suspected financial abuse or exploitation of elders.

ii. Financial institutions should be statutorily required to administer training programs similar to the ones required in Maryland to help identify, prevent, and report elder financial abuse. The training programs should be uniform statewide and should be developed under the leadership of the Department of Aging.

iii. Financial institutions should be given statutory authority (and immunity) to delay, for five days, suspicious financial transactions attempted by or for elders and to report the suspicious conduct to AAAs and/or law enforcement.

iv. The Department of Aging should consider requesting that it receive a copy of SARs.

b. Funding for the aging network through the Department of Aging should be increased through an appropriation, and more grant opportunities should be available through PCCD to facilitate thorough investigations of alleged financial abuse.

c. State-Level Assistance

i. The OAG and PSP should be asked to make financial investigators available to assist local prosecutors and AAAs when complex cases of elder financial abuse are alleged.

ii. The Department of Aging and financial institutions should work together to determine the most effective and efficient way for AAAs to obtain financial records needed to conduct investigations of financial abuse and exploitation. Funds should be made available to enable AAAs to obtain needed records from financial institutions or, if necessary, legislation should be enacted establishing the amount financial institutions may charge AAAs for record production.

d. Prosecutors in Pennsylvania should use 42 Pa.C.S. § 9728(e) and (f) to the fullest extent possible to help ensure funds and assets are available to satisfy anticipated restitution orders in appropriate cases, and educational initiatives should be undertaken to ensure district attorneys and Common Pleas judges are aware of this mechanism for freezing assets.

e. The Supreme Court should consider authorizing a limited practice for pro bono service by retired and voluntarily inactive lawyers to work with elders and members of the aging network to better ensure elder Pennsylvanians have access to legal counsel in drafting documents as well as in civil suits to recover misappropriated funds or assets. The Supreme Court should also consider ways to encourage active attorneys to provide pro bono services to elder Pennsylvanians, such as through CLE credits.

f. The General Assembly should consider whether all personal care homes, assisted living residences, and home health care agencies should carry a minimum of liability insurance.

D. Timing and Fiscal Impact

Recommendations 1a (standing) and 2a (financial institutions) are referred to the General Assembly. Presumably, the referral of these recommendations can be made immediately; however, a full cost analysis, particularly regarding Recommendation 2a, will need to be considered by the General Assembly. There will likely be costs, both to the Commonwealth and to financial institutions. It is not
believed such costs will be prohibitive, as other states have adopted similar training and reporting requirements. It is believed that these Recommendations will have an immediate and substantial impact on preventing financial abuse of elders.

It is believed that portion of Recommendation 2a suggesting financial institutions be authorized to delay transactions for five days will entail only minimal cost, while providing an important tool for stopping elder financial abuse before it occurs.

Cost is a central component of Recommendations 2b and 2c, as both call for increased funding for the Department of Aging and AAAs, and increased assistance to AAAs and local prosecutors by OAG and PSP. The Committee defers to the General Assembly to determine the appropriate amount and source of such funding. However, as with other recommendations in this section, it is believed that implementation of these recommendations will have an immediate and significant effect on preventing elder financial abuse.

Recommendation 2d calls for an educational effort by the PDAA and the AOPC's Judicial Education Department. It is believed education on this initiative, which will help to preserve funds to satisfy anticipated restitution orders, will be highly beneficial. Minimal costs to fund the educational initiatives can be expected.

The fiscal implications of Recommendation 2e (assistance from attorneys) will have to be determined by the Supreme Court. Other than the cost associated with studying these initiatives, no significant cost is anticipated in the near future. However, some cost will likely be associated with maintaining a database of voluntarily inactive attorneys providing pro bono service. Additionally, if CLE credits are to be given for pro bono services, some cost can be anticipated in developing a system to track credits. However, it is expected that the benefits of providing free or low-cost legal counsel to elder Pennsylvanians will far outweigh these negligible expenses.

Recommendation 2f (consistent insurance requirements) will have some cost associated with it, the amount of which will have to be determined by the General Assembly.

As noted above, the Committee believes each of these recommendations will have an immediate and significant impact on preventing financial exploitation of elders, as well as mitigating damages caused by financial abuse.

II. Training, Information and Collaborations

A. Issue Statement – Lack of Elder Abuse Education and Training, Information to the Public and the Need for Further Collaborations

The Committee agreed that in order to prevent elder abuse in Pennsylvania, and to mitigate its effects, there should be a robust effort to educate judges, court practitioners, and members of the public about elder abuse: what it is, how to prevent it, and where to report it when it is suspected. Also, there should be greater communication and collaboration among agencies and organizations that serve Pennsylvania’s elders.

B. Committee Findings

1. Judicial Education – Bench Cards

The Committee noted that judges are often in a unique position to identify elders in need. Whether elders come to court as victims, litigants, or witnesses - and regardless of the type of proceeding - judges are able to observe how an individual acts or reacts in a controlled setting. While not medical doctors or psychologists, judges may be able to “raise a red flag” if elder abuse or neglect is indicated. To help judges recognize risk factors and signs of abuse and neglect, the Committee decided to recommend “bench cards” be created by the AOPC. These bench cards should be distributed to all Common Pleas and Magisterial District Court judges in the Commonwealth. If indications of elder abuse or neglect are suspected, the judge can give relevant information to an individual, counsel, family members, court staff, or others.
The Committee reviewed sample bench cards developed for local jurisdictions in Pennsylvania, as well as information from other states. The Committee determined that all judges should have useful and practical information readily available, including: a reminder of the most frequent types of elder abuse; a summary of risk factors; signs of elder abuse; and a list of relevant state and local contacts. Based on these criteria, a sample bench card was developed and is included with this Report in Appendix A. However, the final decision on what to include on bench cards should be made by the AOPC Judicial Education Department and the OEJC, with input from the Advisory Council on Elder Justice in the Courts (“Advisory Council”). Information about and from the bench cards should be included at educational conferences for trial judges and Magisterial District Court judges.

It is recommended the bench cards be developed centrally for distribution statewide, but adaptable for local modification. Specifically, local modification should include contact information for the county District Attorney’s office and for the local AAA. Information akin to that on the bench cards should also be available on pamphlets or brochures in the courthouse and Magisterial District judges’ offices. Judicial districts, with the assistance of the Department of Aging/AAAs, should coordinate production and distribution. Information should also be available on court websites (both locally and on the state judiciary’s webpage).

2. Judicial Education – Elder Abuse Bench Book

The Committee also discussed the value of providing judges with a bench book regarding elder abuse. The Committee learned that bench books have been developed for Pennsylvania judges on topics such as sexual violence, dependency, public health, and witness and juror intimidation, and agreed that a bench book on topics relevant to elder abuse would be highly beneficial to the judiciary. An exemplary model has been created in California. It is recommended that the Supreme Court authorize the development of an Elder Abuse Bench Book for the Pennsylvania judiciary. It is further recommended that the bench book provide judges with information on diverse subjects, including, but not limited to, the nature of abuse; signs of abuse; substantive laws and procedural court rules relevant to cases involving elders; financial abuse facilitated through POA; basic science on the effects of aging and conditions that may affect elders (such as dementia and Alzheimer’s Disease); and information on guardianship proceedings. It is recommended that development of this bench book be referred to the AOPC Judicial Education Department.

3. Elder Abuse Task Forces

In addition to providing information to the public, the Committee also discussed using elder abuse task forces as vehicles to provide education to and share information with judges, court staff, guardians, practitioners and others. The Department of Aging currently has approximately 33 Elder Abuse Task Forces in various counties engaged in elder abuse case reviews. Some counties have implemented elder abuse task forces where information on elder abuse and prevention is shared. Many of these local elder abuse task forces are active, with participation from district attorneys, law enforcement, AAAs, and community groups. The Committee recommends that the elder abuse task force model be expanded to include participation of judges, private attorneys, community groups, clergy members, hospitals, and any other interested parties.

Law enforcement should be included in the elder abuse task forces to ensure that elder abuse, particularly elder abuse in the form of abusive POA, is not seen as a purely civil matter. Including law enforcement and district attorneys in elder abuse task forces can help ensure the criminal justice system is as responsive as possible to allegations of elder abuse in all forms.

Some county elder abuse task forces include judicial participation, and others do not. A concern was expressed that to have judicial participation, the teams must focus on elder abuse systemically, and not on individual cases (otherwise judges will not be able to preside over matters that may come before them in an adjudicatory capacity). Nevertheless, it was suggested that in those counties/regions where judges are not involved, consideration should be given to including them to the extent possible. As with judicial participation in the AOPC Office of Children and Families in the Courts (“OCFC”) Children’s Roundtable Initiative, judicial participation is highly advisable, if not essential.
The Committee discussed community outreach efforts. It was noted that some counties, notably Schuylkill County and Montgomery County, do an outstanding job of making information available to the public through community outreach efforts. The members agreed that other counties should enhance their efforts. Specifically, counties should consider having meetings and discussions with the public and elders about elder abuse and what to do if abuse is known or suspected. In counties where funding of such meetings is an issue, consideration should be given to partnering with private and civic organizations, senior centers, and hospitals to subsidize the costs associated with meeting facilities and food/refreshments.

The Committee suggests that in those counties where elder abuse task forces do not exist, consideration should be given to legislation requiring their formation. This suggestion may be considered by the Pennsylvania House of Representatives, see House Resolution 929 of 2014, Pr. No. 4097 (“House Resolution 929”), and is also supported by the National Center on Elder Abuse, Administration on Aging.31

Elder abuse task forces should work in collaboration with the Department of Aging as well as with the OEJC and Advisory Council to develop and disseminate informational brochures, posters, and pamphlets to help educate citizens about elder abuse, how to prevent it and where to report it. Elder abuse task forces can be instrumental in helping to disseminate information from the Bench Cards discussed in Section 2.B.1. The statewide Elder Abuse Hotline numbers should be prominently displayed on all publications.

The Committee suggests a list of training topics for elder abuse task forces and, ultimately, the public, including:

- Warning Signs of Elder Abuse/Reporting Abuse or Neglect of an Elder
- Warning Signs of Financial Exploitation
- Scams and Identity Theft – How to Protect Yourself
- Reporting Obligations Regarding Abuse or Neglect of Elders
- Bullying of Elders
- Appropriate Use of Powers of Attorney
- Warning Signs for Exploitation of Powers of Attorney
- Guardianships (and how they differ from powers of attorney)

4. Elder Justice Roundtables

The Committee also supports a statewide Elder Justice Roundtable, similar to, and modeled after, the Children’s Roundtable Initiative developed by Justice Max Baer through the OCFC. An Elder Justice Roundtable initiative might include participation from local elder abuse task forces, DHS and the Department of Aging. The Elder Justice Roundtable could be organized to collect and disseminate information on elder abuse prevention “best practices,” provide updates on the law, enable and facilitate collaboration, and provide other relevant state and national information. Such information could be disseminated to the public through the Roundtable and elder abuse task forces.

OEJC should, through the Elder Justice Roundtable, also pursue community outreach and informational initiatives, including exploring partnerships with financial institutions, utility providers, and perhaps the United States Postal Service and other governmental entities, as vehicles to help provide information about elder abuse, neglect, and exploitation to their customers in mailings as well as on their websites.

Training materials developed through the Elder Justice Roundtable should be presented to Pennsylvania’s Common Pleas and Magisterial District Court judges at educational conferences, on state and local judiciary websites, as well as disseminated through local elder abuse task forces.
Because there is sometimes confusion when multiple entities are involved, the Statewide Elder Justice Roundtable or OEJC should also work with the United States Social Security Administration ("SSA"), the Department of Veterans Affairs ("VA") and the Railroad Retirement Board ("RRB") to develop a system for greater information sharing on adult guardianships and when a representative payee is appointed.

5. Public Education

Throughout this section, several recommendations were considered regarding public education. Because the Committee believes this is one of the most crucial elements of the Task Force’s mission, those recommendations are summarized below.

Local elder abuse task forces should ensure that the information about the warning signs of elder abuse and the other training topics be readily available to the public as well.

Information on these items should be produced on brochures or pamphlets and be made readily available throughout the community. Where appropriate, informational sessions should be provided in senior living centers, community gatherings, churches and other public forums. Information should also be provided on county and court websites.

All informational literature and presentations should contain information on how to recognize elder abuse, and provide local contact information for reporting suspected elder abuse or neglect, as well as the statewide Elder Abuse Hotline numbers for the Department of Aging (1-800-490-8505) and the OAG (1-866-623-2137).

C. Committee Recommendations

1. Bench Cards

   a. The Committee recommends that bench cards be developed by the AOPC and provided to all Common Pleas and Magisterial District Court judges. Bench cards should include information on the most frequent types of elder abuse, a summary of risk factors, signs of elder abuse to watch for, and a list of relevant state and local contacts.

   b. Information about the bench cards should be provided at educational conferences for Trial judges and Magisterial District Court judges.

   c. Information on the bench cards should also be available on pamphlets or brochures in courthouses and Magisterial District Judge offices, and should be available on court websites (both state and local). Information should also be disseminated through the elder abuse task forces.

2. Bench Book

   The Committee recommends that the Supreme Court authorize the development of an Elder Abuse Bench Book. Research and production of the bench book should be referred to the AOPC. Educational sessions incorporating the bench book should be conducted by the AOPC Judicial Education Department for Common Pleas and Magisterial District Court judges.

3. Elder Abuse Task Forces

   The Committee recommends the continuation (or creation) of elder abuse task forces in each county/judicial district to develop best practices, facilitate information sharing and enable and promote collaboration. Elder abuse task forces should include participation from, among others, judges and law enforcement personnel.

4. Elder Justice Roundtables

   The Committee recommends a statewide Elder Justice Roundtable based on the initiative created by Justice Baer and the OCFC, be established, with administrative support provided by the OEJC. The Roundtable should pursue community outreach and informational initiatives, and help
facilitate the sharing of information and best practices to and through the elder abuse task forces. The Roundtable should explore partnerships and collaborations with financial institutions, utility providers, and others, as vehicles for the dissemination of information about elder abuse, neglect and exploitation.

5. **Information Sharing**

The Committee recommends that the OEJC collaborate with SSA, the VA, the RRB and the OPM to develop a system for greater information sharing on adult guardianships.

6. **Public Education**

The Committee recommends that, to the greatest extent possible, information on identifying elder abuse and neglect be disseminated to the public in public forums and through literature. Elder abuse task forces should determine the most effective ways of relaying this information in their communities. Local government websites should be included as repositories of information. Statewide elder abuse hotline numbers and contact numbers for local elder abuse resources should be prominently displayed.

D. **Timing and Fiscal Impact**

It is suggested these recommendations can be implemented in the near future and will have a significant impact by providing information to the judiciary and to the public on elder abuse. The statewide Elder Justice Roundtable and elder abuse task forces will foster collaborations and promote best practices in the Commonwealth’s 67 counties.

There will be some cost associated with the development and distribution of bench cards and the Elder Abuse Bench Book (Recommendations 1 and 2). The precise cost can best be determined by the AOPC. If technical assistance is required, it may be available through the Bureau of Justice Assistance. The cost of developing and distributing posters, pamphlets, and other written materials can presumably be absorbed by the Department of Aging, county, community partners or elder abuse task forces. The Committee cannot determine how much additional funding will be necessary for these or other recommendations, including the creation of elder abuse task forces or the statewide Roundtable, as well as costs associated with training, education, staffing, and public education efforts. (Recommendations 3 - 5). It is suggested these matters be studied by the Advisory Council and OEJC. Local funding sources such as community, businesses, or organizations should be considered, as well as appropriation requests to the General Assembly.

III. **Effective Court Practices to Address Elder Abuse and Promote Access to Justice for Pennsylvania Elders**

A. **Issue Statement - Court Practices and Access to Justice**

The Committee was asked to consider access to justice for Pennsylvania elders as a means of addressing elder abuse. Elder abuse is an umbrella term for a complex and pervasive problem that may take many forms, including physical, sexual or emotional abuse; financial exploitation; and neglect, abandonment or self-neglect. Pennsylvania is home to one of the largest elder populations in the nation, and that population is continuing to grow. It is expected that by the year 2020, up to 25% of Pennsylvanians will be elders. It is therefore essential that courts provide appropriate judicial solutions that respect the independence, dignity, autonomy, values and wishes of elders while protecting their rights, ensuring access to the courts, and enhancing coordination among courts and community resources.²²

B. **Committee Findings**

1. **Quantifying Elder Abuse in the Pennsylvania Courts**

In Pennsylvania, statistics provide an inadequate yet disturbing picture of the gravity of elder victimization. In 2012-13, 18,542 reports of need were made for older adult protective services (“APS”).
Of those reports, 74% of those cases were deemed appropriate for investigation and 37% were substantiated as needing protective services. These reports were classified as follows:

- 42.3% Self Neglect;
- 21.6% Caregiver Neglect;
- 16.1% Financial;
- 15% Emotional;
- 4% Physical; and
- 1% Sexual.  

In addition to the statutory definitions of elder abuse under the OAPSA, courts encounter elder abuse in a variety of contexts: criminal cases such as assault, battery, forgery, fraud, murder, rape, theft; civil fraud or conversion actions to regain misappropriated property; personal injury actions; guardianship; mental health commitment; special protective proceedings initiated through AAAs; cases involving health care decisions for an incapacitated patient; and criminal or civil cases regarding institutional care in nursing homes or other long-term care facilities. The number of petitions for civil orders of protection from abuse (“PFA”) for elders is increasing as courts, advocates, and victims recognize that violence by family members other than spouses or intimate partners also meet the statutory criteria authorizing protections.

Currently the Pennsylvania judiciary’s Common Pleas Case Management System (“CPCMS”) does not routinely record the age of the named victim. As a result, it is extremely difficult to quantify the number of, and types of, crimes involving elder victims. If an individual is convicted of a crime specifically identified as “elder abuse,” such as Neglect of a Dependent Care Person, 18 Pa.C.S. § 2713, this form of criminal elder abuse can be quantified. However, many other crimes committed against elders, including domestic and family violence, are not documented and reported as crimes against the elderly.

The Committee recommends recording the age of the victim in criminal cases for statistical purposes and in order to accurately assess the scope of the elder abuse problem. Moreover, recording the age of the victim on the criminal complaint could be beneficial to practitioners and judges since, for some crimes, a greater penalty may be imposed if the victim is an elder. Also, for the judiciary, a great deal of literature reveals that court practices and procedures may need to be reviewed, and likely modified, to ensure that elder crime victims have appropriate accommodations necessary to participate in, and understand, court proceedings. Quantifying the scope of elder abuse and neglect will help in this regard.

The Committee recommends either a check box or a new mandatory field on the complaint form to record the victim’s age. Presumably, that information can be electronically captured by CPCMS.

The Committee considered whether victim age or a check box should also be included for cases prosecuted without a complaint, such as summary matters initiated by citation. Members agreed that while there could be value in collecting this information for certain crimes, such as summary harassment, there was reluctance to impose upon police the additional burden of collecting a victim’s age for relatively minor offenses. Ultimately the Committee does not recommend the collection of the victim’s age on summary citations.

In addition, the Committee recommends that data collected on the age of the victim/petitioner in PFA cases be compiled. 23 Pa.C.S. §§ 6101-6122. Currently, Pa.R.C.P. 1905(b) directs that PFA petitions include the date of birth of the petitioner. It is suggested that this information be reported to the AOPC for statistical purposes.
2. Criminal Matters

a) Mandatory Minimum Sentences

After considerable discussion and debate, the Committee recommends that the Pennsylvania General Assembly amend 42 Pa.C.S. § 9717 to add mandatory minimum sentences for convictions of additional offenses dealing with the financial exploitation of elders.40

While sentencing issues generally focus on the conduct of the defendant, this recommendation is designed to enhance protections of the elder victim. The Committee believes that, although there is a national trend to eliminate mandatory minimum sentences in drug trafficking cases, that trend is inapt when considering the protection of Pennsylvania’s elders. The use of mandatory minimum sentences can make quick resolution of criminal cases more common, and will likely decrease court appearances for the elder crime victim.

Currently, the only financial crime against elders that falls into a mandatory minimum category is theft by deception. Historically, prosecutors in theft by deception cases have been able to offer immediate plea agreements in cases involving elder victimization, especially when immediate full or partial reimbursement can be made. Criminal defendants who have committed these crimes often have an incentive to accept such plea agreements without running the risk of being subject to the mandatory minimum if convicted at trial. This incentive has caused criminal defendants to enter a plea quickly, facilitating the recovery of stolen funds, and has prevented the re-victimization of elders by forcing them to take the stand. Most importantly, convictions have been obtained while limiting ongoing court appearances.

The Committee acknowledges the unique challenges encountered in prosecuting cases with elder victims, such as memory loss, hearing loss, physical disabilities and declining health. Should the Pennsylvania General Assembly choose to add mandatory minimums for crimes involving elders, the criminal justice system would better serve and protect elder victims.

In addition, because of the serious and arguably unique effect some crimes against elders may have, particularly those involving financial losses, the Committee also recommends that the Pennsylvania Commission on Sentencing consider increasing the offense gravity score for crimes involving elder victims, especially with regard to financial crimes.41

b) Clarification in Pa.R.Crim.P. 500

The Committee considered proposed changes to criminal procedural rules, specifically whether those rules should be amended so that the testimony of elder victims and witnesses may be preserved earlier in a criminal prosecution. This topic was raised due to concerns that long delays in bringing a case to trial often are a significant hardship on an elder victim or witness. A means to record testimony early in the prosecution may be highly beneficial.

It was suggested that consideration be given to recommending changes to Pa.R.Crim.P. 500 and 541 to allow for the preservation of testimony in criminal cases at or shortly after the preliminary hearing (assuming the defendant has been provided with discoverable material and is afforded an opportunity to cross-examine). However, after further consideration and review of the Rules, the Committee members are of the opinion that rule changes may not be necessary, but some clarity through amendment to the official comment may be beneficial. Pa.R.Crim.P. 500 (A) provides:

(A) By court order.

(1) At any time after the institution of a criminal proceedings, upon motion of any party, and after notice and hearing, the court may order the taking and preserving of the testimony of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness’ testimony be preserved.
(2) The court shall state on the record the grounds on which the order is based.

(3) The court’s order shall specify the time and place for the taking of the testimony, the manner in which the testimony shall be recorded and preserved, and the procedures for custody of the recorded testimony.

(4) The testimony shall be taken in the presence of the court, the attorney for the Commonwealth, the defendant(s), and defense counsel, unless otherwise ordered.

(5) The preserved testimony shall not be filed of record until it is offered into evidence at trial or other judicial proceeding.

Pa.R.Crim.P. 500 (A). The comment to the Rule provides:

This rule is intended to provide the means by which testimony may be preserved for use at a subsequent stage in the criminal proceedings. When testimony is to be preserved by videotape recording, see also Rule 501.

This rule does not address the admissibility of the preserved testimony. All questions of admissibility must be decided by the court. See, e.g., Judicial Code § 5917, 42 Pa.C.S. § 5917 (1982); Commonwealth v. Scarborough, 421 A.2d 147 (Pa. 1980); Commonwealth v. Stasko, 370 A.2d 350 (Pa. 1977).

“May be unavailable,” as used in paragraph (A), is intended to include situations in which the court has reason to believe that the witness will be unable to be present or to testify at trial or other proceedings, such as when the witness is dying, or will be out of the jurisdiction and therefore cannot be effectively served with a subpoena, or may become incompetent to testify for any legally sufficient reason.

Under paragraph (A)(4), a judge should preside over the taking of testimony. The court, however, may order that testimony be taken and preserved without a judge’s presence when exigent circumstances exist or the location of the witness renders a judge’s presence impracticable. Furthermore, nothing in this rule is intended to preclude counsel, the defendant(s), and the judge from agreeing on the record that the judge need not be present. Paragraph (B)(3) permits the attorney for the Commonwealth, the defendant(s), and defense counsel to determine among themselves whether a judge should be present during the taking of testimony. That determination should be made a part of the written agreement required by paragraph (B)(1).

Nothing in this rule is intended to preclude the defendant from waiving his or her presence during the taking of testimony.

The means by which the testimony is recorded and preserved are within the discretion of the court under paragraph (A) and the parties under paragraph (B), and may include the use of electronic or photographic techniques such as videotape. There are, however, additional procedural requirements for preservation of testimony by videotape recording mandated by Rule 501.

The party on whose motion testimony is taken should normally have custody of and be responsible for safeguarding the preserved testimony. That party should also promptly provide a copy of the preserved testimony to any other party upon payment of reasonable costs.

When testimony is taken under this rule, the proceeding should be adversarial, and afford the parties full opportunity to examine and cross-examine the witness. Counsel should not reserve objections for time of trial.

Paragraphs (A)(5) and (B)(5) are intended to guard against pretrial disclosure of potentially prejudicial matters.
Pa.R.Crim.P. 500 (comment). The Committee suggests consideration be given to amending the definition of “may be unavailable” in comment paragraph 3 to add the following: “Exceptional circumstances may include those cases where the victim is an elder, frail or demonstrates the symptoms of mental infirmity or dementia, creating the risk that they will not be able to testify in the future. Persons 60 and older are presumed to be elders even if they do not otherwise meet this criterion.”

The Committee recommends that an educational effort be undertaken by the AOPC to ensure that district attorneys and Common Pleas judges across the Commonwealth are aware of this Rule and the procedures authorized when an elder is involved in a case either as a victim or a witness.

c) Requiring District Attorney Approval in Certain Cases

The Committee considered the value of ensuring that district attorneys are aware from the earliest stages when a case involves an elder victim. To aid in that regard, Allegheny County instituted a new procedure pursuant to Pa. R.Crim.P. 507, that requires police departments to obtain approval from the district attorney’s office before filing Complaints when a case involves a victim 65 and older. It has been reported that this procedure is favored by municipal police departments in Allegheny County, and it is suggested other district attorneys consider a similar policy in their jurisdictions.

d) Increased Collaboration with Victim Service Providers

The Committee recognized the important role played by victim service providers, including PCCD’s Office of Victim Services (“OVS”), the Office of the Victim Advocate (“OVA”) and the diverse victim service programs (such as local district attorney-based, community-based and statewide programs). The Committee recommends that advocates, attorneys, law enforcement, and courts work collaboratively with victim service providers to continue to evaluate and improve services to elder crime victims. This effort should place special emphasis on insuring that all elders are provided their rights as outlined in the Pennsylvania Crime Victim Bill of Rights. 18 P.S. § 11.201. Determining ways to evaluate and improve services to elder crime victims should be considered by the elder abuse task forces discussed in Section II.B.3 of this report, and if implemented, by the Elder Justice Roundtable (Section II.B.4).

Elder victims of crime are a special subset of victims who, due to individual vulnerabilities, may require specialized services and assistance. In Pennsylvania, all crime victims are covered by a comprehensive Crime Victim Bill of Rights which provides guarantees of specific performance by agencies involved with victim services.

Many different agencies may be involved depending on the stage of prosecution or punishment. OVS helps to provide victims of crime access to assistance and resources to heal from their trauma and move forward with their lives, including providing financial help through the Victims Compensation Assistance Program. This program administers funding to local and statewide victim service agencies that work directly with crime victims, and provides training to victim service and allied professionals.

OVA represents the rights and interests of crime victims before the Board of Probation and Parole and the Department of Corrections, by providing notification to crime victims of the potential for inmate release and the opportunity to present testimony. It also provides referrals for crime victims to local programs and resources.

Victim services organizations, including those employed by the local AAAs, provide specific assistance at a front line level. Coordination and collaboration among these various organizations are vital to insuring that elder crime victims are properly assisted and served.

3. Civil Matters

a) Private Cause of Action

The Committee considered whether enhanced civil remedies should be recommended, especially when an individual breaches a duty to an elder through misuse of a POA. The Committee considered provisions of the UPAA, specifically Section 117, which states:
Section 117. Agent’s Liability. An agent that violates this [act] is liable to the principal or the principal’s successors in interest for the amount required to: (1) restore the value of the principal’s property to what it would have been had the violation not occurred; and (2) reimburse the principal or the principal’s successors in interest for the attorney’s fees and costs paid on the agent’s behalf.

Comment:

This section provides that an agent’s liability for violating the Act includes not only the amount necessary to restore the principal’s property to what it would have been had the violation not occurred, but also any amounts for attorney’s fees and costs advanced from the principal’s property on the agent’s behalf. This section does not, however, limit the agent’s liability exposure to these amounts. Pursuant to Section 123, remedies under the Act are not exclusive.

If a jurisdiction has enacted separate statutes to deal with financial abuse, an agent may face additional civil or criminal liability. For a discussion of state statutory responses to financial abuse, see Carolyn L. Dessin, Financial Abuse of the Elderly: Is the Solution a Problem?, 34 McGeorge L. Rev. 267 (2003).

UPAA § 117. The JSGC’s Advisory Committee considered UPAA § 117 and recommended the General Assembly not adopt this provision and opined: “[a]lthough a comparable provision does not exist in 20 Pa.C.S. Chapter 56, the Advisory Committee believed that courts are sophisticated enough to resolve issues regarding an agent’s liability and grant appropriate relief without the need for language analogous to that contained in §§ 114 and 117 of the UPAA.”

However, this Committee disagrees with the JSGC’s Advisory Committee assessment. Rather, the Committee suggests there should be enhanced civil remedies for financial abuse and exploitation. This would include recognition of a private right of action on behalf of an elder under the OAPSA and a right to recover attorneys’ fees against an abuser. The Committee supports adoption of the private right of action recognized in House Bill 2057. Concurrently, the Committee recommends that the award of attorneys’ fees or other sanctions may also be appropriate for the frivolous pursuit of causes of action alleging financial abuse or exploitation.

b) Preventing Abusers from Benefiting from the Estate of an Elder

The Committee was asked to address the possibility of seeking the General Assembly’s consideration of amending the existing Slayer’s Statute to cover not only homicide but also any conviction for elder abuse, neglect or exploitation, so as to bar abusers from benefitting from the estate of an elder.

A “slayer statute” bars a killer from inheriting from a victim. Slayer statutes are based on public policy considerations centered on morality, equity and deterrence. Nearly all states have enacted some form of slayer statute. Pennsylvania’s Slayer’s Statute, 20 Pa.C.S. §§ 8801-15, provides that “[n]o slayer shall in any way acquire any property or receive any benefit as the result of the death of the decedent[.]” Id. § 8802. A “slayer” is defined as “any person who participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of any other person.” Id. § 8801.

These directives are declared a policy of the Commonwealth in Section 8815: “This chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong, wherever committed.” Id. § 8815.

The Committee learned that in 2001, California began the movement to expand slayer statute prohibitions to address elder abuse crimes. California law disinherits an abuser upon proof by clear and convincing evidence that a person abused an elder who lacked capacity at the time of abuse, and who did not regain capacity prior to death. In addition, an individual is automatically barred from receiving a share of the decedent’s estate if that individual was convicted of criminally abusing the decedent. Cal. Prob. Code § 259.
Under a Michigan statute, an individual who is convicted of committing abuse, neglect, or exploitation with respect to the decedent is prohibited from inheriting from the decedent’s estate. Michigan Compiled Laws Annotated (“MCLA”) § 700.2803. The statute provides:

An individual who feloniously and intentionally kills or who is convicted of committing abuse, neglect, or exploitation with respect to the decedent forfeits all benefits under this article with respect to the decedent’s estate, including an intestate share, an elective share, an omitted spouse’s or child’s share, a homestead allowance, a family allowance, and exempt property. If the decedent died intestate, the decedent’s intestate estate passes as if the killer or felon disclaimed his or her intestate share.

MCLA § 700.2803(1).

Similarly, an Illinois statute provides that “[p]ersons convicted of [financial exploitation, abuse, or neglect of an elderly person or a person with a disability] shall not receive any property, benefit, or other interest by reason of the death of that person . . . [and that the abuser’s] interest shall pass as if the person convicted . . . died before the decedent.” 755 Ill. Comp. Stat. 5/2-6.6. See also Or. Rev. Stat. Ann. § 112.465 (“[p]roperty that would have passed by reason of the death of a decedent to a person who was a slayer or an abuser of the decedent . . . passes and vests as if the slayer or abuser had predeceased the decedent”); Wash. Rev. Code § 11.84.020 (“[n]o slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent.”).47

Under Maryland law, “[a] person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is at least 68 years old, with intent to deprive the individual of the individual’s property.” Md. Code, Criminal Law, § 8-801(b)(2). If convicted, the defendant may not inherit from the decedent’s estate to the extent he or she has failed to fully restore the unlawfully obtained property, or its value. Id. § 8-801(e)(1).

The Committee members agree that consideration should be given to amending Pennsylvania’s Slayer Statute as has been done in other states. Individuals should be prohibited from receiving financial benefit through a will, intestate succession, insurance proceeds, or in any other way, from an elder who has been abused, neglected or exploited. However, consideration will need to be given to the following, including, but not limited to, identifying the specific criminal convictions that would bar recovery under the statute; determining if a testator chooses to bequeath assets notwithstanding the occurrence of abuse, exploitation, or neglect; and determining if an heir convicted of financially abusing an elder can “cure” disinheritance by returning/repaying improperly taken funds. The Committee suggests these matters be referred to the General Assembly.

4. Access to Justice

a) American Bar Association Recommendations

Many elders face significant attitudinal and systemic factors which serve as obstacles to accessing the courts, navigating the legal system, and pursuing access to justice. The American Bar Association’s (“ABA”) Commission on Law and Aging enumerated these factors:

(1) The abused person’s attitudes about the courts and about the pursuit of legal remedies. Attitudinal barriers identified include[]:

Older abused persons are commonly reluctant to press charges against abusive family members or caregivers because “they do not want to get that person in trouble.”

Often, the abused person is dependent on the abuser for care or companionship, and, therefore, believes that he or she has “no choice” but to continue in the abusive relationship.

Older persons also fear that involving APS or law enforcement in their problems will lead to their removal from their home and placement in a
nursing home. They also fear that APS or court intervention will not prevent further abuse or retaliation.

Older abused persons are sometimes so afraid of testifying in court or so ashamed to have their abusive situation aired in public that they are willing to forego pursuit of their legal rights.

Older persons’ lack of knowledge about their rights and about the judicial system also inhibits their pursuit of appropriate legal remedies.

Older abused persons may have no means of traveling to the courthouse for hearings or may have no one to provide care for their ill spouse, partner, or care-dependent adult child while they are meeting with lawyers or testifying at trial.

Older abused persons often are ignorant of the availability of APS and other services that may be able to help them correct an abusive situation. Additionally, even if they are aware of these services they may not think of themselves as abused.

(2) Systemic practices in or related to the courts. These include[ ]:

The lack of knowledge about and sensitivity to elder abuse by judges was seen as inhibiting prosecutors, civil lawyers, and abused persons from bringing cases into the courts.

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 the pursuit of legal remedies by abused persons.

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 was also considered to be a barrier to elder abuse cases.

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.

Lack of knowledge about elder abuse among prosecutors, law enforcement officers, and civil lawyers was also viewed as a barrier by the participants [ ].

To address these attitudinal and systemic barriers, the Committee recommends that the Advisory Council consider, and, where appropriate, the Supreme Court adopt, the following 29 ABA recommended guidelines for state courts to increase access to justice for Pennsylvania elders consistent with the recommendations contained in the Task Force’s Report:

(1) Ways in which the state courts can improve their handling of cases involving elder abuse:

Have judges and other court staff, [in partnership with the Department of Aging], obtain training on topics related to elder abuse (ABA 1 and 2). [Presumably this could be accomplished with the assistance of the AOPC Judicial Education Department, or perhaps through the OEJC].

Encourage and support the training of other relevant professionals, including prosecutors, law enforcement officers, civil lawyers, APS workers, and others about the dynamics and issues of elder abuse and about the role of the courts in addressing that problem (ABA 3).
Provide accommodations for older persons with physical or mental impairments, including holding hearings in elder abuse cases in the setting that best accommodates the older person’s needs (ABA 4).

Understand that capacity to participate in judicial proceedings may fluctuate depending on time of day, medications, or other issues, and being flexible in scheduling hearings to accommodate those challenges (ABA 5).

Expedite elder abuse cases on the court’s calendar (ABA 6).

Use expert witnesses, evaluators, guardians ad litem, court investigators, court visitors, or interdisciplinary teams who are trained and knowledgeable about the problems of older persons to assess the older person’s capacity (ABA 7).

Understand gradations of diminished capacity in order to more effectively manage and adjudicate cases involving elder abuse (ABA 8).

Consider that incapacity could increase the likelihood of abuse and, if necessary, ordering that an unbiased assessment of the older person’s capacity be conducted by a qualified evaluator (ABA 9).

Ensure that plea agreements meet the needs of the older abused person, including protection from further abuse, by being willing to be creative in negotiations and sentencing after exploration of the alternatives available to the older abused person (ABA 13).

Consider the ramifications of courts taking steps when necessary to reduce the level of fear experienced by an older person who is testifying against his or her abuser such as allowing the hearing to be held in a less confrontational setting, allowing testimony and cross-examination of the older abused person by videotape or closed-circuit television, and closing the courtroom to the public (ABA 15).

Develop ways of ensuring that judges become aware of cases involving older abused persons that might be underway simultaneously in different divisions of the court or that might previously have been heard and have some legally relevant bearing on a current case (ABA 17).

Consider the concept of consolidating the courts handling cases involving elder abuse (ABA 18).

Avoid or be cautious about the use of alternative dispute resolution in cases involving elder abuse (ABA 19).

(2) Ways of ensuring that cases involving elder abuse enter the court system:

Train newly appointed guardians about their role and responsibilities as guardians, and about preventing, recognizing, and reporting elder abuse (ABA 20).

Encourage and support the availability and involvement of victim services providers who are knowledgeable about elder abuse to assist older abused persons throughout the judicial process in both non-criminal and criminal court proceedings (ABA 21 and 22).

Ensure that court staff are able and available to help explain and de-mystify the court process for older abused persons who may be intimidated, confused, or experiencing a mental or cognitive disability, particularly if
there are no victim services providers available to provide such help (ABA 23).

(3) Coordination of the state judicial system with other community resources:

Encourage and support the development and continuing operation of a state or local task force or coordinating council on elder abuse issues (ABA 24).

Support existing task forces or coordinating councils on elder abuse (ABA 24).

Encourage evolving or existing task forces or coordinating councils on family violence or domestic violence to incorporate elder abuse advocates into their membership and elder abuse issues into their agenda (ABA 24).

Include APS and aging services providers on court advisory council or developing other mechanisms for establishing linkages with those organizations and others that address elder abuse (ABA 25).

Encourage and support the development and continued operation of elder abuse multidisciplinary teams (ABA 26).

Encourage and support the development of protocols or memoranda of understanding between various entities involved in elder abuse cases (ABA 27).

Ensure that judges and court personnel are familiar with APS, aging, and other social services providers in their community, and have brochures or other materials from those agencies so that they can direct an older abused person to appropriate service providers (ABA 28).

Encourage and support the development of a “court social worker” or “court ombudsman” program to help older, disabled, incapacitated, or other individuals by giving them information about social services and other community organizations, linking them to social services and other community organizations, assisting them with the completion of pro se documents, and helping them understand the court process (ABA 29) [ ].

The above guidelines were adopted by the American Bar Association, Commission on Law and Aging, Section on Real Property, Trust and Estate Law - Report to the House of Delegates: Resolution. Recognition of the special challenges of elder victims should be made by all courts across the Commonwealth with the goal of making accommodations as needed to overcome these obstacles. In addition to the above, these include:

Strategizing on ways to give cases involving an elder victim priority.

Enabling at least temporary PFA orders for elder victims to be obtained through telephone or making other accommodations, particularly for those who are unable or for whom it is especially difficult to travel to court due to medical, disability, mobility or other challenges.

Physical changes or modifications to courtrooms and attendant areas, including separate waiting rooms, visual and hearing amplification systems or aids, colored carpeting, etc.

Transportation assistance and court accompaniment to enable elders to get to and from and navigate the courthouses.
b) Pilot “Elder Court”

Specialized courts, dockets and court-based projects focused on the problems of elders are emerging “best practices” throughout the country. Their focus is on elder victims, witnesses and/or offenders. The Committee recommends that the Supreme Court encourage one or more pilot “elder courts” in jurisdictions where there are large, documented numbers of elders and/or elder victims. The purpose would be to provide focused services such as a modified courtroom or court calendar, for example, for elders based on the ABA model and guidelines. Philadelphia court leaders have expressed an interest in pursuing such a pilot court.

c) Elder Clinics and Programs

The Committee was asked to consider other potential resources that would assist elders in obtaining information and services, including materials on estate planning. Members discussed the idea of collaborating with and encouraging colleges, universities, and law schools to develop elder clinics and other programs to assist elder Pennsylvanians in accessing social services. These institutions, with appropriate supervision, could also draft or review simple documents, such as a POA or a living will. While the Committee members strongly endorse this concept, it was recognized that many details need to be carefully considered, including, but not limited to, which institutions would be most appropriate to encourage and collaborate with, what types of services could be offered, what resources could be made available to the institutions from the government or private organizations, what costs could be reasonably expected, and possible sources of funding.

d) Access to Civil Legal Aid for Pennsylvania Elders

The Committee discussed the growing number of elders who need access to civil legal aid to address critical legal issues, including those affecting basic human needs of safety, shelter, and sustenance, their rights, and access to justice.

A report released in May 2014 by the Pennsylvania Civil Legal Justice Coalition to the Pennsylvania Senate Judiciary Committee highlights a growing crisis in the state’s civil justice system. In Toward Equal Justice for All: Report of the Civil Legal Justice Coalition to the Pennsylvania State Judiciary Committee, live testimony, written statements, and studies presented at three statewide hearings comprehensively document that the lack of representation for low-income, unrepresented litigants negatively affects the quality of justice for those unable to afford counsel, and undermines the rule of law. Pennsylvania Chief Justice Ronald D. Castille, Honorary Chair of the Coalition, testified at the May 23, 2013 hearing: “The unfortunate and often tragic fact is that many Pennsylvanians face formidable legal situations in our civil courts where those citizens may face dire consequences as the result of a civil legal matter that can greatly impact their lives or their futures. The vast majority of those citizens are left to fend for themselves in an unfamiliar courtroom without legal representation.” The Chief Justice further remarked that the Commonwealth should treat civil legal services for indigent individuals, families and elders as an important government service. The report, which includes the Chief Justice’s testimony, concludes that increased civil legal aid is needed to ensure fairness for all in the justice system, help streamline the court system and maximize Commonwealth funds.

Our Commonwealth is facing a “civil justice crisis” in which at least 80 percent of the critical legal needs of most low-income individuals and families go unmet. According to a recent IOLTA Report, “[o]nly one in five low-income Pennsylvanians having a critical legal problem receives legal help from any source.” Legal aid organizations — the core response to serving the legal needs of the poor — are drastically underfunded. Even with pro bono assistance, the great majority of low-income Pennsylvanians’ legal needs are not met.

The stakes are enormous for elders who cannot afford an attorney for their most basic legal problems and must navigate the complex legal system alone.

The recent economic downturn has exacerbated the crisis of the unavailability of counsel. Those with low and moderate income have been severely affected, with high rates of foreclosures, abuse,
unemployment, and reductions in public benefits intended to alleviate poverty. These economic hardships have led to a growth in a wide range of legal problems while, at the same time, there has been a radical decline in funding for civil legal aid – from the federal Legal Services Corporation, the IOLTA program, the state legislature, private foundations, local government contracts, private donors, and other sources. This confluence has led to a dramatic increase in the unmet civil legal needs of low income people and a surge in the numbers of unrepresented litigants in the Pennsylvania courts.

Poverty involving elders in Pennsylvania is severe: 10.1 percent of older women live in poverty. Seniors in Pennsylvania also face alarming rates of deep poverty, defined as less than 50 percent of the federal poverty level, surviving on less than $500/month. Deep poverty for Pennsylvanians 65 and over rose 11 percent between 2011 and 2012. The National Women’s Law Center reports that 750,000 female elders across the nation live in deep poverty, with dramatic increases from 2011-12.56

The growing justice gap in Pennsylvania reflects a national trend. According to a 2009 study of the “justice gap” by the federal Legal Services Corporation, there is one attorney for every 429 people above the poverty level in the United States.57 For people eligible for legal services, there is one attorney for every 6,415 people.

Access to civil legal services in basic human needs cases provides substantial economic and social benefits to individual litigants and the community, while significant economic and social harm to individuals and the community is inflicted when critical legal needs are not met. Funding civil legal aid produces dramatic economic and social benefits for Pennsylvania: for each dollar spent on legal aid, there is an eleven dollar return to Pennsylvania and its residents.58 Civil legal representation serves Pennsylvania businesses and saves costs associated with domestic violence, foster care, child custody, housing, healthcare, crime and imprisonment.

The Committee recognizes the critical importance of access to civil legal aid, for low-income and vulnerable elders. The Committee recommends that consideration be given to how to meet the civil justice crisis in the Commonwealth.

C. Committee Recommendations

1. The Committee recommends that a victim’s age be collected by police departments on all criminal complaint forms, and that information be included in the Unified Judicial System’s Common Pleas Case Management System (“CPCMS”). The Committee also recommends that the victim’s age be reported to the AOPC Research and Statistics Department.

2. Criminal Matters

   a. The Committee supports enhanced mandatory minimum sentences in addition to those listed in 42 Pa.C.S. § 9717 for the conviction of crimes against elders. There are strong policy and practical justifications for such enhancements. However, the Committee also recognized that there may be countervailing considerations. Ultimately, the issue of enhanced mandatory minimum sentences for crimes against elders is a legislative issue. The General Assembly should determine the specific additional crimes for which enhanced mandatory minimum penalties should apply. The Committee also recommends that the Pennsylvania Commission on Sentencing consider increasing the offense gravity score for crimes involving elder victims.

   b. The Committee recommends that the Comment to Pa.R.Crim.P. 500 be amended to help ensure the testimony of elder victims and witnesses in criminal cases can be preserved. It further recommends that educational efforts be undertaken to ensure the bench and bar are aware of this Rule and its implications for cases involving elders.

   c. The Committee recommends that district attorneys consider requiring municipal police departments to obtain approval before filing criminal charges in certain cases involving elder victims 60 and over.
d. The Committee recommends that advocates, attorneys, law enforcement, and courts work collaboratively with the OVS, OVA and other victim service providers to continue to evaluate and improve services to elder crime victims.

3. Civil Matters

a. The Committee recommends the creation of a civil private right of action for elder abuse or exploitation, such as the one recognized in House Bill 2057. Concurrently, the Committee recommends that the award of attorneys’ fees or other sanctions may also be appropriate for the frivolous pursuit of causes of action alleging financial abuse or exploitation.

b. The Committee recommends that the General Assembly consider enacting amendments to Pennsylvania’s Slayer’s Statute, 20 Pa.C.S. §§ 8801-15, to include not only homicide, but also convictions of specified crimes resulting in elder abuse, neglect, or exploitation. Such statutory expansion would be a progressive and significant step in addressing both prevention and remediation of elder abuse.

4. Access to Justice

a. The Committee recommends, consistent with the recommendations of the Task Force’s Report, the Advisory Council consider and, if appropriate, the Supreme Court adopt, the ABA’s 29 recommended guidelines for state courts to increase access to justice for Pennsylvania’s elders.

b. The Committee recommends the Supreme Court authorize a pilot “Elder Court” in a judicial district, with consideration given to Philadelphia.

c. The Committee recommends that the Advisory Council study the feasibility and benefits of collaborating with and encouraging colleges, universities, and law schools to develop elder clinics and other programs to assist elder Pennsylvanians in accessing social services and, with appropriate supervision, drafting or reviewing simple documents, such as a POA or living will. The development of such elder clinics could provide tremendous benefits to elders.

d. The Committee recommends that the General Assembly provide greater and more consistent funding and support of civil legal aid, including services specifically targeted to low income Pennsylvania elders. The Committee further recommends that bar associations, AAAs, the Department of Aging, law schools and other organizations in the aging network strengthen their partnership with, support and fund civil legal aid resources for elders. This recommendation is timely with the 2014 release of the Civil Legal Justice Coalition Report, and merits immediate attention. It will have a significant impact on the prevention and remediation of elder abuse, as well as the safety, shelter, and economic security of Pennsylvania’s elders.

D. Timing and Fiscal Impact

For Recommendation 1, regarding the inclusion of a victim’s age on criminal complaint forms, this measure should be raised with the Supreme Court for referral to the Criminal Procedural Rules Committee for a determination of whether Pa.R.Crim.P 504 should be amended. If approved, the criminal complaint form should be amended by the AOPC to include a place for the victim’s age to be added. The AOPC should begin to collect data about victim ages from criminal and PFA matters. If it is determined that a Rule change is warranted, and new criminal forms be developed, some cost will be associated with the change and development of the forms; however, the Committee cannot determine the extent of that cost. This Recommendation could be implemented immediately.

Recommendation 2a regarding increases in mandatory minimum sentences for certain crimes against elders and that sentencing guidelines be enhanced should be referred to the General Assembly for a financial analysis.
For Recommendation 2b that the Comment to Pa.R.Crim.P. 500 be amended to clarify when testimony of elders may be preserved, it is suggested this matter be referred to the Criminal Procedural Rules Committee. Such an amendment could be implemented immediately.

It is suggested that the educational recommendations 2b and 2c regarding the use of procedures identified in Pa.R.Crim.P. 500 and Allegheny County Local Rule (requiring approval by the District Attorney’s Office before certain cases involving elder victims are filed), be referred to the AOPC Judicial Education Department and to the PDAA. There will be some modest cost associated with increased educational efforts. These efforts could begin immediately.

Recommendation 2d, regarding collaborative efforts by OVS, OVA and victim service providers does not necessarily have a fiscal aspect to it. On the contrary, better information sharing and collaboration will likely save money for all interested parties.

There does not seem to be any fiscal impact regarding Recommendation 3a – civil matters.

The recommendation 3b to amend Pennsylvania’s “Slayer Statute,” to prevent abusers from benefiting from the estate of an elder, can be implemented in the near future and may have a significant impact on the prevention and remediation of elder abuse. The only costs associated with this recommendation would be those incurred through the legislative process.

It is recommended the Advisory Council consider the ABA’s 29 recommended guidelines for state courts to increase access to justice for Pennsylvania’s elders. (Recommendation 4a). These recommendations, if adopted, will likely need to be implemented over time.

With regard to Recommendations 4b (Elder Court) and 4c (Elder Law Clinics and Programs), there will be a financial impact. Both of these recommendations will require further study to determine their feasibility. These recommendations should be studied by the OEJC and the Advisory Council.

Recommendation 4d, civil legal aid for Pennsylvania elders, necessarily has a fiscal component. This matter should be referred to the Legislature.

The Committee believes the recommendations in this section will have a significant impact on reducing elder abuse and neglect through greater educational initiatives, mandatory prison sentences for offenders, better tracking of elder crime, greater collaboration among victim service providers, the creation of private rights of action, increased funding, and promoting access to justice for elders.

Additional funding for the recommendations in this Report may be available through appropriations from the General Assembly, or possibly through grants or collaboration with other state agencies, such as the Department of Aging and DHS. Funds for some initiatives may be available through Criminal Justice Advisory Boards or, as noted above, through the PCCD. Another consideration could be to generate funds through costs of prosecution in elder abuse cases, or through fees, although increased imposition of such fees is disfavored. The sources of such funding are matters for the General Assembly to consider.

E. Timing and Impact

Many of the initiatives in this Report call for funding, some relatively modest and some significant. The Committee urges that funding be found to support these important recommendations, as many will not occur without financial support. Given the scope of the elder abuse and neglect problem in Pennsylvania, the Committee believes finding ways to financially support these recommendations as soon as possible is critical.
ENDNOTES AND REFERENCES


6 Compare UPAA §116.


9 Act of July 2, 2014, P.L. 855 No. 95 (“Act 95 of 2014”), § 3 (amending 20 Pa. C.S. § 5601.3(d)(1)). Act 95, § 5 enables a party who in good faith accepts a POA without actual knowledge that a signature or mark thereon is not genuine may, without liability, rely upon the genuineness of the signature or mark of individuals enumerated in the Act. It is assumed this statute “legislatively overrules” the result reached in Vine v. Commonwealth, 9 A.3d 1150 (Pa. 2010). While other amendments have been made to the Power of Attorney statute through Act 95, such as notice and acknowledgment provisions, this Act also allows a third party to request additional assurance (e.g., certification or opinion of counsel) that a POA is valid; adds a new section governing the power to make limited gifts; enumerates what an agent may do in regard to gifts; and adds a new section outlining the duties of agents who have accepted appointment as an agent (e.g., acting in accordance with principal’s reasonable interests, loyalty, good faith). On this last point it is unclear what effect, if any, this has on the fiduciary relationship between principals and agents, formerly found at 20 Pa.C.S.A. § 5601(e) (amended by Act 95, § 1).


11 See also J. Rhein, No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals, 17 Elder L.J. 165, 181-182 (2009) (noting that many states have broad standing provisions and that § 116 of the UPAA “may be the only means to detect and stop agent abuse of an incapacitated principal.”)


13 In addition, while not binding on a Pennsylvania court, case law from other jurisdictions provides some guidance. See Santucci v. Citizens Bank of R.I., 799 A.2d 254 (R.I. 2002)(holding there is no private right of action against a bank for failing to stop a transaction); Shamgochian v. Bank of America, 2013 WL 1098256 (Cal.App. 5 Dist. 2013)(same); Repub.Nat’l Bank of Miami v. Johnson, 622 So.2d 1015 (Fla. App.3 Dist 1993)(holding banks have no duty to halt suspicious transactions).

14 The Committee was advised that banks operating in jurisdictions where mandatory reporting is the law also report all suspected financial abuse in other jurisdictions where they operate (even if mandatory reporting is not required) since different policies would be impractical.

16 The Committee would defer to the Legislature to determine how broadly the phrase “financial institutions” should be defined.

17 See Wash. Rev. Code § 74.34.215.


20 Id. at n. 73.


23 The GAO report cited above stated that elder financial exploitation is underreported by banks and that bank staff may not be aware of signs of or how to report it. See United States Gov’t Accountability Office, National Strategy Needed to Effectively Combat Elder Financial Exploitation, 32, http://www.gao.gov/products/GAO-13-110. The GAO report was based on interviews conducted in four states, including Pennsylvania. The report states that banks are important partners and well-positioned to recognize, report and provide evidence about suspected financial abuse.

24 This recommendation is at odds with the recommendation in a portion of House Bill 2014 of 2014, Pr. No. 3326, which would make financial institutions “voluntary reporters” of suspected financial abuse. The Legislature may also consider what penalties may be appropriate for the failure to report. See, e.g. Colo. Rev. Stat. §18-6.5-108(1)(c) (providing a fine of $50 - $750 plus six months imprisonment); Md.Fin.Inst.Code Ann. §1-305(c)(2) (providing a civil penalty of $1,000 to $5,000 for willful failure to report). In California, it has been asserted that not all financial institutions are complying with mandatory reporting laws. An effort is being considered to increase the statutory fine from $1000 to $25,000 as an incentive to improve reporting.

25 The Committee members recognize that banks and other financial service providers may not have the date of birth for some customers who opened accounts prior to 2001.

26 It is unclear if statutory authorization would be necessary for such assistance.


28 42 Pa.C.S.A. § 9728(e),(f).

29 The Bench Books could include information pertaining to procedures for freezing assets that may be necessary for restitution, 42 Pa. C.S.A. § 9728(e) and (f), and procedures for recording testimony pursuant to Pa. R.Crim.P. 500.

30 The Committee suggested that if discussions turn toward a specific case likely to come before the court, the judge can decline to be present or participate in that portion of the discussion.


35 Under current case law, when age is an element of an offense, or relevant to sentencing, it must be included in the Information. Victim age is not necessarily included in the Affidavit of Probable Cause or the Criminal Complaint.


(a) Mandatory sentence.—A person under 60 years of age convicted of the following offenses when the victim is over 60 years of age and not a police officer shall be sentenced to a mandatory term of imprisonment as follows:

18 Pa.C.S. § 2702(a)(1) and (4) (relating to aggravated assault) - not less than two years.

18 Pa.C.S. § 3121 (relating to rape) - not less than five years.

18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse) - not less than five years.
18 Pa.C.S. § 3922 (relating to theft by deception) - not less than 12 months, but the imposition of the minimum sentence shall be discretionary with the court where the court finds justifiable cause and that finding is written in the opinion.

(b) Eligibility for parole.--Parole shall not be granted until the minimum term of imprisonment has been served.

37 The Committee members assume this can be accomplished by simply changing the criminal complaint form. It is not known if this will also require a change to Pa.R.Crim.P. 504, Contents of Complaint.

38 See, e.g., Pa.R.Crim.P. 403, Contents of Citation.

39 Petitions for emergency court orders under the OAPSA, 35 P.S. § 10225.307, necessarily apply to the elderly, so a separate recommendation is not necessary.

40 For example, offenses under the following provisions of 18 Pa.C.S.:

(1) § 3921 (relating to theft by unlawful taking or disposition).
(2) § 3922 (relating to theft by deception).
(3) § 3923 (relating to theft by extortion).
(4) § 3924 (relating to theft of property lost, mislaid, or delivered by mistake).
(5) § 3925 (relating to receiving stolen property).
(6) § 3926 (relating to theft of services).
(7) § 3927 (relating to theft by failure to make required disposition of funds received).
(8) § 4101 (relating to forgery).
(9) § 4105 (relating to bad checks).
(10) § 4106 (relating to access device fraud).
(11) § 4107 (relating to deceptive or fraudulent business practices).
(12) § 4113 (Misapplication of entrusted property and property of government or financial institutions).
(13) § 4114 (Securing execution of documents by deception).
(14) § 4117 (relating to insurance fraud).
(15) § 4120 (relating to identity theft).

This list of crimes is similar to, but more extensive than, those identified in House Bill 2057 of 2014, Pr. No. 3054.


42 Criminal cases charging the following require approval of the Allegheny County District Attorney’s office: Neglect of a Care-Dependent Person (18 Pa.C.S. § 2713); Aggravated Assault (18 Pa.C.S. § 2702); Robbery (18 Pa.C.S. § 3701); Rape (18 Pa.C.S. § 3121); Statutory Sexual Assault (18 Pa.C.S. § 3122.1); Involuntary Deviate Sexual Intercourse (18 Pa.C.S. § 3123); Sexual Assault (18 Pa.C.S. § 3124.1) or Aggravated Indecent Assault (18 Pa.C.S. § 3125); Theft by Deception (18 Pa.C.S. § 3922- Felony grade); Identity Theft (18 Pa.C.S. § 4120); Misapplication of Entrusted Property and Property of Government or Financial Institutions (18 Pa.C.S. § 4113); Home Improvement Contracts (73 P.S.§ 517.7) and the victim is of 65 years old or older. ** Note: Allegheny County has determined age 65 to be key, however the Task Force recommends identifying elders as age 60 and older.


46 Kymberleigh N. Korpus, Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse But Fails to Build an Effective Foundation, 52 Hastings L. J. 537, 569 (2001) (providing rationale for adapting the unworthy heir statute to the elder abuse context).


49 See id. at 6-8.

51 It is further recommended that elders be provided with information regarding their rights during hearings, or have information available to assist the elder in contacting a local advocate.


54 Id. at 20.


Elder Abuse and Neglect Bench Card

What Is It?
Abuse, Exploitation, or Neglect Against Individuals Over Age 60

Most Frequent ly Reported Forms of Elder Abuse:
- Self Neglect
- Caregiver Neglect
- Financial Exploitation
- Emotional Abuse
- Physical Abuse
- Sexual Abuse

Primary Risk Factors
- An adult (child or individual) who is dependent upon an older adult
- A history of domestic violence in the home
- Living with others in isolation
- A possible abuser having a mental illness or substance abuse problem

Signs of Abuse
- Bruises or other injuries
- Poor Hygiene
- An elderly individual who appears unusually withdrawn or evasive
- An appearance that an individual exerts excessive control over actions or finances of an elderly individual

Resources:

Local Area Agency on Aging

PA Department of Aging
1-800-490-8505
Local resources available at www.aging.state.pa.us

PA Attorney General Elder Abuse Unit
1-866-623-2137
Email: elderabuse@attorneygeneral.gov

Office of the State Long Term Care Ombudsman
717-783-8975

Local District Attorney or other Local Resources