

# ELDER LAW IN THE UNITED STATES: THE INTERSECTION OF THE PRACTICE AND DEMOGRAPHICS<sup>1</sup>

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## I. INTRODUCTION

Much has been written of late about the aging of America, and indeed of the world<sup>3</sup> as we are all living longer. In many cases, people may outlive their savings, or find that their pension plans will not provide the income and benefits they had when they retired.<sup>4</sup> Health care costs are increasing, and more of retirees' dollars are spent on health care.<sup>5</sup> Elder Americans are increasingly becoming the targets of scammers, and other who consider elder Americans to be vulnerable, preying on them, to financially exploit them or even physically abuse them.<sup>6</sup> Laws have been created specifically to deal with the legal

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<sup>1</sup> The aging of the Baby Boomers and the increasing longevity of the population coupled with the complexity of many laws that impact elders, will have noticeable impact on the practice of elder law. The issues faced by elders as well as the population numbers will have significant policy implications for government at all levels in this country.

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<sup>3</sup> Howard W. French, *As China Ages, A Shortage of Cheap Labor Looms*, N.Y. Times A1 (June 30, 2006).

<sup>4</sup> *Managing Retirement Assets: Ensuring Seniors Don't Outlive Their Savings*, United States Senate Special Committee on Aging, Aging Committee Hearings (June 21, 2006), <http://aging.senate.gov/public/index.cfm?Fuseaction=Hearings.Detail&HearingID=180> (visited September 17, 2006). *Roadblocks to Retirement: A Report on What Happens When Living Life Today Gets in the Way of Financial Security Tomorrow*, Prudential's Four Pillars of Retirement Series (2005), <http://www.prudential.com/media/managed/RoadblockStudysample.pdf> (visited September 16, 2006); *Americans Lack Knowledge About How to Turn Retirement Savings Into Sustainable Income*, New York Life, <http://www.newyorklife.com/cda/0,3254,15555,00.html> (May 15, 2006) (accessed September 16, 2006).

<sup>5</sup> Richard W. Johnson & Rudolph G. Penner, *Will Health Care Costs Erode Retirement Security?*, 23 An Issue in Brief 1, Center for Retirement Research at Boston College (October 2004) [http://www.bc.edu/centers/crr/issues/ib\\_23.pdf](http://www.bc.edu/centers/crr/issues/ib_23.pdf) (accessed September 17, 2006). Their projections indicate that by 2030, when the youngest Baby Boomers are old enough to qualify for Medicare, older adults will devote implausibly large shares of income to health care. Future out-of-pocket spending will soar despite the introduction of costly new drug coverage for Medicare beneficiaries in 2006. As a result, many boomers may not be as well prepared for retirement as some studies suggest. The increased financial burden of health care costs will be particularly painful for low income adults who do not qualify for Medicaid. State governments may need to expand Medicaid coverage in the future to better protect vulnerable older adults, further increasing budgetary pressures.

*Id.* at 6.

<sup>6</sup> The catch-all phrase is "elder abuse" which includes physical abuse, psychological or mental abuse, sexual abuse, and financial exploitation. The National Center for Elder Abuse, [www.elderabusecenter.org](http://www.elderabusecenter.org), recognizes seven types of elder abuse: physical abuse, sexual abuse,

problems faced by older Americans.<sup>7</sup> There is a label for this area of law—elder law. Elder law has grown from a speciality practice to a general area of practice within which an attorney may specialize.

This article will look at the demographics of America now and in the near future. It will examine the creation and growth of the elder law practice in the U.S. Specific laws pertaining to elder law will be reviewed. The article will conclude by examining the near future and coming developments in elder law in the United States.

## II. THE AGING OF AMERICA

Who are these people anyway? The United States is not alone in this aging of its population, and other countries, including Italy, the U.K., Sweden, Japan, and Germany have high percentages of elders.<sup>8</sup> Boomers are expected to be better educated than seniors of the past, and, as a result, are expected to be more demanding, especially for health care.<sup>9</sup> Demographic data has been predicting a significant growth in the 65 and over population as the Boomers<sup>10</sup> hit retirement age. By 2030, twenty percent of the population will be sixty-five or older.<sup>11</sup>

The yet-unanswered question for all elders, current and future, is whether the increased life expectancy for U.S. citizens will be “good” or whether the elders will suffer from chronic and disabling conditions.<sup>12</sup> Although it is clear that there is a correlation between age and chronic health conditions,<sup>13</sup> generally it seems that people not only are living

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emotional or psychological abuse, neglect, abandonment, financial or material exploitation, and self-neglect. See <http://www.elderabusecenter.org/default.cfm?p=basics.cfm> (accessed July 1, 2006).

<sup>7</sup> Generally speaking, many of the laws are age-neutral. For example, guardianship or conservatorship statutes apply to every person who meets the statutory definition of incapacity. The laws governing nursing homes' residents apply to those who reside in nursing homes regardless of age. On the other hand, there are age-specific laws. For example, some laws governing elder abuse are applied to victims of a certain age and vulnerability. Medicare and Social Security laws are mainly age-based, but also include other covered groups such as spouses or dependents, or individuals with disabilities.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Baby Boomer refers to the generation born during a particular span of years. Merriam-Webster OnLine defines baby boom as “a marked rise in birthrate (as in the United States immediately following the end of World War II) <http://www.m-w.com/dictionary/baby%20boomer> (accessed Mar. 22, 2007). Baby Boomers in the United States are generally considered as that generation of Americans born between 1946 and 1964. See [http://www.census.gov/Press-Release/www/releases/archives/facts\\_for\\_features\\_special\\_editions/006105.html](http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006105.html).

<sup>11</sup> AGS Aging in the Know, *Trends in the Elderly Population*, [http://www.healthinaging.org/agingintheknow/chapters\\_ch\\_trial.asp?ch=2#Increasing%20Numbers%20of%20Seniors](http://www.healthinaging.org/agingintheknow/chapters_ch_trial.asp?ch=2#Increasing%20Numbers%20of%20Seniors).

<sup>12</sup> *Id.*

<sup>13</sup> Although the number of elders with disabilities is declining, at least eighty percent of elders have at least one chronic health condition, and fifty percent have two. HHS & U.S. Department of Commerce, *65+ In The United States: 2005*, <http://www.census.gov/prod/2006pubs/p23-209.pdf>, at

longer, but are living healthier lives.<sup>14</sup> Will the extra years be good years? Studies seem to suggest yes.<sup>15</sup>

Bottom line—there are significant numbers of elders in the U. S. and elsewhere and more are coming. Beyond that, the population can be broken down by sex, age, race, income, education, and more.<sup>16</sup> The sheer numbers will affect this country as never before—in the work force, in the provision of health care, in the economy, and in determining social policy.

### III. ELDER LAW IN THE UNITED STATES—FROM A NICHE TO A GENERAL PRACTICE AREA

Elder law is the representation of elder Americans and their family members with legal problems. According to the National Academy of Elder Law Attorneys (“NAELA”),<sup>17</sup> elder law is defined by the client:

Rather than being defined by technical legal distinctions, elder law is defined by the client to be served. In other words, the lawyer who practices elder law may handle a range of issues but has a specific type of clients--seniors.

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58-63. (December 2005). This generalization may not hold true when the statistics for assistance with activities of daily living (ADL) are examined. *See id.* at 60.

<sup>14</sup> *Id.* at 1.

<sup>15</sup> There is a debate among the experts on how old we can live to be and what quality of life we will have during those extra years. *Id.* at 50 (citing to Manton and Gu, 2001; Freedman et al., 2002; Spillman and Lubitz, 2000). There is the possibility that people will live longer but with functional and cognitive impairments. *Id.*

One way to determine quality of life is to use the “Active Life Expectancy” “to measure the number of years that people can expect to live on average without disability.” Recent studies, from a variety of methods of analysis and measurement, show “that in addition to living longer, the current generation of older people are healthier and less disabled” when compared to their predecessors. *Id.* at 50 (citing to Manton et al., 1997; Freedman, 1998; Manton and Gu, 2001; Freedman et al., 2002).

<sup>16</sup> *Id.*

<sup>17</sup> The National Academy of Elder Law Attorneys (NAELA) is a membership organization of attorneys who practice elder law. According to the NAELA website, NAELA is a professional association of attorneys who are dedicated to improving the quality of legal services provided to the elderly.

The primary focus of the Academy is education. The Academy sponsors continuing legal education programs on elder law for attorneys throughout the year, and provides publications and educational materials to its members on a wide range of elder law topics.

The Academy seeks to provide support to other organizations serving the elderly. NAELA also examines and advocates on public policy issues facing the elderly, but does not provide direct legal services.

*See* <http://www.naela.com/public/whatisneala.htm> (accessed July 1, 2006).

Elder law attorneys focus on the legal needs of the elderly, and work with a variety of legal tools and techniques to meet the goals and objectives of the older client.

Under this holistic approach, the elder law practitioner handles general estate planning issues and counsels clients about planning for incapacity with alternative decision making documents. The attorney would also assist the client in planning for possible long-term care needs, including nursing home care. Locating the appropriate type of care, coordinating private and public resources to finance the cost of care, and working to ensure the client's right to quality care are all part of the elder law practice.<sup>18</sup>

Elder law has now been a recognized practice area for almost thirty-five years,<sup>19</sup> although for private practitioners most of the growth has occurred in the past twenty years. Initially, "aging and the law" was the province of legal services attorneys, while private practitioners were practicing "traditional" estate planning.<sup>20</sup> Professor Larry Frolik<sup>21</sup> took the view that elder law came into being because of attorneys' interest in the area and the interest of academics in the field.<sup>22</sup> As noted by

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<sup>18</sup> *Id.*

<sup>19</sup> The National Senior Citizens Law Center (NSCLC) was established in 1972. NSCLC "advocates nationwide to promote the independence and well-being of low-income elderly individuals and persons with disabilities."

The National Senior Citizens Law Center was created in 1972 when, Terry Hatter, then Director of the Western Center on Law and Poverty in Los Angeles and now a 12-year veteran of the federal district court, submitted an application to the Office of Economic Opportunity to create a nation(sic) "back-up center" for issues affecting the elderly poor.

See [http://www.nslc.org/about\\_nslc.html](http://www.nslc.org/about_nslc.html); see also Gill DeFord, *Twenty Years of the National Senior Citizens Law Center: A Personal Recollection* 26 Clearinghouse Review 117 (Special Issue, 1992).

<sup>20</sup> Michael Gilfix, Esq., one of the founders of NAELA, started his career in elder law by founding the Senior Adults Legal Assistance (SALA), a legal aid program for seniors in Santa Clara County, California. On entering private practice with his wife, he "identified other attorneys across the nation with similar interests. . . ." including legal aid attorneys, estate planners, and "some . . . interested in the idea, and some . . . motivated exclusively by the profit motive." Michael Gilfix, *Creation And Evolution of Elder Law*, 12 NAELA Q. 7 (Winter 1999).

<sup>21</sup> Professor Frolik is a Professor of Law at the University of Pittsburgh School of Law. Considered one of the founders in the field of elder law, Professor Frolik is a prolific writer who has authored several treatises and a number of articles on subjects of elder law. Professor Frolik has written two articles tracing the development of the practice of elder law. Professor Frolik could be considered one of the Deans of elder law.

<sup>22</sup> "Elder law owes its existence to the convergence of two social and intellectual forces: the desire of lawyers to create legal practices which have come to be called elder law, and the simultaneous growth of academic interest in the topic of the elderly and the law", noting that "[t]he

Professor Frolik, the field of practice would exist even without the label “elder law.”<sup>23</sup>

It took a while for the public to grasp the concept of elder law, in fact, comments were frequently made about the name of the practice area.<sup>24</sup> However, one thing that distinguished elder law from other areas of practice is the holistic nature of elder law. Although the practice area label tends to come from the tasks performed by lawyers,<sup>25</sup> elder law has come to be recognized not only by the legal tasks performed by the lawyers, but by the attorney’s function as a counselor to the client and/or the client’s family, the attorney’s knowledge of the aging services network and the nature of the representation of the clients in the later years of their lives.<sup>26</sup>

Twenty-plus years later, an exact definition of elder law still tends to depend on whom one asks.<sup>27</sup> Elder law has evolved from a

rise of elder law obviously is also depending upon the growth in the number and relative wealth of the elderly. . . . [Professor Frolik’s] purpose [was] to consider the other, less obvious factors, that help explain the growth of elder law. . . . Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 Elder Law J. 1 (Spring 1993).

<sup>23</sup> Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 Elder L. J. 1, 1-2 (Spring 1993). “Of course, elder law would exist even if not identified as such . . . [e]lder law exists whether or not it has a label. *Id.*”

<sup>24</sup> Perhaps the confusion stemmed from the title “elder law” which, although descriptive, is at the same time ambiguous. The author would frequently hear remarks such as “elder law, that’s law for old attorneys” or “you’re too young to be practicing elder law.”

Professor Frolik relates a conversation he had with an attorney who asked him about elder law, and when he described it, the attorney responded “[t]hat’s what I do. I guess that I’ve been an elder attorney for years and never knew it.” Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 Elder L. J. 1, n. 2 (Spring 1993). *See also* Lawrence A. Frolik, *The Developing Field of Elder Law Redux: Ten Years After*, 10 Elder L. J. 1 (2002) (noting ten years later that attorneys have at least heard of elder law, even if they don’t have a good idea of what it involves).

Now elder law is a recognized practice area, but is not completely descriptive of the practice. In fact NAELA recently changed its tag line to include clients with special needs, recognizing that oftentimes elder law attorneys also represent clients with disabilities who do not fall into the category of elder. *See* [www.naela.com](http://www.naela.com).

<sup>25</sup> *The Developing Field of Elder Law*, *supra* n. 24, at 2.

<sup>26</sup> Professor Frolik focuses more on the legal tasks, noting that “. . . the term elder law bundles together a variety of legal work. The term, however, does not only aggregate a group of existing activities. It implies something more, a new kind of legal practice, a new way to perceive what the lawyer does. The term *elder law* is both a collective title for existing activity and a new category of legal work which creates new practice possibilities for lawyers.” *The Developing Field of Elder Law*, *supra* n. 24, at 2.

<sup>27</sup> For example, Stu Zimring, a past president, fellow and member of CAP of NAELA describes his view of elder law as:

a broad, very holistic, communitarian approach, defining it in terms of assisting seniors and their families, primarily in helping them age in place whenever possible. I do not and have never restricted the definition to “public benefit planning”. For those who do, the answer is Elder Law/public benefit planning is probably doomed since the opportunities to do this kind of planning will become increasingly difficult or (I should live so long) there will be a national healthcare system in place that makes such planning unnecessary. For those of us who define the field broadly, I see it as nothing but a growth area simply based on demographics –the boomers are becoming the next client wave and their parents are the current client wave. The parents are being driven (sometimes

specialized area into a general practice area within which attorneys may specialize.<sup>28</sup> Some perceive the practice as later-life planning<sup>29</sup> while others view it more as a combination of elder law and disability law.<sup>30</sup> The National Elder Law Foundation<sup>31</sup> has a comprehensive definition used to define the knowledge areas needed for certification as an elder law attorney.<sup>32</sup> Under this definition, elder law can be grouped into three

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literally) to our offices by their children—this generation would not necessarily have sought out legal assistance—their children are more savvy. Hence, one generation will drive two client generations through the door. Add to this the 1<sup>st</sup> cousin to elder law, [Special Needs Trusts] SNTs or disability planning in general, and the potential growth curve is even greater.

Email interview with Stu Zimring (August 27, 2006) (on file with author).

<sup>28</sup> For example, some attorneys specialize in guardianships while others may specialize in asset protection planning. There are areas of elder law where many elder law attorneys do not practice. For example, many elders have consumer problems, whether it be a contract issue or a consumer fraud yet many elder law attorneys do not take these cases and if they are involved, it may be in the context of a guardianship where the elder is a victim of a financial exploitation. *See, e.g.*, Lawrence A. Frolik, *The Developing Field of Elder Law Redux*, *supra* n. 24, at 3-4.

<sup>29</sup> *Id.* Professor Frolik defines late life legal planning by noting that the fact of growing old presents “a host of legal problems that can be best addressed by . . . elder law attorney[s].” *Id.* at 4-8.

<sup>30</sup> In 2003, NAELA changed its mission statement to include clients with disabilities

The mission of the National Academy of Elder Law Attorneys is to establish NAELA members as the premier providers of legal advocacy, guidance and services to enhance the lives of people with special needs and people as they age.

Adopted by the NAELA Board of Directors, 2003. NAELA had 5145 members as of July 1, 2006. Email from Debbie Barnett, Managing Partner (July 13, 2006) (on file with the author).

<sup>31</sup> The National Elder Law Foundation, or NELF, is the organization that certifies attorneys in elder law.

<sup>32</sup> NELF defines elder law as:

2.1 "Elder Law" is the legal practice of counseling and representing older persons and their representatives about the legal aspects of health and long term care planning, public benefits, surrogate decision-making, older persons' legal capacity, the conservation, disposition and administration of older persons' estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

2.2 In addition, attorneys certified in elder law must be capable of recognizing issues of concern that arise during counseling and representation of older persons, or their representatives, with respect to abuse, neglect, or exploitation of the older person, insurance, housing, long term care, employment, and retirement. The certified elder law attorney must also be familiar with professional and non-legal resources and services publically and privately available to meet the needs of the older persons, and be capable of recognizing the professional conduct and ethical issues that arise during representation.

All the experience, task, and examination requirements relate to these areas of law.

This definition of elder law is the result of a lengthy process, which began in 1988. It involved those who formed NAELA, NAELA board members during the years 1988 through 1993, the Fellows of NAELA, the membership of NAELA, the members of the board of certification, and the ABA Standing Committee on Specialization. NAELA and its members have been involved at every step in the process of defining this new and growing specialty. <http://www.nelf.org/randregs.htm#howis> (accessed July 12, 2006). As part of certification, an applicant has to have devoted a certain number of hours in tasks, which provide insight into how these categories are further defined:

5.1.4.2 Task Requirements. The applicant shall satisfy the following task requirements:

A. During the three-years immediately preceding the short form application, the applicant shall have provided legal services in at least sixty (60) elder law matters in the following categories:

areas: income protection, health care, and autonomy,<sup>33</sup> although some issues might fall in more than one grouping. Others would group differently, depending on their views and experiences. Income protection could include issues surrounding retirement income (pensions, Social Security, private savings), bankruptcy, asset preservation, estate and tax planning, etc. Health care includes, for example, paying for

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1. Health and Personal Care Planning, including giving advice regarding, and preparing, advance medical directives (medical powers of attorney, living wills, and health care declarations) and counseling older persons, attorneys-in-fact, and families about medical and life-sustaining choices, and related personal life choices.
  2. Pre-Mortem Legal Planning, including giving advice and preparing documents regarding wills, trusts, durable general or financial powers of attorney, real estate, gifting, and the financial and tax implications of any proposed action.
  3. Fiduciary Representation, including seeking the appointment of, giving advice to, representing, or serving as executor, personal representative, attorney-in-fact, trustee, guardian, conservator, representative payee, or other formal or informal fiduciary.
  4. Legal Capacity Counseling, including advising how capacity is determined and the level of capacity required for various legal activities, and representing those who are or may be the subject of guardianship/conservatorship proceedings or other protective arrangements.
  5. Public Benefits Advice, including planning for and assisting in obtaining Medicaid, Supplemental Security Income, and Veterans benefits.
  6. Advice on Insurance Matters, including analyzing and explaining the types of insurance available, such as health, life, long term care, home care, COBRA, medigap, long term disability, dread disease, and burial/funeral policies.
  7. Resident Rights Advocacy, including advising patients and residents of hospitals, nursing facilities, continuing care retirement communities, assisted living facilities, adult care facilities, and those cared for in their homes of their rights and appropriate remedies in matters such as admission, transfer and discharge policies, quality of care, and related issues.
  8. Housing Counseling, including reviewing the options available and the financing of those options such as: mortgage alternatives, renovation loan programs, life care contracts, and home equity conversion.
  9. Employment and Retirement Advice, including pensions, retiree health benefits, unemployment benefits, and other benefits.
  10. Income, Estate, and Gift Tax Advice, including consequences of plans made and advice offered.
  11. Public Benefits Advice, including planning for and assisting in obtaining Medicare, Social Security, and food stamps.
  12. Counseling with regard to age and/or disability discrimination in employment and housing.
  13. Litigation and Administrative Advocacy in connection with any of the above matters, including will contests, contested capacity issues, elder abuse (including financial or consumer fraud), fiduciary administration, public benefits, nursing home torts, and discrimination.

The NELF certification prioritizes the tasks by requiring a certain number of matters performed in the "core" categories:

B. Of the 60 elder law matters, 40 must be in categories listed in 5.1.4.2.A. 1 through 5, with at least five matters in each category.

C. Ten of the elder law matters must be in categories listed in 5.1.4.2.A. 6 through 13, with no more than five in any one category, and

D. The remaining 10 elder law matters may be in any category listed in 5.1.4.2.A. 1 through 13, and are not subject to the limitation contained in parts B. or C. of this subsection.

<http://www.nelf.org/randregs.htm#howis> (accessed July 12, 2006).

<sup>33</sup> Professor Frolik divided elder law "roughly" into two categories: income and asset protection and preservation and health law issues. *The Developing Field of Elder Law*, *supra* n. 24, at 3..

health care, long-term care,<sup>34</sup> and health care decision-making. Autonomy could include planning for incapacity, alternatives to guardianship and housing choices, anything designed to maximize a person's autonomy and independence while providing the needed help in the least restrictive setting possible.

Why the growth and evolution of elder law? One reason may be the demographics.<sup>35</sup> Another reason may be the attraction to a holistic law practice, a more problem-solving or helping practice area rather than the "typical" litigation model.<sup>36</sup> Others attribute the growth more to market forces or the complexity of the area of law.<sup>37</sup> Perhaps all of these reasons are true. But in addition, maybe elder law as a field has grown simply because of the satisfying nature of the practice<sup>38</sup>—an elder law attorney truly has the opportunity to make a difference in the lives of his or her clients, oftentimes during the final phase of the clients' lives and many times in a crisis. The elder law attorney has the opportunity to ensure the client has the most quality of life as possible during the last years of his or her life.

#### IV. SELECT LEGISLATION

Elder Law may be defined more by the client than the laws, but there are laws specifically designed for target groups of individuals, most often those target groups are elders and people with disabilities. In this

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<sup>34</sup> Some might put long-term care (including paying for long-term care) under income security.

<sup>35</sup> See *supra* n. 11.

<sup>36</sup> The public may think of lawyers as litigators, given the adversarial nature of the United States judicial system. Elder law attorneys tend to not be litigators (although some are) and instead deal more in "planning as problem-solving" approach to resolution.

Stu Zimring, a NAELA past president, fellow and CAP member views his practice as a holistic one: "I have always taken a broad, very holistic, communitarian approach, defining it in terms of assisting seniors and their families, primarily in helping them age in place whenever possible." Email interview with Stu Zimring (August 27, 2006) (copy on file with author).

<sup>37</sup> Professor Frolik attributed the growth of elder law to "the rapid growth in the number of lawyers, the influx of women into the profession, the growth and acceptance of professional specialization, and the growth both in the number of elderly and in the degree and complexity of their legal needs." *The Developing Field of Elder Law*, *supra* n. 24, at 4.

<sup>38</sup> Professor Frolik noted that one cause of the growth of elder law would be the Baby Boomer Lawyers—" [t]ouched intellectually by the radical idealism of the late 1960-s, often attracted to law as a perceived instrument of social change, the boomers, initially in law school and then in the "real world" met the reality of law, which was being transformed from a profession to a business. Far from being some sort of domestic Peace Corps, the practice of law revealed itself to be "nasty, brutish, and short." For some of these disillusioned lawyers, elder law appeared to offer a plausible mix of earning a living while doing good. . . . In short, the elder law attorney was on the side of the angels." *The Developing Field of Elder Law*, *supra* n. 24, at 11-12 (*citations omitted*). Professor Frolik also posits that elder law as a practice area might be attractive to women attorneys for various reasons, including women may be more effective at "reconciliation, counseling, and negotiation which are so essential for the elder law attorney." *Id.* at 12-13 (*citations omitted*).



section, certain areas of law that pertain to elders will be summarized and discussed.

#### A. *Elder Abuse and Neglect*

Elder abuse is a catch-all phrase to describe various types of abuse, neglect or exploitation. Elder abuse is a growing problem in the United States, yet the extent of the problem is really not known.<sup>39</sup> In a 2004 national survey, state adult protective services agencies reported 565,747 cases of potential abuse in 2003, up from 482,913 reports in 2000, or a 15.6% increase in substantiated cases, and a 19.7% increase in the combined total of elder and vulnerable adult neglect and abuse reports since 2000.<sup>40</sup>

The National Center for Elder Abuse<sup>41</sup> has identified seven types of major abuse: physical abuse,<sup>42</sup> sexual abuse,<sup>43</sup> emotional or psychological abuse,<sup>44</sup> neglect,<sup>45</sup> abandonment,<sup>46</sup> financial or material exploitation,<sup>47</sup> and self-neglect.<sup>48</sup>

In the United States, governmental responses to dealing with elder abuse is where domestic violence responses were twenty years ago. That is, it is not unusual for elder abuse to be viewed as a “civil” matter, to be dealt with through the state’s guardianship process. Elder abuse is primarily dealt with at the state level,<sup>49</sup> with the various states having

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<sup>39</sup> Elder Abuse is considered to be a seriously under-reported problem. There are a number of reasons why victims and others do not report, including fear of retaliation, fear of being placed in a long-term care facility such as a nursing home, isolation, lack of knowledge of the abuse, embarrassment, etc.

<sup>40</sup> NCEA, *2004 Survey of State Adult Protective Services (APS)*, Fact Sheet, <http://www.elderabusecenter.org/pdf/2-14-06%20final%2060+report.pdf> (visited July 12, 2006).

<sup>41</sup> The National Center for Elder Abuse, or NCEA, is “a national resource for elder rights, law enforcement and legal professionals, public policy leaders, researchers, and the public. The Center’s mission is to promote understanding, knowledge sharing, and action on elder abuse, neglect, and exploitation . . . and “is administered under the auspices of the National Association of State Units on Aging.” The NCEA “makes available news and resources, collaborates on research, provides consultation, education and training, identifies and provides information about promising practices and interventions, answers inquiries and requests for information, operates a listserv forum for professionals, and advises on program and policy development.” <http://www.elderabusecenter.org/default.cfm?p=aboutncea.cfm> (accessed July 12, 2006).

<sup>42</sup> National Center on Elder Abuse, *The Basics: Major Types of Elder Abuse*, <http://www.elderabusecenter.org/default.cfm?p=basics.cfm> (last updated Sept. 28, 2006).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* There is some debate about whether self-neglect should be included in elder abuse, since self-neglect is “self-inflicted,” whereas the other types of elder abuse are caused by another.

<sup>49</sup> The Older Americans Act, 42 U.S.C. § 3001 et seq., defines elder abuse and also provides for funding for NCEA and activities but does not fund adult protective services (APS) or victims’ shelters. Am. Bar Assoc. Commn. on L. and Aging, *Information About Laws Related to Elder*

statutes that define elder abuse, provide for protective services and, increasingly, criminalize the offense. There is some variation amongst the states in the definitions of elder abuse, the acts that constitute elder abuse, and the scope of the statutes.<sup>50</sup> Many statutes cover both elders and people with disabilities.<sup>51</sup> Some may be age-based, with a threshold

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*Abuse,*

<http://www.elderabusecenter.org/pdf/publication/InformationAboutLawsRelatedtoElderAbuse.pdf> (visited July 12, 2006).

Abuse is defined as “the willful . . . (A) infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or

(B) deprivation by a person, including a caregiver, of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness.” 42 U.S.C. § 3002(1)(a)-(b) (2006).

Elder abuse is defined as “abuse of an older individual. . . .” 42 U.S.C. § 3002(1), while exploitation is defined as “the illegal or improper act or process of an individual, including a caregiver, using the resources of an older individual for monetary or personal benefit, profit, or gain. . . .” 42 U.S.C. § 3002(18)(a) (2006).

Neglect is defined as “the failure of a caregiver . . . or fiduciary to provide the goods or services that are necessary to maintain the health or safety of an older individual; or self-neglect.” 42 U.S.C. § 3002(38)(a)-(b) (2006). Physical harm is defined as “bodily injury, impairment, or disease.” 42 U.S.C. § 3002(41) (2006).

The federal law defines an older individual as someone who is 60 or older. 42 U.S.C. § 3002(35).

<sup>50</sup> See e.g., Am. Bar Assoc. Commn. on L. and Aging, *Information About Laws Related to Elder Abuse*,

<http://www.elderabusecenter.org/pdf/publication/InformationAboutLawsRelatedtoElderAbuse.pdf> (accessed July 12, 2006) and Am. Bar Assoc. Commn. on L. and Aging, *Citations to Adult*

*Protective Services (APS), Institutional Abuse and Long Term Care Ombudsman Program (LTCOP) Laws*,

[http://www.elderabusecenter.org/pdf/publication/CitationstoAPS\\_InstitutionalAbuseandLTCOPombudsmanProgramLaws.pdf](http://www.elderabusecenter.org/pdf/publication/CitationstoAPS_InstitutionalAbuseandLTCOPombudsmanProgramLaws.pdf) (Aug. 2005) for a general discussion of the states’ laws covering elder abuse and links to state statutes for adult protective services, institutional abuse, and the long-term care ombudsman programs.

The variation in definitions contributes to the difficulty in determining the number of cases of elder abuse in an examination of agency records. Erica F. Wood, *The Availability & Utility of Interdisciplinary Data on Elder Abuse: A White Paper for the National Center On Elder Abuse* 21-22, <http://www.elderabusecenter.org/pdf/publication/WhitePaper060404.pdf> (May 2006).

<sup>51</sup> For example, California’s act, the Elder Abuse and Dependent Adult Civil Protection Act, covers both elders and adults who meet the statutory definition of “dependent”. An elder is a resident of the state who is 65 years of age or older, Cal. Welf. & Inst. Code § 15610.27. A dependent adult is any resident between the ages of 18 and 64 “who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age”. . . . or . . . “is admitted as an inpatient to a 24-hour health facility. . . .” Cal. Welf. & Inst. Code § 15610.23.

Florida uses vulnerable adult, defining a vulnerable adult as someone who is “18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, long-term physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging.” Fla. Stat. § 415.102(26) (2007). Similarly, Colorado uses “at risk adult” to mean a person who is sixty or older or eighteen or older with a disability. Colo. Rev. Stat. § 18-6.5-102(1) (2006). For APS, Colorado defines an at-risk adult as a person, 18 or older, “susceptible to mistreatment . . . or self-neglect . . . because the individual is unable to perform or obtain services necessary for the individual’s health, safety, or welfare or lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the individual’s person or affairs.” Colo. Rev. Stat. § 26-3.1-101(1) (2006). Arizona

age for coverage. For example, under federal law, the threshold age for an older person is 60.<sup>52</sup> Because of the lack of consensus in this country as to what is old, the age threshold may vary from state to state.

The primary methods used at this time to fight elder abuse are the states' adult protective services systems and mandatory reporting requirements. Statutorily-mandated reporting may cover everyone,<sup>53</sup> and specifies a variety of individuals and occupations, ranging from health care professionals to law enforcement to bank tellers.<sup>54</sup> Mandatory reporting of elder abuse is not without its critics and little effort seems to be made to prosecute those mandated reporters who fail to report.

The increased number of reported cases can thus be interpreted two ways: either elder abuse is on the rise, or more people are reporting abuse. Still because of the problems with the victim reporting, it is important that those who would likely be in a position to report the abuse do so.

Caregiver abuse is on the rise, and unfortunately, as people live longer, they may become more dependent on caregivers for help, leading to increasing numbers of cases of physical abuse, neglect, or financial

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uses vulnerable adult, meaning someone who is eighteen or older and "unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment." Az. Rev. Stat. § 46-451(A)(10) (2006).

For a summary of the requirements of all state statutes, see National Academies Press, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, <http://www.nap.edu/books/0309084342/html/> (2002).

<sup>52</sup> 42 U.S.C. § 3002(40) (2007) (60 or older). At the time of enactment of the Older Americans Act in 1965, 60 was considered old. In 2006, with people living longer, 60 is no longer considered old, and in fact, is considered by many to be middle-aged.

<sup>53</sup> "Everyone" excludes attorneys (and their employees) who learn about the abuse in the context of representation, unless the client consents to the disclosure of the information. Attorneys who learn about the abuse outside of the client-attorney relationship would have a reporting requirement. See, e.g. Fla. Stat. § 415.1034 (2007), which provides for mandatory reporting:

(a) Any person, including, but not limited to, any:

1. Physician, osteopathic physician, medical examiner, chiropractic physician, nurse, paramedic, emergency medical technician, or hospital personnel engaged in the admission, examination, care, or treatment of vulnerable adults;
2. Health professional or mental health professional other than one listed in subparagraph 1.;
3. Practitioner who relies solely on spiritual means for healing;
4. Nursing home staff; assisted living facility staff; adult day care center staff; adult family-care home staff; social worker; or other professional adult care, residential, or institutional staff;
5. State, county, or municipal criminal justice employee or law enforcement officer;
6. An employee of the Department of Business and Professional Regulation conducting inspections of public lodging establishments under s. 509.0327.

7. Florida advocacy council member or long-term care ombudsman council member; or

8. Bank, savings and loan, or credit union officer, trustee, or employee, who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited shall immediately report such knowledge or suspicion to the central abuse hotline.

<sup>54</sup> For example, Florida includes "[b]ank, savings and loan, or credit union officer, trustee, or employee" as mandatory reporters. Fla. Stat. § 415.1034(1)(a)(8).

exploitation. More needs to be done to fight elder abuse, including greater education of first responders and criminalizing the acts. Enhanced penalties are being used in some states, where the victim is over a certain age, which can have some success in punishment, but is unlikely an effective deterrent when the causes of elder abuse are examined.<sup>55</sup> More can be done to develop protocols for identifying elder abuse. For example, autopsies may not often be performed on an elder who had a number of chronic conditions, any of which could have caused the elder's death. As a result, the medical examiner would not be looking for signs of elder abuse in performing an autopsy, if an autopsy is even performed.

### B. Social Security, Pensions & Income Security

Retirement security has become a major concern in the United States. Elders are living longer than their savings will cover, Social Security is projected to run out of money, and employers are looking to shed their pension obligations. The concern about the stability of Social Security is driven in large part by demographics, as the Boomers reach retirement age and begin to draw Social Security benefits while the worker-to-retiree ratio shrinks.<sup>56</sup> America's retirees generally have three sources to fund their retirement: Social Security, pensions, and private savings. Often the metaphor of the three-legged stool<sup>57</sup> is used to

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<sup>55</sup> According to the NCEA website, in general the abusers tend to be impaired in some way and dependent on the victim. The victim may be isolated and suffered from conditions that make her more likely to be abused. National Center on Elder Abuse, *Risk Factors for Elder Abuse*, <http://www.elderabusecenter.org/default.cfm?p=riskfactors.cfm> (last updated Sept. 28, 2006); National center on Elder Abuse, *Domestic Abuse in Later Life*, <http://www.elderabusecenter.org/pdf/research/abusers.pdf> (Aug. 2002).

<sup>56</sup> The fundamentals of the financial status of Social Security . . . remain problematic under the intermediate economic and demographic assumptions. Social Security's current annual surpluses of tax income over expenditures will soon begin to decline, and will be followed by deficits that begin to grow rapidly toward the end of the next decade as the baby-boom generation retires. . . . The projected growing deficits . . . will exhaust . . . Social Security reserves in 2040, under current financing arrangements. . . . As Social Security . . . reserves are drawn down . . . , pressure on the Federal budget will intensify. We do not believe the currently projected long-run growth rates of Social Security . . . are sustainable under current financing arrangements.

Soc. Sec., *A Message to the Public* 1, <http://www.ssa.gov/history/pdf/tr05summary.pdf>.

In 2001, the President established a Commission to Strengthen Social Security "to study and report specific recommendations to preserve Social Security for seniors while building wealth for younger Americans." See <http://www.csss.gov/index.html> (visited July 14, 2006).

<sup>57</sup> According to the Social Security web site, the three-legged stool metaphor applied to Social Security. Larry DeWitt, SSA Historian's Office, *Agency History*, <http://www.ssa.gov/history/stool.html> (May 1996).

Social Security benefits are considered to be only one part of a complete approach to retirement planning. In contemporary parlance, Social Security benefits are described as the

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"foundation" upon which individuals can build additional retirement security through company or personal pensions and through savings and investment.

For many years, an older metaphor was used to make this point. Social Security benefits were said to be one leg of a three-legged stool consisting of Social Security, private pensions and savings and investment. The metaphor was intended to convey the idea that all three approaches were needed to provide stable income security in retirement.

The question has been raised as to the origins of the three-legged stool model and whether President Roosevelt used this metaphor in his conception of Social Security.

#### The Origin of the Metaphor

President Franklin Roosevelt is not the source of this metaphor, nor was anyone else associated with the creation of the Social Security program in the 1934-35 period. The earliest use of this metaphor which we have been able to document was by Reinhard A. Hohaus, who was an actuary for the Metropolitan Life Insurance Company. Mr. Hohaus, who was an important private-sector authority on Social Security, used the image in a speech in 1949 at a forum on Social Security sponsored by the Ohio Chamber of Commerce. Hohaus, however, had a slightly different "stool" in mind than came to be understood in later years. His three-legged stool consisted of: private insurance; group insurance; and Social Security. In his 1949 speech Hohaus stated:

"The first in order of time is individual insurance . . . the second, a variety of employee benefit plans of which Group insurance is an outstanding American contribution; and the third, social security--designed by the government for the well-being of our fellow citizens . . . Each has its own function to perform and need not, and should not, be competitive with the others. When soundly conceived, each class of insurance can perform its role better because of the other two classes. Properly integrated, they may be looked upon as a three-legged stool affording solid and well-rounded protection for the citizen."

#### A Familiar Concept

Although Hohaus appears to be the creator of the three-legged stool metaphor, the basic concept which the metaphor expresses was clearly understood and widely shared by the creators of the Social Security program. In fact, in a 1942 speech before the 37th annual meeting of the American Life Convention in Chicago, Hohaus approvingly quoted Social Security Board Chairman Arthur Altmeyer as expressing the core idea: "A social insurance system does not and need not undertake to furnish complete protection to all whom it covers under all circumstances. The social insurance approach is to assure that the benefits would provide a minimum protection, leaving to the individuals the responsibility of buying additional protection from private sources through their private means."

Although President Roosevelt apparently never used the "three-legged stool" metaphor, he clearly had this concept in mind when he created the Social Security program, and he expressed the idea, in other words, several times over the years[:]

These three great objectives the security of the home, the security of livelihood, and the security of social insurance--are, it seems to me, a minimum of the promise that we can offer to the American people. They constitute a right which belongs to every individual and every family willing to work. . . . This seeking for a greater measure of welfare and happiness does not indicate a change in values. It is rather a return to values lost in the course of our economic development and expansion. Ample scope is left for the exercise of private initiative.

Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration [(June 8, 1934)] . . . [announcing the President's intention to send a Social Security proposal to Congress.]

and

In the important field of security for our old people, it seems necessary to adopt three principles: First, non-contributory old-age pensions for those who are now too old to build up their own insurance. It is, of course, clear that for perhaps thirty years to come funds will have to be provided by the States and the Federal Government to meet these pensions. Second, compulsory contributory annuities which in time will establish a self-supporting system for those now young and for future generations. Third, voluntary contributory annuities by which individual initiative can increase the annual amounts received in old age. It is proposed that the Federal Government assume one-half of the cost of the old-age pension plan, which ought ultimately to be supplanted by self-supporting annuity plans.

describe funding retirement, today, using the three-legged stool metaphor, all three legs of the stool are wobbly, with the stool's stability increasingly at risk and, it seems, the stool is headed for certain collapse. Americans are not saving enough for retirement, or simply are living longer—outliving their savings.

*Social Security—a Brief History and an Even Briefer Overview*

When President Roosevelt<sup>58</sup> signed the Social Security Act into law, Social Security was designed as a safety net to provide a minimum level of income to retired workers. Coming on the heels of the Great Depression, it became obvious that American workers needed some way to secure a minimum amount of income upon retirement. Social Security was never intended to be the sole source of retirement income for American retirees, but many have come to depend on Social Security for just that.<sup>59</sup> Over the years, Social Security was expanded to provide benefits to groups other than retirees, including dependents (spouses and children, survivors) and individuals who are disabled.<sup>60</sup>

Retirement benefits for Social Security are based on a worker's earnings record. Generally speaking, to be fully insured, a worker must have 40 quarters of coverage, that is, have worked a certain amount during the forty quarters. Usually someone who works full-time for ten years is considered fully insured.<sup>61</sup> The amount an individual will draw in the form of a monthly Social Security check will depend on the individual's earnings record. A spouse is also eligible for Social Security, either on her own earnings record or her husband's, and gets the higher monthly amount.<sup>62</sup> In addition to eligibility based on quarters of coverage, Social Security retirement benefits are age-based, that is the worker must attain a specific age in addition to being fully insured, before the worker will draw a check.<sup>63</sup>

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Message to Congress on Social Security . . . [(J)anuary 17,1935[]] . . . (transmitting Administration's legislative proposal).

*Id.*

<sup>58</sup> President Roosevelt served as the twenty-third president, serving from January 1933, until his death in 1945. He was perhaps best known for his leadership through the Great Depression, WWII and being disabled.

<sup>59</sup> See generally, Federal Inter-agency Forum on Aging-Related Statistics, *Older Americans Update 2006: Key Indicators of Well-Being: Economic Indicator #9, Sources of Income 4*, <http://www.agingstats.gov/update2006/Economics.pdf>.

<sup>60</sup> See generally, 42 U.S.C. §§ 401 (2007).

<sup>61</sup> See e.g., Social Security, *How You Earn Credits*, <http://www.ssa.gov/pubs/10072.html#number> (Jan. 2007).

<sup>62</sup> Social Security, *Benefits for Your Spouse*, <http://www.ssa.gov/retire2/yourspouse.htm> (modified Jan. 12, 2007).

<sup>63</sup> Social Security, *Full Retirement Age*, <http://www.ssa.gov/retire2/retirechart.htm> (modified Jan. 12, 2007).

For many years the age of retirement for Social Security was 65.<sup>64</sup> Some years ago, concerns about the future viability of Social Security resulted in a decision to gradually raise the age of retirement to 67.<sup>65</sup> This increase in age is being phased in incrementally,<sup>66</sup> with 67 becoming the retirement age in the year 2027.<sup>67</sup> However, a fully-insured individual can take “early retirement” of Social Security benefits at age 62, but the amount of the Social Security benefits are permanently reduced throughout the worker’s retirement lifetime.<sup>68</sup>

For most individuals who are fully insured, there are very few issues about eligibility for Social Security benefits. Some years ago, there were some difficulties proving a person’s age, for those who might have been born at home, a family bible may have been the only birth record in areas where birth certificates were not routinely issued or where records might have been destroyed. The bigger issue today regarding eligibility for benefits are for those who seek Social Security Disability benefits.<sup>69</sup>

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<sup>64</sup> Social Security, *The Full Retirement Age is Increasing*, <http://www.ssa.gov/pubs/ageincrease.htm> (modified Jan. 12, 2007).

<sup>65</sup> Social Security, *Summary of P.L. 98-21, (H.R. 1900) Social Security Amendments of 1983-Signed on April 20, 1983*, <http://www.ssa.gov/history/1983amend.html> (prepared Nov. 26, 1984) (summarizing the 1983 amendments to the Social Security law “[r]aises the age of eligibility for unreduced retirement benefits in two stages to 67 by the year 2027. Workers born in 1938 will be the first group affected by the gradual increase. Benefits will still be available at age 62, but with greater reduction.”).

<sup>66</sup> Social Security, *Age to Receive Full Social Security Retirement Benefits*, <http://www.ssa.gov/pubs/retirechart.htm> (modified Jan. 12, 2007).

| Year of Birth   | Full Retirement Age |
|-----------------|---------------------|
| 1937 or earlier | 65                  |
| 1938            | 65 & 2 months       |
| 1939            | 65 & 4 months       |
| 1940            | 65 & 6 months       |
| 1941            | 65 & 8 months       |
| 1942            | 65 & 10 months      |
| 1943–1954       | 66                  |
| 1955            | 66 & 2 months       |
| 1956            | 66 & 4 months       |
| 1957            | 66 & 6 months       |
| 1958            | 66 & 8 months       |
| 1959            | 66 & 10 months      |
| 1960 & later    | 67                  |

*Id.*

<sup>67</sup> Social Security, *Summary of P.L. 98-21, (H.R. 1900) Social Security Amendments of 1983-Signed on April 20, 1983*, <http://www.ssa.gov/history/1983amend.html> (prepared Nov. 26, 1984).

<sup>68</sup> Soc. Sec., *Retirement Planner*, <http://www.ssa.gov/retire2/applying2.htm> (last modified Jan. 12, 2007).

<sup>69</sup> Disability under Social Security is based on . . . inability to work. [You are] . . . consider[ed] . . . disabled under Social Security rules if you cannot do work that you did before and [SSA] . . . decide[s] that you cannot adjust to other work because of your medical condition(s). Your disability must also last or be expected to last for at least one year or to result in death.

Social Security is something of a “sacred cow”<sup>70</sup> and periodic attempts at reform often never got off the ground or were viewed as political suicide. Elders were not interested in any tinkering with their benefits, for various reasons. However, in his January 2005 State of the Union Address,<sup>71</sup> President Bush made reform a priority for his administration in 2005, traveling about the country to promote change.

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This is a strict definition of disability. Social Security program rules assume that working families have access to other resources to provide support during periods of short-term disabilities, including workers' compensation, insurance, savings and investments.

Soc. Sec., *Disability Planner: What We Mean by Disability*,  
<http://www.ssa.gov/dibplan/dqualify4.htm> (Last modified Jan. 12, 2007).

In addition to meeting . . . [the] definition of disability, you must have worked long enough--and recently enough--under Social Security to qualify for disability benefits. . . . The number of work credits you need to qualify for disability benefits depends on your age when you become disabled. Generally, you need 40 credits, 20 of which were earned in the last 10 years ending with the year you become disabled.

Soc. Sec., *Disability Planner: How Much Work Do You Need?*  
<http://www.ssa.gov/dibplan/dqualify2.htm> (updated Jan. 11, 2007).

<sup>70</sup> A sacred cow is defined to include “[a]n idea, institution, etc., unreasonably held to be immune from questioning or criticism” (with reference to the respect of Hindus for the cow as a sacred animal). *The Oxford English Dictionary*, vol. XIV, 339 (2d ed., Clarendon Press Oxford 1989).

<sup>71</sup> White House, *Fact Sheet: The State of the Union*,  
<http://www.whitehouse.gov/news/releases/2005/02/20050202-14.html> (Feb. 2, 2005). The fact sheet on the State of the Union Address described the President’s comments on reforming Social Security:

Saving Social Security for America's Future Generations

Fixing the Current Social Security System: The President wants to strengthen Social Security for the 21st century. His fiscally responsible plan calls for reforms that would keep Social Security's promises for today's seniors and those near retirement; solve the financial problems of Social Security once and for all; and give younger workers a chance to save in personal accounts for their own retirement.

By 2018, Social Security will owe more in annual benefits than the revenues it takes in, and when today's young workers begin to retire in 2042, the system will be exhausted and bankrupt. As currently structured, Social Security cannot afford to pay promised benefits to young workers.

President Bush has laid out basic principles to guide reform:

We must make Social Security permanently sound;

We must guarantee no change for those 55 years or older (born before 1950);

We must not jeopardize our economic strength by raising payroll taxes;

We must ensure that lower-income Americans get the help they need to have dignity and peace of mind in their retirement;

We must make sure any changes in the system are gradual, so that younger workers have years to prepare and plan for their future; and

We must make Social Security a better deal for younger workers through voluntary personal retirement accounts.

The President laid out his vision for voluntary personal retirement accounts. Under his plan, personal retirement accounts would start gradually. Yearly contribution limits would be raised over time, eventually permitting all workers to set aside 4 percentage points of their payroll taxes in their accounts.

There will be careful guidelines for personal accounts to provide greater security in retirement, including a conservative mix of bonds and stock funds similar to those offered under the Federal employee retirement plan; protection from hidden fees; protection from sudden market swings on the eve of retirement; and a requirement of pay-outs over time to prevent a person from emptying his or her account all at once.

<http://www.whitehouse.gov/news/releases/2005/02/20050202-14.html>.



After Hurricane Katrina, and other more pressing issues, reform was put on the “back burner.”<sup>72</sup>

### C. Health Care—An Even Briefer Overview.<sup>73</sup>

Health care is a big issue for elders in the United States.<sup>74</sup> There are a number of components that fall under the rubric of health care: paying for health care, decision-making, end of life issues, long-term care, and regulation. Paying for health care is of course an enormous concern for elders. Among those who fall in the demographic of current elderly, recent Census reports show that disabilities among United States elders is declining.<sup>75</sup> Although the number of elders with disabilities is declining, at least eighty percent of elders have at least one chronic health condition, and fifty percent have two.<sup>76</sup> Because so many of America’s elders have at least one chronic health condition,<sup>77</sup> it goes without saying that health care, in particular obtaining and paying for it, is one of the top issues facing elder Americans. The number of elders with some type of dementia or memory impairment may increase with

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<sup>72</sup> It appeared that reform was gaining no traction, and although the reasons promoted for reform continue to exist, the national priorities shifted in the aftermath of Katrina. *See, e.g., President’s Statement on 70th Anniversary of Social Security*

For 70 years, Social Security has been a vital program and helped millions of America’s seniors in retirement. The Social Security system is sound for today’s seniors, but there is a hole in the safety net for younger workers. On this 70th anniversary, we renew our commitment to save and strengthen Social Security for our children and grandchildren, and keep the promise of Social Security for future generations.

<http://www.whitehouse.gov/news/releases/2005/08/20050814-2.html> (August 14, 2005); Jonathan Weisman, *Social Security Legislation Could Be Shelved*, Wash. Post A5, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/15/AR2005091502200.html> (Sept. 16, 2005); Bob Cusack & Patrick O’Connor, *GOP Split on Social Security*, The Hill, <http://www.hillnews.com/thehill/export/TheHill/News/Frontpage/092105/gop.html> ((Sept. 21, 2005), Jonathan Weisman, *GOP Agenda in Congress May Be at Risk Katrina’s Costs, High Fuel Prices Working Against More Tax Cuts*, Wash. Post A2, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090301065.html> (Sept. 4, 2005).

<sup>73</sup> A thorough discussion of health care as it affects America’s elders would be volumes, so anything other than a brief discussion of the issues is way beyond the scope of this article.

<sup>74</sup> This is a huge understatement, but needed to set the stage for this section of the article.

<sup>75</sup> *See supra* n. 13, at 58-63.

<sup>76</sup> *Id.* This generalization may not hold true when the statistics for assistance with activities of daily living (ADL) are examined. *See id.* at 60.

<sup>77</sup> *Id.* Health disease, cancer, diabetes and stroke are the most common and costly of these conditions, and can have a negative impact on an elder’s quality of life, leading to deterioration in functioning and independent living in the community. Arthritis, heart disease and high blood pressure rank high as the reported chronic conditions affecting elders. *See generally, Older Americans Update 2006: Key Indicators of Well-Being*, Federal Inter-Agency Forum on Aging-Related Statistics, Health Status Indicator #15, Chronic Health Conditions 4, [http://www.agingstats.gov/update2006/Health\\_Status.pdf](http://www.agingstats.gov/update2006/Health_Status.pdf).

age, leaving individuals at risk for exploitation and candidates for guardianship and institutional care.<sup>78</sup>

Medicare<sup>79</sup> has been the primary health insurance for those retired Americans, with Medicare and Medicaid covering the more than three-quarters of health care expenditures.<sup>80</sup> Medicare currently can be divided into four parts: A-D. Generally speaking, A is hospital benefits, B is doctor and outpatient, C is managed care and D is prescription drug coverage.<sup>81</sup> Up until the passage of Part C in 1997,<sup>82</sup> Medicare was unique in its coverage, similar to a defined benefits program—every beneficiary had the same benefits. Now with Part C, managed care, not everyone has the same coverage any longer. Under Part C, managed care plans can offer various “extra” services to lure members. Much is said about the viability of Social Security, but only occasionally is the viability of Medicare mentioned, yet Medicare’s stability is at risk, perhaps even more so than Social Security.<sup>83</sup> With the rising costs of

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<sup>78</sup> Low cognitive functioning is reported as a significant risk factor for nursing home placement. Federal Inter-Agency Forum on Aging-Related Statistics, *Older Americans Update 2006: Key Indicators of Well-Being: Health Status Indicator #17, Memory Impairments 6*, [http://www.agingstats.gov/update2006/Health\\_Status.pdf](http://www.agingstats.gov/update2006/Health_Status.pdf).

<sup>79</sup> U.S. Dept. of HHS, *Historic Overview*, <http://www.cms.hhs.gov/History/> (last modified July 7, 2005).

<sup>80</sup> See *supra* n. 13, at 83.

<sup>81</sup> Part A Hospital Insurance - Most people don’t pay a premium for Part A because they or a spouse already paid for it through their payroll taxes while working. Medicare Part A (Hospital Insurance) helps cover inpatient care in hospitals, including critical access hospitals, and skilled nursing facilities (not custodial or long-term care). It also helps cover hospice care and some home health care. Beneficiaries must meet certain conditions to get these benefits.

Part B Medical Insurance - Most people pay a monthly premium for Part B. Medicare Part B (Medical Insurance) helps cover doctors’ services and outpatient care. It also covers some other medical services that Part A doesn’t cover, such as some of the services of physical and occupational therapists, and some home health care. Part B helps pay for these covered services and supplies when they are medically necessary.

Prescription Drug Coverage - Most people will pay a monthly premium for this coverage. Starting January 1, 2006, new Medicare prescription drug coverage will be available to everyone with Medicare. Everyone with Medicare can get this coverage that may help lower prescription drug costs and help protect against higher costs in the future. Medicare Prescription Drug Coverage is insurance. Private companies provide the coverage. Beneficiaries choose the drug plan and pay a monthly premium. Like other insurance, if a beneficiary decides not to enroll in a drug plan when they are first eligible, they may pay a penalty if they choose to join later.

U.S. Dept. of HHS, *Medicare Program- General Information*, <http://www.cms.hhs.gov/MedicareGenInfo/> (modified Dec. 14, 2005).

<sup>82</sup> *Balanced Budget Act of 1997*, 42 U.S.C. § 1395w-21 (2007).

<sup>83</sup> John Palmer and Thomas Saving, *Summary Trust Fund Reports (2005)*, <http://www.ssa.gov/history/pdf/tr05summary.pdf>.

In sharp contrast, Medicare’s financial outlook has deteriorated dramatically over the past five years and is now much worse than Social Security’s. This is due primarily to a major change in the projected long-term growth rate of Medicare costs relative to that of the economy and, secondarily, to more rapid expenditure growth so far this decade than previously anticipated. In 2000 annual cash-flow deficits were projected to first appear for HI in 2010. But these deficits actually began last year, resulting in the projected exhaustion date for HI Trust Fund reserves moving forward from

health care<sup>84</sup> continuing for the foreseeable future, Medicare premiums will continue to rise, and Part A in particular may be vulnerable without changes in funding structures.<sup>85</sup>

Medicaid, which was also part of the Great Society programs, is a federal-state program designed to provide health care for the poor.<sup>86</sup> Because Medicaid covers what used to be called “custodial care” in

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2025 to 2020—at which time trust fund income would be sufficient to pay only 79 percent of HI costs. HI costs are expected to rise so rapidly thereafter that trust fund income will be adequate to cover only 27 percent of program costs by the end of the 75-year period.

The change in the outlook is equally stark for SMI, where Part B is now joined by the new Part D Prescription Drug Benefit. Annual income to the SMI Trust Fund is always projected to be sufficient to cover costs, since general revenue transfers and beneficiary premiums are automatically adjusted each year to achieve this outcome. But the required rate of growth of such revenues is far more than previously anticipated. With the retirement of the baby boom generation, SMI costs (as a percent of GDP) are now projected to nearly quadruple from 1.2 to 4.6 over the next 30 years and to continue to increase rapidly thereafter. As a result, total Medicare expenditures are now projected to increase from 2.6 to 5.7 percent of GDP by 2024, when Medicare expenses will first exceed those of Social Security. By the end of the 75-year period, the cost of Medicare is now expected to approach 14 percent of GDP. In contrast, in 2000 the cost was projected to be less than 4 percent of GDP in 2024 and to reach only 5.3 percent of GDP by the end of the 75-year period.

A notable addition to the Trustees Reports during our tenure has been the inclusion of new measures that summarize program finances for a period extending beyond the traditional 75 years and indicate whether those finances can be expected to improve in this extended time frame. These measures indicate that both Social Security and Medicare will be subject to increasing deficits into the indefinite future under current policies.

Two important observations follow from an examination of the 2000-2005 Trustees Reports projections. First, Medicare’s costs are expected to grow at a much faster rate than those of Social Security. The impending retirement of the baby boom generation, continued lower birth rates, and further increases in life expectancy thereafter will cause the costs of both programs to grow faster than the economy. But Medicare’s costs are also fueled by ever increasing scientific knowledge, medical technology incorporating that knowledge, and per capita utilization of the resulting health care capabilities. The second observation follows from the first: there is considerable inherent uncertainty in the future path of costs under current law for both programs, with projections for Medicare being a less reliable guide than those for Social Security the further out in time they go. In the balance of this message we briefly examine the reasons for the uncertainty inherent in these projections and the relevance to policy discussions.

*Id.* at 15-16.

See also Ben S. Bernanke, Chair, Federal Reserve Board, *The Coming Demographic Transition: Will We Treat Future Generations Fairly?*

<http://www.federalreserve.gov/boarddocs/speeches/2006/20061004/default.htm> (Oct. 4, 2006).

The outlook for Medicare is particularly sobering because it reflects not only an increasing number of retirees but also the expectation that Medicare expenditures per beneficiary will continue to rise faster than per capita GDP. For example, the Medicare trustees’ intermediate projections have Medicare spending growing from about 3 percent of GDP today to about 9 percent in 2050—a larger share of national output than is currently devoted to Social Security and Medicare together.

<sup>84</sup> See e.g., Kaiser Family Foundation, *Snapshots: Health Care Costs Comparing Projected Growth in Health Care Expenditures and the Economy*, <http://www.kff.org/insurance/snapshot/chem0502060th2.cfm#2>.

<sup>85</sup> John Palmer and Thomas Saving, *Summary Trust Fund Reports (2005)*, <http://www.ssa.gov/history/pdf/tr05summary.pdf>.

*Id.* at 15-16.

<sup>86</sup> U.S. Dept. of HHS, *Medicaid Program- General Information*, <http://www.cms.hhs.gov/medicaidgeninfo/> (modified Apr. 25, 2006).

nursing homes,<sup>87</sup> a significant portion of state budgets goes to Medicaid,<sup>88</sup> and of that, thirty-five percent goes to long-term care.<sup>89</sup> The country has not really developed a viable policy on long-term care, instead relying on individuals to buy long-term care insurance, or to pay for long-term care through private savings, employer health care coverage, or through Medicaid planning to make themselves eligible for Medicaid coverage of nursing home care.

Another issue of health care is decision-making, both the ability to consent to the provision of health care and the refusal of health care, especially end of life decisionmaking and the removal of life-prolonging procedures.<sup>90</sup> Finally, another area of concern regarding health care is the insurance companies' role in deciding patient's treatment. Especially because of the proliferation of managed care, too often treatment decisions are based on whether the insurance company will cover the treatment. This idea has been picked up in the design of Medicare Part D, so depending on the prescription plan (whether under original Medicare or Medicare Advantage), some beneficiaries may not be able to obtain the drug prescribed by their doctors but instead may have to take "equivalents."<sup>91</sup>

#### D. *Long-Term Care—a Quick Look at a Growing and Looming Issue.*

Long-term care usually refers to nursing home care and community care for those elders in need of some level of care or assistance with activities of daily living or ADLs. Activities of daily living (ADLs) are defined as

self-care activities that a person must perform every day  
(eg, *sic*) eating, dressing, bathing, transferring between

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<sup>87</sup> Medicare only provides limited coverage for nursing home care—a maximum of 100 days of coverage following a hospital stay of at least three days for beneficiaries that need *skilled* care. Medicaid's requirements of coverage of nursing home care involve income and need for care—but does not require that the beneficiary need *skilled* care. 42 U.S.C. § 1395(d) (2007); 42 C.F.R. § 409.5 (2007).

<sup>88</sup> According to the National Governors' Association Center for Best Practices, "long term care costs [consume] 35% of all Medicaid spending by states [or (] \$76.5 billion. . . ." Natl. Governors' Assoc. Center for Best Practices, *Long Term Care: Overview*, <http://www.nga.org/portal/site/nga/menuitem.1f41d49be2d3d33eacdcbeeb501010a0/?vgnnextoid=97d84bf37ebdff00VgnVCM1000001a01010aRCRD>.

<sup>89</sup> *Id.*

<sup>90</sup> The body of law dealing with end of life decision-making has been developed over the past thirty years and a comprehensive discussion of that is beyond the scope of this article. Only a mention of the issue will be included in this article.

<sup>91</sup> See e.g. 42 U.S.C. § 1395w-102 (2007), 42 C.F.R. §§ 423.120, 423.566 (2007).

the bed and a chair, using the toilet, controlling bladder and bowel).

ADLs are different than instrumental activities of daily living (IADLS), which are

activities that enable a person to live independently in a house or apartment (eg, (*sic*) preparing meals, performing housework, taking drugs, going on errands, managing finances, using a telephone).<sup>92</sup>

Institutional long-term care, that is, care provided in nursing homes, is one of the most heavily regulated industries in the United States, with federal<sup>93</sup> and state laws and regulations applying to the industry.<sup>94</sup> There is also a substantial body of case law, primarily dealing with resident rights, focusing mainly on the quality of care provided to residents, in particular, falls, bed sores, and death.<sup>95</sup>

A more current issue involves long-term care provided in the community. Because neither Medicare<sup>96</sup> or Medicaid is set up to routinely cover community-based long-term care,<sup>97</sup> our history with this type of long-term care is still somewhat underdeveloped. Most people wish to remain in the community, preferably in their homes, and in many instances, care can be provided cheaper to elders in their homes than in a nursing home. A significant number of elder Americans in fact receive care in their homes.<sup>98</sup> Architects, builders and others are recognizing

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<sup>92</sup> The Merck Manual of Geriatrics, Sec 1, Ch. 4, Assessment Domains (3d ed.), [http://www.merck.com/mrkshared/CVMHighLight?file=/mrkshared/mmg/sec1/ch4/ch4b.jsp%3Fregion%3Dmerckcom&word=activities%20of%20daily%20living&domain=www.merck.com#hl\\_anchor](http://www.merck.com/mrkshared/CVMHighLight?file=/mrkshared/mmg/sec1/ch4/ch4b.jsp%3Fregion%3Dmerckcom&word=activities%20of%20daily%20living&domain=www.merck.com#hl_anchor)

(accessed Mar. 22, 2007).

<sup>93</sup> See e.g., 42 U.S.C. § 1395 (2007); 42 C.F.R. § 483.1 (2007).

<sup>94</sup> See e.g., [www.cms.hhs.gov](http://www.cms.hhs.gov) for federal regulations, policy manuals, agency transmittals.

<sup>95</sup> Usually the reported cases are torts, including negligence and intentional torts or malpractice cases. A large number of cases deal with bed sores and deaths.

<sup>96</sup> See *supra* n. 13, at 81.

<sup>97</sup> *Id.* at 83.

<sup>98</sup> See *supra* n. 13, at 66 (“Home- and community-based care are the most common care arrangements for older Americans. About 70 percent to 80 percent of noninstitutionalized older people receive care from friends and family, often with help from supplementary paid helpers. . . .”) (citing Stone et al., 1987; Miller et al., 1996); *id.* (“Over 65 percent of older noninstitutionalized people depend solely on unpaid help.”) (citing Stone, 2000); *id.* (“For seniors who remain in the community, studies have shown an increase in the use of paid care, especially at higher levels of disability, when informal care was often supplemented by formal care.”) (citing Noelker and Bass, 1989; Norgard and Rodgers, 1997; Liu et al., 2000; Spillman and Pezzin, 2000; Langa et al., 2001); *id.* (“Older people receiving paid care receive, on average, fewer hours of care per week.”) (citing Feder et al., 2000); *id.* at 80 (“Among the nearly 70 percent of the oldest old who needed long-term care in 1995, nearly 70 percent lived in the community.”).

that homes can be built, or retrofitted, in a way that allows people to maximize their independence in their homes as they age, allowing them to stay at home longer, and perhaps avoid the need for nursing home care.<sup>99</sup>

#### V. THE FUTURE—HOW THE U.S. WILL RESPOND<sup>100</sup> TO ISSUES FACING AMERICAN’S ELDERS

Perhaps more critical than where we have been or where we are is where we are going. Elder Law is at a crossroads of sorts, in part because of the enactment of the Deficit Reduction Act,<sup>101</sup> in part because of the aging of the Boomers, in part because of the changes in pension and estate tax laws, and in part because of the number of attorneys who include people with disabilities in their elder law client base. This section of the article will address the future of the law, the future of the practice, and the future of legal education on elder law.

#### *The Future of the Law*

Although without a working crystal ball, it is likely that there will be ongoing changes in certain areas of the law and more dramatic changes in others. Consumer law, for example, may take on more importance, as consumer scams continue to proliferate,<sup>102</sup> while Medicaid planning may become less prominent in the long-term care planning process.<sup>103</sup> The demographics of the United States may direct a shift in social programs. With fewer workers and more retirees, will we be able to sustain Social Security and Medicare at their current levels of

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<sup>99</sup> Various housing options for elders exist in the U.S., but more than a mention are beyond the scope of this article. One area of growing recognition is the concept of Universal Design, that is designing homes that work for all occupants, no matter the occupant’s age or disability. See N.C. State U. College of Design, *Center for Universal Design: Environments and Products for All People*, <http://www.design.ncsu.edu/cud/>.

<sup>100</sup> Perhaps a better title for the section would be *The Future—How the U.S. Will Respond—or Not—to Issues Facing American’s Elders*. There are many instances where no cohesive policy was developed and laws and “solutions” were simply developed piecemeal on an ad hoc basis, if at all. We are seeing some of this occurring now in the changes to Medicare and Medicaid. Rather than being driven by a desire to provide better benefits to elders, the changes are being driven by cost-cutting measures without much, if any, regard to the consequences and impact on America’s elders.

<sup>101</sup> *Deficit Reduction Act of 2005*, Pub. L. 109-171 (Feb. 8, 2006).

<sup>102</sup> This generation, especially those referred to as *The Greatest Generation*, are generally referred to as growing up at a time when a person’s word meant something, therefore they are considered to be more trusting of what someone tells them. The Boomers may not share that trait, which may come in handy in protecting themselves from consumer scams.

<sup>103</sup> The decline of the importance of Medicaid planning, or the need for more complicated plans to achieve Medicaid eligibility is driven in part by the Deficit Reduction Act. Because of the questions surrounding the passage of the Act, it is still not known whether the Act will ultimately be upheld as constitutional.

benefits and coverages, or will we as a nation have to change social policy?

A. *Elder Abuse and Neglect*

It is frequently said that elder abuse is where child abuse and domestic violence was twenty years ago—in terms of effectiveness in dealing with the problem, the laws, the response of courts, law enforcement, APS and other professionals, etc.<sup>104</sup> If that does hold true, then there will be significant improvements in the fight against elder abuse - as long as the federal and state governments devote sufficient funding to do so. Courts need to explore the idea of elder courts<sup>105</sup> to help combat elder abuse more effectively. Under-reporting of elder abuse still appears to be a significant problem, for a variety of reasons. Mandatory reporting, although understandable, does not appear to have been as effective as intended.<sup>106</sup> There has to be sufficient funding for training of law enforcement and other personnel. There needs to be more education of the public regarding why this is a serious crime. Law enforcement and prosecutors need to put as much emphasis on these cases as they do other felonies.

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<sup>104</sup> See generally David A. Wolfe, *Elder Abuse Intervention: Lessons from Child Abuse and Domestic Violence Initiatives*, Chapter 15 from *ELDER MISTREATMENT: ABUSE, NEGLECT, & EXPLOITATION IN AN AGING AMERICA*, The National Academies Press, Richard J. Bonnie and Robert B. Wallace, eds. (2002). “Efforts to understand and deal with abuse of the elderly by family members or other caregivers are reminiscent of where the study of child abuse and woman abuse was 20 years ago.” *Id.* at 501. [http://books.nap.edu/openbook.php?record\\_id=10406&page=501](http://books.nap.edu/openbook.php?record_id=10406&page=501).

<sup>105</sup> The idea of elder court is similar to family court but with broader jurisdiction. The concept would create a division within the circuit courts of the state and all cases where one party is a specific age would be assigned to that division. The advantages of the elder court would be that judges and court personnel could be trained in special needs involving elders, could be schooled in appropriate intervention programs, and more effective punishments and sentencing (for example, if an Alzheimer’s patient kills someone, does he get sent to prison or a facility that specializes in treatment of people with Alzheimer’s?). It would also allow judges to more effectively track those times when one person is involved in multiple cases. For example, if a defendant is scamming a number of elderly people, the same judge (or judges in the division) would be assigned all those cases, so it would be known at sentencing that the defendant has multiple offenses against multiple victims. It would also allow a judge to know about an elder victim of a crime, such as elder abuse, who now is the subject of a guardianship proceeding, brought about in large part because of the abuse.

Although there are a number of speciality courts in existence (family court, domestic violence court, drug court to name a few), there does not seem to be much momentum for the establishment of an elder court division. The closest is the Elder Justice Centers in Hillsborough County and in Palm Beach County. These are not speciality courts, but the Centers work closely with the probate judges, providing, for example, case management or advice to the courts. See Thirteenth Judicial Circuit: Administrative Office of the Courts, *Elder Justice Center*, <http://www.fljud13.org/ejc.htm> (accessed Feb. 23, 2007) and Dept. of Pub. Safety, *Elder Justice*, <http://www.co.palm-beach.fl.us/pubsafety/justice/ElderJustice.htm> (last modified Oct. 6, 2004).

<sup>106</sup> Some mandatory reporters may have concerns regarding liability if the elder ever learns about the reporter’s identity, despite the protections provided by the statutes.

B. *Social Security, Pensions and Income Security –  
You Can't Take That to the Bank!*<sup>107</sup>

“*The sky is falling*”<sup>108</sup> or is it? For the past several years, the Bush administration has claimed that Social Security’s solvency is at risk because of the number of Boomers who will soon be reaching retirement age. Numbers don’t lie, but certainly can be manipulated. It is clear that the worker-to-retiree ratio will drastically drop as the Boomers retire, so at some point Social Security will run at a deficit without changes.<sup>109</sup> Privatization may not be the answer, but at least partial privatization is being offered as one of the solutions. With the passing of the mid-term elections, it is likely that either the Administration or Congress will take up the issue.

The chairman of the Federal Reserve has spoken on the issue of changes to Social Security and Medicare, and described the issues of their fiscal impact as one of “generational equity.” Looked at broadly, to prepare for the aging of America, crucial changes may be necessary to our basic economic habits of savings, work, and consumption. How much of a change will hinge on the way the “burdens of aging” are spread over the generations. Spreading the costs of aging across the various age groups raises issues of “intergenerational equity” and “economic efficiency.”<sup>110</sup> The choices offered by the Chair of the

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<sup>107</sup> The phrase “you can take that to the bank” was used to connote a sure thing—something you can bank on. According to the Random House Historical Dictionary of American Slang, the phrase “take to the bank” was made popular by the main character of the television series *Baretta* and means that is something one can “bank on” or “be absolutely assured of.” Random House Historical Dictionary of American Slang, Vol. 1, A-G at 89 (J.E. Lighter, ed. 2004). The phrase has come to signify reliability or a guarantee, something you can count on. Because of the precarious situation of the sources of retirement income, they are no longer a “sure” thing.

<sup>108</sup> Quote from “Chicken Little,” “a character in a story who is hit on the head by an acorn and believes the sky is falling.” Am. Heritage Dictionary of the English Language, *Chicken Little*, <http://www.bartleby.com/61/72/C0287200.html> (4th ed. 2000).

<sup>109</sup> John Palmer and Thomas saving, *Summary Trust Fund Reports (2005)*, <http://www.ssa.gov/history/reports/trust/trustreports.html#summaries> (accessed Feb. 23, 2007).

The fundamentals of the financial status of Social Security and Medicare remain problematic under the intermediate economic and demographic assumptions. Social Security’s current annual cash surpluses will soon begin to decline and will be followed by deficits that begin to grow rapidly toward the end of the next decade as the baby boom generation retires.

<sup>110</sup> Ben S. Bernanke, Chair, Federal Reserve Board, *The Coming Demographic Transition: Will We Treat Future Generations Fairly?*, <http://www.federalreserve.gov/boarddocs/speeches/2006/20061004/default.htm> (Oct. 4, 2006).

[T]he broader perspective shows clearly that adequate preparation for the coming demographic transition may well involve significant adjustments in our patterns of consumption, work effort, and saving. Ultimately, the extent of these adjustments depends on how we choose—either explicitly or implicitly—to distribute the economic burdens of the aging of our population across generations. Inherent in that choice are questions of intergenerational equity and economic efficiency, questions



Federal Reserve are not happy ones—“[a]s the population ages, the nation will have to choose among higher taxes, less non-entitlement spending, a reduction in outlays for entitlement programs, a sharply higher budget deficit, or some combination thereof.”<sup>111</sup>

Any reform is a hard sale.<sup>112</sup> Social Security is one of the sacred cows and politicians fear repercussions at the polls. Current retirees are unconcerned, because the proposals previously put forward by the Administration wouldn't affect them. The younger generations just entering the work force don't seem to care much, perhaps because of the number of years they have until retirement.<sup>113</sup> Those who need to be the most concerned about the Administration's proposals are the tail-end of the Boomer generation—those who might find their benefits lessened if a reform plan is adopted. Truth be told—we can't continue as we are and something needs to be done, but is a drastic overhaul of the program very likely?

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that are difficult to answer definitively but are nevertheless among the most critical that we face as a nation.

<sup>111</sup> *Id.*

Mr. Bernanke described the impact of his four options this way:

To get a sense of the magnitudes involved, suppose that we tried to finance projected entitlement spending entirely by revenue increases. In that case, the taxes collected by the federal government would have to rise from about 18 percent of GDP today to about 24 percent of GDP in 2030, an increase of one-third in the tax burden over the next twenty-five years, with more increases to follow. . . . Alternatively, financing the projected increase in entitlement spending entirely by reducing outlays in other areas would require that spending for programs other than Medicare and Social Security be cut by about half, relative to GDP, from its current value of 12 percent of GDP today to about 6 percent of GDP by 2030. In today's terms, this action would be equivalent to a budget cut of approximately \$700 billion in non-entitlement spending.

Besides tax increases, spending cuts, or reform of the major entitlement programs, the fourth possible fiscal response to population aging is to accommodate a portion of rising entitlement obligations through increases in the federal budget deficit. The economic costs and risks posed by large deficits have been frequently discussed. . . . I will only observe that, among the possible effects, increases in the deficit (and, as a result, in the national debt) would shift the burden of paying for government spending from the present to the future. Consequently, the choices that fiscal policy makers make with respect to these programs will be a crucial determinant of the way the economic burden of an aging population is distributed between the current generation and the generations that will follow.

<sup>112</sup> The Federal Reserve Chairman described the need for reform as one of fairness in determining which generation should bear the costs of the population's aging. Ben S. Bernanke, Chair, Federal Reserve Board, *The Coming Demographic Transition: Will We Treat Future Generations Fairly?*, Remarks before The Washington Economic Club, Washington, D.C. (Oct. 4, 2006), <http://www.federalreserve.gov/boarddocs/speeches/2006/20061004/default.htm> (“At the heart of the choices our elected representatives will have to make regarding the distribution of these costs across generations will be an issue of fairness: What responsibility do we, who are alive today, have to future generations? What will constitute ethical and fair treatment of those generations, who are not present today to speak for themselves? . . . [I] suspect that many people would agree that a fair outcome should involve the current generation shouldering at least some of that burden, especially in light of the sacrifices that previous generations made to give us the prosperity we enjoy today.”) *Id.*

<sup>113</sup> Or, perhaps, the lack of interest stems from their belief that Social Security won't be there for them.

Pensions will be different in the future. The shift is already underway, changing pensions from defined benefit plans to defined contribution plans.<sup>114</sup> Although new laws will hopefully shore up those underfunded pension plans, employees are going to need to rely less on employer plans to fund their retirements and will need to save more. Employers will continue to look at benefits packages for current and retired employees as a way to cut cost and maximize profits.

That leaves the third leg of the metaphorical three-legged stool—private savings, but that won't save the day. People are struggling with increasing costs of health care and daily living expenses. As the housing market skyrocketed, many homeowners found their home values increasing, along with their taxes and insurance. Although the housing market may have cooled off, homeowners are still facing increased taxes and property insurance rates.<sup>115</sup> There is just a finite amount of money and people may not be saving enough to fund their retirements<sup>116</sup> or are having to spend a significant amount on health care costs. Unless the future generations change their spending and savings ways,<sup>117</sup> we may

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<sup>114</sup> *Pension Protection Act of 2006*, Pub. L. 109-280 (Aug. 17, 2006) (generally, enacting more burdensome requirements for defined benefit plans, and providing incentives for defined contribution plan sponsorship).

<sup>115</sup> In Florida, for example, many homeowners' insurance companies are either drastically increasing premiums or pulling out, making it very difficult for homeowners to find insurance at all, and forget trying to find "affordable" insurance.

See generally Fed. Interagency Forum on Aging Related Statistics, *Older Americans Update 2006: Key Indicators of Well-Being: Economics 10*, <http://www.agingstats.gov/update2006/Economics.pdf> (accessed Feb. 23, 2007) discussing housing expenditures and noting that "[w]hen housing expenditures comprise a relatively high proportion of total expenditures, less money is available for health care, savings, and other vital goods and services."

<sup>116</sup> See e.g., Helen Huntley, *Think You Have a Good Game Plan for Retirement Expenses? Think Again*, St. Petersburg Times (Sept. 3, 2006).

<sup>117</sup> One of the options put forth by the Federal Reserve Chairman was to increase individual savings. The Federal Reserve has looked at how to encourage personal savings but has yet to find the best way to make that happen:

A broad-based increase in household saving would benefit both the economy and the millions of American families who currently hold very little wealth. Unfortunately, many years of concentrated attention on this issue by policymakers and economists have failed to uncover a silver bullet for increasing household saving. One promising area that deserves more attention is financial education. The Federal Reserve has actively supported such efforts, which may be useful in helping people understand the importance of saving and to learn about alternative saving vehicles. Psychologists have also studied how the framing of alternatives affects people's saving decisions. For example, studies suggest that employees are much more likely to participate in 401(k) retirement plans at work if they are enrolled automatically—with a choice to opt out—rather than being required to actively choose to join. The pension bill recently passed by Congress and signed by the President included provisions to increase employers' incentives to adopt such opt-out rules; it will be interesting to see whether such rules are adopted and, if so, how effective they are in promoting employee saving.

Ben S. Bernanke, Chair, Federal Reserve Board, *The Coming Demographic Transition: Will We Treat Future Generations Fairly?*, <http://www.federalreserve.gov/boarddocs/speeches/2006/20061004/default.htm> (Oct. 4, 2006).

see some serious issues – whether people will be able to afford to retire<sup>118</sup> or whether they will have to work past the typical retirement age before retiring.<sup>119</sup> Usually, once an individual retires, the individual may experience a shift in income or savings.<sup>120</sup> The shift may be an upward shift or a downward shift, in large part dependent on cost of living, terms of retirement plans, and investment portfolio for savings. In cases where the costs of daily living outpace the increase in cash flow, over time, an individual will experience a decline in savings, and perhaps, income.

Decreases in income can best be illustrated by those current retirees who receive Social Security. The increases in the cost of health care, in particular, Medicare premiums and deductibles are greater than the annual cost of living adjustment (“COLA”), meaning that Social Security recipients are actually losing ground for every year that the health care costs increase more than the Social Security COLA. It stands to reason then, for at least some retirees, that their incomes and their savings will diminish with each passing year. There are variables that can

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<sup>118</sup> There is some evidence that people may have to continue working past “normal” retirement age in order to fund their retirement at the desired standard of living. See, Alicia H. Munnell and Pamela Perun, *Center for Retirement Research at Boston College, Issues in Brief: An Update on Private Pensions*, [http://www.bc.edu/centers/crr/ib\\_50.shtml](http://www.bc.edu/centers/crr/ib_50.shtml) (Aug. 27, 2006).

The key finding is that total pension coverage has remained stagnant while the nature of coverage has continued to shift to 401(k) plans. These developments, coupled with declining levels of earnings replacement under Social Security, mean that future retirees will have to work longer if they want to maintain their pre-retirement standard of living in retirement.

*Id.*

<sup>119</sup> Alicia H. Munnell, Marris Buessing, Mauricio Soto, and Steven A. Sass, *Center for Retirement Research at Boston College, Issues in Brief: Will We Have to Work Forever?*, [http://www.bc.edu/centers/crr/wob\\_4.shtml](http://www.bc.edu/centers/crr/wob_4.shtml) (Aug. 2006).

One powerful antidote to reductions in retirement income is to work longer. Working directly increases people’s current income; it avoids the actuarial reduction in Social Security benefits; it allows their 401(k) plans to grow; and it postpones the day when they start drawing down their pension accumulations or other retirement saving. The question is how much longer people will need to work . . . and . . . delaying retirement by about two years can have a major impact on retirement security for those with significant 401(k) assets; households that depend solely on Social Security, however, would have to extend their work lives by more than three and a half years to achieve similar gains.

*Id.*

According to the MetLife Survey, Boomers are worried about outliving their assets:

When it comes to having enough money in retirement, aging Boomers (age 55-59) are the least confident of the bunch. About 44% are not confident they will have enough money to live comfortably past age 85. Those age 60-65 and 66-70 are considerably more confident (69%) on the issue of retirement security, although their confidence may be unfounded.

David DeLong & Assoc., Zogby Intl., MetLife Mature Mkt. Inst.®, *Living Longer, Working Longer: The Changing Landscape of the Aging Workforce – A MetLife Study Findings from a National Survey of Aging Workers Who Remain in – Or Return to – the Workplace, How They Fare, And Why* 18, <http://www.metlife.com/WPSAssets/93703586101144176243V1FLivingLonger.pdf> (Apr. 2006).

<sup>120</sup> See e.g., Barbara A. Butrica, *How Economic Security Changes During Retirement*, Center for Retirement Research at Boston College, CRR WP 2007-6 (Feb. 2007), <http://www.bc.edu/crr>.

drastically affect a retiree's financial well-being, not the least of which is a change in health status.<sup>121</sup> The impending retirement of the leading edge of the Boomers heralds a worsening problem, as the Boomers as a group are projected to have a drop in their post-retirement standard of living.<sup>122</sup> Of course, having some people work longer rather than retire has benefits for their income security and the economy.<sup>123</sup> Although some may benefit from continued working, others may not.<sup>124</sup>

### C. Health Care

Medicaid planning has already been significantly affected by the passage of the Deficit Reduction Act.<sup>125</sup> That, coupled with the "repeal"

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<sup>121</sup> Barbara A. Butrica, *How Economic Security Changes During Retirement* 15, Center for Retirement Research at Boston College, CRR WP 2007-6 (Feb. 2007).

<sup>122</sup> Barbara A. Butrica, *How Economic Security Changes During Retirement* 9-10, Center for Retirement Research at Boston College, CRR WP 2007-6 (Feb. 2007). After retirement, the Boomers are predicted to only replace 93% of their earnings. *Id.* at 10.

<sup>123</sup> Ben S. Bernanke, Chair, Federal Reserve Board, *The Coming Demographic Transition: Will We Treat Future Generations Fairly?*, <http://www.federalreserve.gov/boarddocs/speeches/2006/20061004/default.htm> (Oct. 4, 2006).

Another response to population aging is to adopt measures that encourage participation in the labor force, particularly among older workers. In the near term, increases in labor force participation would raise income; some of this income would be saved and would thus be available to augment the capital stock. In the long run, higher rates of labor force participation, particularly by those who would otherwise be in retirement, could help to offset the negative effect of population aging on the share of the population that is working.

To some extent, increased labor force participation by older workers may happen naturally. Increased longevity and health will encourage greater numbers of older people to remain longer in the workforce. And slower growth in the labor force will motivate employers to retain or attract older workers--for example through higher wages, more flexibility in work schedules, increased training directed toward older workers, and changes in the retirement incentives provided by pension plans.

*Id.*  
<sup>124</sup> Esteban Calvo, *Center for Retirement Research at Boston College, Work Opportunities for Older Americans, Issue Brief, Does Working Longer Make People Healthier and Happier?*, [http://www.bc.edu/centers/crr/issues/wob\\_2.pdf](http://www.bc.edu/centers/crr/issues/wob_2.pdf) (Feb. 2006).

While working longer seems beneficial for most people, it will likely have negative consequences for some. The type of job seems to be a critical factor. Undesirable jobs can wash out the potential favorable effects of work. Another critical factor is the opportunity to continue working. Older workers may be *willing* to prolong paid work, but, in order to find a job, they need to be *able* to work and have a real demand for their labor. Policymakers need to consider these factors when evaluating proposals to keep people in the labor force.

These findings suggest interesting areas for future research. For example, an increase in the early retirement age reduces the ability of people to voluntarily decide their labor force participation. Less control in the work/retirement decision could have an adverse impact on the well-being of older individuals. . . . Even though work at older ages seems beneficial for many, the benefits may decrease, or stop increasing, after a certain age or amount of time worked per year. (citations omitted).

*Id.*  
<sup>125</sup> *Deficit Reduction Act of 2005*, Pub. L. No. 109-171 (Feb. 8, 2006). Because the House and Senate did not enact identical versions of the bill, several lawsuits were filed challenging the constitutionality of that law. States are moving forward with implementation of the DRA's

of the estate tax,<sup>126</sup> makes long-term planning less appealing to clients who may be less likely to seek services of elder law attorneys.

Medicare is changing as well. Part B premiums will be “means-tested,” with those above a certain income paying more than those below that income level.<sup>127</sup> Although much is made about the long-term viability of Social Security, Medicare must not be forgotten.<sup>128</sup> Although Part B is more viable because of the correlation of expenses to costs and the ability to increase premiums each year, Part A is more vulnerable because of the way it is funded, but both programs are at serious risk.<sup>129</sup> Prescription costs continue to increase and Part D only provides a limited amount of coverage.<sup>130</sup>

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provisions, but a lot of uncertainty remains. How some provisions will be applied by the states remains to be seen. Many states have to pass implementing legislation, and their timetables for doing so are not uniform. It is also unclear which date will be the effective date in each state and whether the states will apply the five-year look-back period on the date of the passage of the law (February 8) or whether they will apply it effective on the passage of their implementing statutes (where needed).

In an opinion dismissing one challenge to the DRA was a statement that the House Clerk acknowledged that the House and Senate did not pass identical versions of the bill.

the House leadership and Clerk of the House subsequently have acknowledged in letters and other statements that the vote was upon the engrossed bill containing the erroneous 36-month provision. . . . (*citations omitted*).

*Public Citizen v. Clerk*, 451 F. Supp. 2d 109 (D.D.C. 2006).

<sup>126</sup> At this writing the repeal sunsets in 2011 absent action from Congress making the repeal permanent. There were efforts in this last Congress to do so, but those efforts failed, perhaps because it was an election year.

<sup>127</sup> For the first time, starting in 2007, Medicare beneficiaries will pay different amounts for their Part B premiums, based on their incomes. For those beneficiaries whose income is less than or equal to \$80,000 (or file jointly, less than or equal to \$160,000), the premium will be \$93.50. The increased premiums for 2007 are \$105.80 for those individuals filing a tax return with income greater than \$80,000 and less than or equal to \$100,000 (or jointly, greater than \$160,000 and less than or equal to \$200,000), \$124.40 for those individuals filing a tax return with income greater than \$100,000 and less than or equal to \$150,000 (or jointly, greater than \$200,000 and less than or equal to \$300,000), \$142.90 for those individuals filing a tax return with income greater than \$150,000 and less than or equal to \$200,000 (or jointly, greater than \$300,000 and less than or equal to \$400,000), and \$161.40 for those individuals filing a tax return with income greater than \$200,000 (or jointly, greater than \$400,000). 71 Fed. Reg. 54,666 (Sept. 18, 2006); *corrected by* 71 Fed. Reg. 55,480 (Sept. 22, 2006).

<sup>128</sup> *See supra* n. 83.

<sup>129</sup> *Id.*

<sup>130</sup> John Palmer and Thomas Saving, *Summary Trust Fund Reports (2005)*, <http://www.ssa.gov/history/pdf/tr05summary.pdf>.

The change in the outlook is equally stark for SMI, where Part B is now joined by the new Part D Prescription Drug Benefit. Annual income to the SMI Trust Fund is always projected to be sufficient to cover costs, since general revenue transfers and beneficiary premiums are automatically adjusted each year to achieve this outcome. But the required rate of growth of such revenues is far more than previously anticipated. With the retirement of the baby boom generation, SMI costs (as a percent of GDP) are now projected to nearly quadruple from 1.2 to 4.6 over the next 30 years and to continue to increase rapidly thereafter. As a result, total Medicare expenditures are now projected to increase from 2.6 to 5.7 percent of GDP by 2024, when Medicare expenses will first exceed those of Social Security.

*Id.* at 16.

Both Social Security and Medicare are projected to be in poor fiscal shape, though Social Security poses a far more manageable problem—in analytic and dollar terms—than does Medicare.

With health care costs continuing to increase, there will be a growing problem with people paying for health care.<sup>131</sup> In fact, this may dictate how long people continue to work before retiring.<sup>132</sup> People may have to make choices between health care and other financial obligations.

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The fiscal problems of both programs are driven by inexorable demographics and, in the case of Medicare, inexorable health care cost inflation, and are not likely to be ameliorated by economic growth or mere tinkering with program financing.

Trustees of the Social Security and Medicare Trust Funds, *A Summary of the 2006 Annual Social Security and Medicare Trust Funds Reports*, <http://www.ssa.gov/OACT/TRSUM/tr06summary.pdf> (2006).

One ignominious provision of Part D is the coverage gap, or the infamous “donut hole” where the beneficiaries continue to pay premiums but have no coverage for their prescriptions until they accumulate enough expenses to reach the other side of the “gap”. Many elders are now in the gap, and are learning the hard way that “donut hole” is not just a snack food.

<sup>131</sup> A recent study from the Commonwealth Fund found that people are having increasing problems paying for health care. Cathy Schoen, Sabrina K. H. How, Ilana Weinbaum,

John E. Craig, Jr., and Karen Davis, Commission on a High Performance Health System, the Commonwealth Fund, *Public Views on Shaping the Future of the U.S. Health System*, [http://www.cmwf.org/usr\\_doc/Schoen\\_publicviewsfuturehltsystem\\_948.pdf](http://www.cmwf.org/usr_doc/Schoen_publicviewsfuturehltsystem_948.pdf) (Aug. 2006)

Affordability of care and insurance is of growing concern. In addition to concerns about costs, a high proportion of adults has serious problems getting timely care and reported spending time on paperwork and having disputes related to medical bills and insurance. . . .

- Nearly two of five adults (38%) reported serious problems paying for their own or their family’s medical care. A similarly high proportion said it (*sic*) has had difficulty paying for health insurance.

. . . .

- Overall, more than two-thirds of respondents (69%) noted that at least one of the aforementioned issues was a serious problem in the previous two years.

- Half of middle-income (\$35,000–\$49,999 annually) and lower-income (less than \$35,000 annually) families said they have had serious problems paying for care in the past two years.

- With the median U.S. household income at \$44,000, the findings indicate that more than half of all households are experiencing stress when paying for medical care.

- A similarly high proportion of middle- and lower-income adults reported difficulties paying for health insurance.

- Among these middle- and lower-income groups, more than one of four described cost concerns are “very serious.”

- Affordability is a now a concern at even higher-income levels. One-third of adults with annual incomes between \$50,000 and \$74,999 reported serious problems in paying for care.

*Id.* at 13-15.

<sup>132</sup> Working longer could be looked at as an equation with three parts: the need, the desire and the ability to work longer. A person’s health may negatively affect the person’s ability and to some extent, desire, but not necessarily the person’s need. In fact, for some poor health may be a reason the person needs to work longer—in order to have income to cover those costs not otherwise covered by health insurance or for the costs of health insurance. Although a need may exist, a person may no longer have the ability. See generally, Alicia H. Munnell & Jerilyn Libby, Center for Retirement Research at Boston College, *Issues in Brief: Will People Be Healthy Enough To Work Longer?* (Mar. 2007).

#### D. Long-Term Care

America has failed to have any effective policy on long-term care, instead dealing with the issue piecemeal. Medicare only pays for skilled care, while Medicaid pays for long-term care, but primarily that care is provided in a nursing home rather than in a community setting.<sup>133</sup> Nursing home care continues to be problematic, with quality and compliance spotty in many homes. Most Americans would prefer to remain in their homes and receive care there, but lack the resources and savings to pay for it. Although long-term care insurance is offered as the solution for paying for nursing home care, insufficient numbers of Americans have adequate long-term care coverage. That, coupled with the way the policies' premiums and coverages are determined, oftentimes leaves the insured with little needed coverage.<sup>134</sup> With the demographic data, sheer numbers, longevity and chronic health conditions, it is clear that the United States needs to take a hard look at how health care is funded and provided. Although rationing currently exists, subtly, through pre-existing condition exclusions, co-pays, and gatekeepers, to name a few, we may see this country headed soon to a time where health care is denied a person based on age *and* ability to pay. Although some advocate for more patient financial responsibility<sup>135</sup> that is not a path that can be taken overnight. People must be given notice of the financial responsibility and the opportunity to save for it.<sup>136</sup>

The moral test of government is how that government treats those who are in the dawn of life, the children; those who are in

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<sup>133</sup> Medicaid may cover care at home or in the community through a waiver program or demonstration project. Those are not without pitfalls, and may be put forth more as a way for a state to save money than to provide better care to the elder. For a commentary on the problem with home and community based care funded by Medicaid. See Edward C. King, Executive Director, National Senior Citizens Law Center, The Commonwealth Fund, *Rethinking Long-Term Care*, [http://www.cmwf.org/publications/publications\\_show.htm?doc\\_id=331767](http://www.cmwf.org/publications/publications_show.htm?doc_id=331767) (Dec. 2005) (expressing concerns about the lack of quality oversight and the ability of the states to cover less services).

<sup>134</sup> See e.g., Consumer Reports, *Do You Need Long-Term Care Insurance?*, [http://www.consumerreports.org/cro/personal-finance/longterm-care-insurance-1103/overview/index.htm?resultPageIndex=1&resultIndex=1&searchTerm="long-term%20care"](http://www.consumerreports.org/cro/personal-finance/longterm-care-insurance-1103/overview/index.htm?resultPageIndex=1&resultIndex=1&searchTerm=) (Nov. 2003).

<sup>135</sup> See e.g., John F. Derr, R.Ph., The Commonwealth Fund, *Financing Health Care for An Aging Population*, [http://www.cmwf.org/publications/publications\\_show.htm?doc\\_id=331494](http://www.cmwf.org/publications/publications_show.htm?doc_id=331494) (Dec. 2005).

<sup>136</sup> A different course of action is not a solution unless it is viable. Given the problems that American elders currently have with saving and meeting ever-increasing expenses of daily living, shifting greater financial responsibility for the cost of health care onto the beneficiary will have a domino effect, with elders no longer able to afford needed health care, taxes and insurance on their homes, utilities, etc.

the twilight of life, the elderly; and those who are in the shadows of life - the sick, the needy and the handicapped.<sup>137</sup>

Doesn't look like we're doing too good meeting this test.

### *The Future of the Practice*

Over the years, the number of attorneys holding themselves out as elder law attorneys has grown steadily. NAELA<sup>138</sup> now has over 5,000 members<sup>139</sup> and the management of NAELA predicts continued growth. NAELA recently changed its mission statement, logo, and tag line to reflect the representation of people with special needs.<sup>140</sup> In an interview with the executive director<sup>141</sup> and managing director,<sup>142</sup> they were confident that NAELA and concomitantly, the elder law practice, would continue to grow, because they expect an increasing emphasis on issues affecting seniors, and an increasing focus on the numbers and needs of seniors.<sup>143</sup>

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<sup>137</sup> Hubert Horatio Humphrey, Vice President of the United States (1911-1978), *Eminently Quotable*, <http://www.buzzflash.com/articles/perspectives/quotes> (Aug. 23, 2006).

<sup>138</sup> See *supra* text accompanying n. 17.

<sup>139</sup> See *supra* n. 30.

<sup>140</sup> The NAELA "tag line" is "Leading the Way in Special Needs and Elder Law." National Academy of Elder Law Attorneys, *Leading the Way in Special Needs and Elder Law*, <http://www.naela.org> (visited August 27, 2006). See *supra* n. 24.

<sup>141</sup> Susan McMahon, Esq. is Executive Director for the National Academy of Elder Law Attorneys and Vice President of the Kellen Company in Tucson, Arizona. From 1992 to 2004 she was In-house Council and Director of Advocacy for Ray Graham Association for People with Disabilities. Starting in 1975, Susan directed Ray Graham Association in many managerial roles, including Vice President of Operations. She is a founding member, past president, and past director of the National Guardianship Association, the National Guardianship Foundation, and the Illinois Guardianship Association. She holds a J.D. from John Marshall Law School, Chicago, Illinois, and a B.S. from MacMurray College, Jacksonville, Illinois, with majors in Psychology and Special Education (EMH & TMH Certification).

<sup>142</sup> Deborah Barnett was Vice President of Management Plus, Ltd, a Tucson, Arizona based association management company since April 1, 1991. Management Plus was acquired by The Kellen Company in January 2004. Debbie began her career with Management Plus in 1986 and worked as both an employee and an independent contractor in the years leading up to her partnership with Laury Adsit Gelardi. At the time of the merger, Management Plus had 18 employees and 11 full-service client associations. Debbie serves as Managing Director for the National Academy of Elder Law Attorneys and Executive Director of the National Elder Law Foundation. She oversees client finances and budgets, web site development and implementation, and certification programs, as well as the day-to-day operations of the company. Prior to joining Management Plus, Debbie worked for the Tucson Board of Realtors as Director of the Multiple Listing Service; and Lawyers Title Agency of Arizona as an escrow officer and branch manager, and marketing representative. She has a Master's Degree in Business Administration from the University of Phoenix and a Bachelor of Arts Degree in Communications from the University of California, PA.

<sup>143</sup> Telephone interviews with Susan McMahon, Exec. Dir. for Natl. Acad. of Elder L. Attys. and Vice Pres. of Kellen Co., and Deborah Barnett, Managing Dir. for Natl. Acad. of Elder L. Attys. and Exec. Dir. of the Natl. Elder L. Found. (July 18, 2006).



The plan for NAELA is to expand its education.<sup>144</sup> The leadership believes that as NAELA moves more into the areas of special needs and disability law, more attorneys will join NAELA. NAELA has found that their web site's listing of member names is proving popular with consumers who are finding elder law attorneys through the NAELA web site.<sup>145</sup>

Elder law attorneys are going to need to learn more about issues surrounding health care because they are needed to help clients obtain and navigate the health care system.<sup>146</sup> Technology, not just in the law office, but in clients' homes, and in the provision of health care, may drive issues and make new options available to clients.<sup>147</sup> Technology

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<sup>144</sup> NAELA will offer three levels of programs: basic, intermediate and advanced, as well as staff programming. They expect that the basics programs will draw new attorney members. As well, NAELA is adding more telephone CLEs and has entered into a relationship with ALI-ABA. *Id.*

<sup>145</sup> Because more consumers are finding attorneys through the NAELA web site, management believes that as that word gets out (that consumers are using NAELA to find attorneys) more attorneys will join NAELA. NAELA has also rolled out a public relations and branding campaign. *Id.*

<sup>146</sup> Telephone interview with Charlie Robinson, Esq., Elder L. Atty. and nationally known futurist about the law practice. (July 18, 2006).

<sup>147</sup> *Id.* Mr. Robinson used the example of robotic in-home caregivers as an example of how technology might provide new options to clients.

The idea of robotic care-givers and other technological advances to provide care-giving is not that far away. See AARP Global Aging Program Idea Exchange Series, *Aging in the 21st Century – Emerging Technologies Around the World A Conversation with Russell Bodoff*, [http://www.aarp.org/research/international/events/jan30\\_06\\_bodoff.html](http://www.aarp.org/research/international/events/jan30_06_bodoff.html) (Feb. 2006).

Russell Bodoff serves as the Executive Director of the Center for Aging Services Technologies (CAST), [and] spoke at AARP about the potentials of technology to improve lives and societies in an aging world, how it can be used to help older people live healthier, more independent and more active lives, and how it can help alleviate the costs of care to families, care systems and public finances. [He] . . . described CAST's work and highlighted best practices and examples from the United States and internationally for effectively using technology to help people age in place and to improve care facilities.

Mr. Bodoff foresees the use of technology to provide or augment in-home care.

Technology can be used to create "caregiver networks," that enable people to age in the comfort of their homes, safely and actively. Older people can be equipped with wireless health devices that consistently monitor vital signs, remind them to take medications, and record activity rates. The data collected can be networked to personal computers that store and send reports, signals and alerts to caregivers, physicians and families. The information creates important data logs that can be tracked and analyzed, providing "caregiver networks" with accurate and timely information about the health and safety of their patients and family members. Such systems can allow children of older parents to remain mobile, yet remain engaged with, and even more aware of the conditions of their parents. At the same time, these systems can allow older people to remain independent, mitigate concerns they may have of over burdening their caregivers, and provide crucial information to physicians that can help with early detection and prevention of physically and financially costly medical conditions.

In addition to improving life at home, new technologies are being tested and incorporated into care facilities. Devices can enable physicians to interact with and observe their patients in separate locations, sometimes thousands of miles away. Robotic nurses have been tested in long-term care facilities and have been greeted enthusiastically by residents. Technology has enormous potential to change the way health care is provided, as well as the way people manage their own care, having a positive impact on cost and quality of care.

has a role in various facets of aging beyond the provision and monitoring of health care. Innovations are being made in communications, working, driving and support for those with cognitive deficits.<sup>148</sup> But how will the clients pay for these new treatments if Medicare does not cover it, illustrating one matter complicating the practice, and clients' lives—the intersection between politics, social policy, and funding. Sometimes those are contradictory rather than complimentary, to the point of being ludicrous.<sup>149</sup>

In order for elder law to continue its growth trajectory, there needs to be a better uniform definition of what is meant by elder law.<sup>150</sup> Interestingly, some attorneys will define it by the direction in which their

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Mr. Bodoff believes the U.S. is lagging behind in developing this potential:

[M]any in the U.S. government are not focusing adequate attention on shaping regulations and strategies that foster its optimal implementation . . . [and] many U.S. policies were written post-technology and need revision if technology is to be used to its full potential. . . . [M]any countries are way ahead of the United States in research, pilot and market stages of high-tech care products. For example, a South Korean company is marketing a mobile phone, which doubles as a diabetic monitor. . . . A robotic teddy bear with a limited vocabulary is being tested in Japan to provide companionship and therapy to long-term care patients. Because the bear can converse with the patient, it can be designed transmit conversations back to caregivers, who can monitor voice patterns and cognitive skills of the patient. Japan is also testing a home-care robot . . . [w]ith an extensive vocabulary and built-in mobile phone and camera the robot provides companionship and allows people to age at home safely because family members can view the home and interact with the older person through the lens of the robot . . . [T]he Dutch . . . use . . . technology in care facilities, including extensive use of telehealth networks and electronic monitoring devices.

*Id.*

<sup>148</sup> An entire volume of *Generations* (the Journal of the American Society on Aging) was devoted to technological innovations and their applications to aging. The articles discuss using technology for health care at home, monitoring home health care, driving, working, communications and support for cognitively impaired elders. *Innovations in Technology and Aging*, *Generations*, J. Am. Socy. on Aging, 6-69 (Summer 2006), <http://www.generationsjournal.org/generations/gen30-2/toc.cfm>.

<sup>149</sup> Mr. Robinson used the example of the emphasis that conservative members of Congress and the Florida legislature put on the right to life, but they don't provide increasing funding. For example, many politicians voted for the state and federal variations of "Terri's [Schiavo] law" but are not proposing or voting for increased funding to provide care for patients on life-prolonging procedures. Telephone interview with Charlie Robinson, Esq., Elder L. Atty. and nationally known futurist about the law practice. (July 18, 2006).

<sup>150</sup> Email Interview with Stu Zimring, Esq. (Aug. 27, 2006) who describes his definition as a broad, very holistic, communitarian approach, defining it in terms of assisting seniors and their families, primarily in helping them age in place whenever possible. I do not and have never restricted the definition to "public benefit planning". For those who do, the answer is Elder Law/public benefit planning is probably doomed since the opportunities to do this kind of planning will become increasingly difficult or (I should live so long) there will be a national healthcare system in place that makes such planning unnecessary. For those of us who define the field broadly, I see it as nothing but a growth area simply based on demographics—the boomers are becoming the next client wave and their parents are the current client wave. The parents are being driven (sometimes literally) to our offices by their children—this generation would not necessarily have sought out legal assistance—their children are more savvy. Hence, one generation will drive two client generations through the door. Add to this the 1<sup>st</sup> cousin to elder law, SNTs or disability planning in general, and the potential growth curve is even greater.

practices have grown and will focus the definition by the types of cases they handle.<sup>151</sup>

In reality, as states try to control costs, fewer Medicaid dollars will be available, waivers will limit the services covered, and the laws will be amended to foreclose more planning options.<sup>152</sup> However, people will still be people—will need to plan and will not always plan ahead. Clients will still need wills, advance directives, trusts, powers of attorney and tax planning. Although planning for public benefits eligibility may diminish, more sophisticated planning will be needed.<sup>153</sup> Those individuals with disabilities will need to be helped, as their parents-caregivers age and die.<sup>154</sup> People in need of long-term care will find it more challenging, because of the very demographics discussed earlier. There will be a need for more assistance in finding what benefits and assistance are available, and the need to navigate the application process.<sup>155</sup> Contributing to the need for representation will be the very characteristics of the Boomer generation.<sup>156</sup>

The quick and easy volume Medicaid planning practice is unlikely to continue to exist. Instead, there will be a greater need for the knowledge and expertise of elder law attorneys to customize the planning for the individual client's needs. "[E]lder law will expand in lawyers' (and the public's) consciousness to include more guardianship, more non-tax-driven estate planning, and more consultative practices helping seniors deal with a variety of stressors and difficulties in their lives--like dealing with grandchildren, spendthrift children, pets and property, or

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<sup>151</sup> For example, many attorneys who consider themselves elder law attorneys do almost exclusively Medicaid planning. Limiting the scope of their practices to such a narrow field leaves them vulnerable to the vagaries of practicing law in an area driven so heavily by politics and public policy. The enactment of the DRA is a clear example of the pitfall of doing so. As Mr. Zimring said in his email interview "I do not and have never restricted the definition to "public benefit planning". For those who do, the answer is Elder Law/public benefit planning is probably doomed since the opportunities to do this kind of planning will become increasingly difficult or (I should live so long) there will be a national healthcare system in place that makes such planning unnecessary."

*Id.*

<sup>152</sup> An example is the Deficit Reduction Act of 2005, Pub. L. 109-171.

<sup>153</sup> In Stu Zimring's view, "[p]lanning in advance through [long term care] insurance, annuities, proper document drafting (i.e. crafting the documents to deal with life time needs rather than simply tax sensitive generational shifting) will become more important." Email Interview with Stu Zimring (Aug. 27, 2006).

<sup>154</sup> "[T]here is a significant population of persons with disabilities who, for one reason or another, have never been on the radar screen before – they're taken care of at home by a parent(s) who is now aging or ill or both and planning to take care of them will be a significant new component of the planning process." *Id.*

<sup>155</sup> Email Interview with Robert Fleming (Aug. 30, 2006).

<sup>156</sup> Robert Fleming describes those characteristics as "[d]emographics—plus the impatience, sense of entitlement and relative procedural sophistication of the boomer generation." *Id.*

recovering from scams and exploitation, or navigating an increasingly fragmented and balkanized benefits system.”<sup>157</sup>

### *The Future of Elder Law in Legal Education*

There seems to be a finite number of law schools offering elder law, although the number may increase slightly from time to time.<sup>158</sup> The core legal education provided appears to be either through an elder law clinic or a basic elder law survey course. With the increasing number of elders, why aren't more law schools increasing their elder law offerings?

To answer that question, three law school deans were interviewed, one without an elder law program,<sup>159</sup> one with a current elder law program,<sup>160</sup> and a former Dean from University of Georgia School of Law and University of Utah School of Law.<sup>161</sup>

Dean Spurgeon found that two of his schools, Georgia and Utah, did not have an elder law program until he advocated for them. Even though he is no longer at those schools, they continue to offer some course on elder law.<sup>162</sup> Dean Spurgeon is now in the process of

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<sup>157</sup> *Id.* Email interview with Robert Fleming (August 30, 2006). As far as the future of long-term care planning, Mr. Fleming stated he thought that it “will continue to be hot, though the big, easy-money work may be replaced by a higher-volume practice with fewer high-income (for the lawyer) options available in each case.” *Id.*

<sup>158</sup> See the listing of law schools offering elder law at

<http://www.law.stetson.edu/excellence/elderlaw/surveyoptions.asp>.

<sup>159</sup> Dean I. Richard Gershon, Dean of Charleston, South Carolina Law School. Dean Gershon was also the Dean of Texas Wesleyan Law School which also did not have an elder law program. Dean Gershon is planning to offer a course in elder law at his law school, hopefully as early as Spring 2007. Dean Gershon did teach at Stetson Law School, the school of the author's elder law program, so he is familiar with elder law courses.

<sup>160</sup> Dean Darby Dickerson, Dean of Stetson University College of Law, the school of the author's elder law program.

<sup>161</sup> Dean Ned Spurgeon. Dean Spurgeon has been Dean of the law school at Georgia and Utah, and is now on the faculty at McGeorge Law School. Dean Spurgeon taught elder law at Georgia, and co-taught a course at Utah. He is now creating a new course at McGeorge that will cover elder law and health law (McGeorge had a traditional elder law course previously taught by Professor Jan Rein).

<sup>162</sup> Dean Spurgeon did note that he had the advantage of being Dean when he advocated for the addition of elder law courses to their curriculums. Neither school is using a regular faculty member to teach elder law. Since he left Georgia, they have used an adjunct to teach. First they continued to offer a survey course, but he believes they are now offering an elder law clinic through an adjunct. At Utah, the elder law course is offered every other year with an adjunct (Dean Spurgeon co-teaches if he's available). On the off-year, Utah offers a non-elder law seminar that includes a fundamental topic that affects elders, as well as other segments of the population. Telephone Interview with Dean Ned Spurgeon, faculty at McGeorge L. Sch. (July 25, 2006).

developing a health law and policy course that will combine the health law aspects of aging with a traditional health law curriculum.<sup>163</sup>

If there is such an increase in the number of people who fall into the classification of elderly, why aren't law schools following the demographic trend, and more offering elder law? Although the practicing bar perhaps has recognized the field is growing, the law school community may not. Dean Spurgeon's view is that Deans recognize it as a growth area,<sup>164</sup> but it has not achieved recognition as a "fully-respected academic discipline."<sup>165</sup> The fact that elder law really is not a separate field, but an aggregation of different subjects covered in other courses may contribute to the lack of urgency on the parts of law schools to add a stand-alone course.<sup>166</sup>

Dean Spurgeon concluded on an optimistic note about elder law in law schools. When looking back over the past fifteen years, the number of courses offered (and, of course, the number of faculty teaching them) has grown, as well as the number of students taking courses. He sees forward movement and remains optimistic about the continued growth of elder law in law schools.<sup>167</sup>

Dean Gershon's school does not yet have an elder law course but plans to add one in the near term. Dean Gershon views elder law as a highly relevant course because of demographics and the changing legal issues affecting elders. Dean Gershon has a refreshing look at the fact that elder law contains components of other courses. He sees it as "a great "cap" on a student's curriculum. It ties together courses they have had in their first two years of law school, and applies those courses (like Estate Planning, Torts, Healthcare Law, Insurance, Constitutional Law, and many more) to a particular specialty."<sup>168</sup> He, too, is optimistic about the future of elder law, but sees it more popular in certain areas of the country than others.<sup>169</sup>

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<sup>163</sup> Dean Spurgeon holds a chair in health law and policy at McGeorge for three years (one semester/year). Dean Spurgeon sees a "growing connection in curriculum and research thinking about elder law and health law." He plans to expand elder law into health law courses. *Id.*

<sup>164</sup> Dean Spurgeon observed that gives law schools an opportunity to provide a service to the community or the opportunity to raise money around the program. *Id.*

<sup>165</sup> Dean Spurgeon believes elder law is making inroads as an academic discipline, and although faculties generally do provide the same respect for elder law as an academic discipline other courses are given. Those in the discipline may need to do more to promote the importance of elder law. *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Email interview with Dean Richard Gershon, dean of Charleston, S.C. L. Sch. (July 16, 2006).

<sup>169</sup> Dean Gershon described the "popularity" of elder law this way:  
Elder Law will always be an important part of a law school curriculum. I think that it can be part of the school's skills program (externships, clinics, simulated skills classes) as well as its

Dean Dickerson views it as driven by the percentage of the population but also the special issues encompassed in elder law. It is a broader draw for reasons other than demographics and geography. Students have personal and family relationships that fuel their interests. The national trend in aging, as evidenced by specialized legislation affecting elders differently helps increase the interest of law students.<sup>170</sup>

It seems that it would be hard to grow an elder law program at a law school based solely on the use of adjuncts.<sup>171</sup> Whether a full-time faculty member will teach elder law will depend on the teaching interests of individual faculty.<sup>172</sup> Typically adjuncts tend to cost less than full-time faculty (in many ways) so in reality it is cheaper for law schools to offer one elder law course using an adjunct, unless there is a full-time faculty member with the interest and availability in her teaching load.<sup>173</sup>

The future of elder law in law schools, like any other speciality course, is driven by a variety of factors. These include the availability of a faculty member (full-time or adjunct) and the interest of students, as student demands can drive course offerings.<sup>174</sup>

### Conclusion

Elder law in the United States is truly a growth industry, driven by the increasing population, the growing complexity of the issues, laws and policies, and the interest and recognition of elder law by the attorneys in the United States. The U. S. laws and policies certainly do not hold the only answers to the issues, and much can be learned from

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doctrinal classes. It will especially be important in areas like St. Pete or Charleston, with large retirement communities . . . it might be less relevant in some parts of the country.

*Id.*

<sup>170</sup> Interview with Dean Darby Dickerson, Vice President and Dean of Stetson University College of Law (Aug. 15, 2006).

<sup>171</sup> *Id.* This comment is not intended to disparage an adjunct professor in any way. But reality is—adjuncts generally have other jobs so their involvement in the life of the law school is limited.

<sup>172</sup> Dean Gershon gave examples of teaching interests among his faculty and ended with a sports analogy:

The fulltime [sic] v. adjunct issue is really a matter of who you have on the faculty, and what their areas are. We have an expert in Maritime Law, so we have built a sequence of courses around him. We also have an expert in Environmental Law, so we have done the same with him. This year, we hired a BA teacher, who also happens to be an international lawyer, so we will have her teaching IBT. Had she not been on the faculty[,] IBT would have been adjuncted. It is like building a football team. If you draft great running backs, you have a running game.

Email interview with Dean Richard Gershon, Dean of Charleston, S.C. L. Sch. (July 16, 2006).

<sup>173</sup> Interview with Dean Darby Dickerson, Dean of Stetson University College of Law (and the author's boss). Dean Dickerson acknowledged that without the teaching interest of a full-time faculty member, there would probably be only one elder law course offered at Stetson and it would be taught by an adjunct. *Id.*

<sup>174</sup> *Id.*

collaborations with other attorneys and educators in other countries as we remind ourselves that aging is a global issue.

Elder law is not dependent on the existence of public benefits or other programs or any other factors that some commentators say will contribute to the diminishment of it as a practice area. Elder law is a growth industry—if only driven by demographics. The fact is that we are all aging and many of us are living longer. That itself means that there will be a continued, and increasing, need for attorneys trained in the laws and issues affecting those who are elders or near-elders.

The true strength and appeal of elder law attorneys is the holistic approach to clients' legal problems and the ability to listen, counsel and shape a solution.<sup>175</sup> The practice of elder law is a people-driven practice. Clients are drawn to elder law attorneys because of the way the attorneys treat them. One attorney said it best:

[I] also know that the service I provide is not dependent on the technological methodology of how I accomplish a goal – it's still based on assisting people achieve their goals – counseling them, giving them a shoulder to cry on, a sympathetic ear, logical, dispassionate analyses and solutions. That's what it's really all about as far as I'm concerned.<sup>176</sup>

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<sup>175</sup> In an email interview with Robert Fleming, he predicted the increase in “more consultative practices helping seniors deal with a variety of stressors and difficulties in their lives--like dealing with grandchildren, spendthrift children, pets and property, or recovering from scams and exploitation, or navigating an increasingly fragmented and balkanized benefits system.” Email Interview with Robert Fleming (Aug. 30, 2006).

<sup>176</sup> Email Interview with Stu Zimring (Aug. 27, 2006).