



## **AoA-Funded Legal Services Protect Income, Housing and Health Care for Vulnerable Older Americans**

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*This paper is submitted to accompany Mr. Carlson's "Elder Rights and Elder Justice" panel presentation on March 3, 2010, at the Listening Forum convened by the Administration on Aging in San Francisco.*

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### **Recommendations:**

- 1) Legal services should be targeted to those with the greatest need; implementation of current targeting criteria should be improved.**
- 2) Legal services should be funded sufficiently for strong and effective advocacy.**
- 3) Legal services should be coordinated at the statewide level.**
- 4) Legal services developers should be better funded and supported.**

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Title III-B of the Older Americans Act provides funding for legal services. These legal services are essential to protect income, housing, health care, and other important interests for vulnerable older Americans. For example, some Title III-B attorneys defend against foreclosures when older persons have been trapped by predatory lending or other types of consumer fraud. Title III-B attorneys also protect older persons against eviction and possible homelessness, and in general assist consumers in asserting their legal rights to stable, decent housing. In addition, Title III-B attorneys represent persons who have been wrongfully denied eligibility or coverage under Medicare or Medicaid and, as discussed in more detail below, represent older Americans who have been deprived wrongfully of benefits due under the Social Security or SSI programs.

I can bear witness to the importance of these direct legal services from my work at the National Senior Citizens Law Center and, before that, at Bet Tzedek Legal Services of Los Angeles.

### Three Examples of the Value of Title III-B Legal Services

#### *Preventing Eviction from Nursing Home*

From 1989 through 2000, I worked at Bet Tzedek Legal Services of Los Angeles, which receives Title III-B funding. For virtually all of those years, I served as Director of Bet Tzedek's Nursing Home Advocacy Project, representing older persons who lived in nursing homes or assisted living facilities, or who received long-term care services at home. The legal services often rescued our clients from dire situations. One nursing home resident, for example, had spent his savings down to Medicaid-eligible levels, but his nursing home refused to accept the resident's Medicaid coverage, telling the resident and his family that the nursing home was not Medicaid-certified. The resident and family were shocked when the nursing home issued an eviction notice for nonpayment, as they had assumed that the resident would be able to stay in the nursing home indefinitely under Medicaid coverage.

I represented the resident in an eviction hearing, pointing out that the admission agreement included an explanation of how residents could pay for nursing home care through Medicaid eligibility. This promise in the admission agreement, I contended, prohibited the nursing home from imposing the private-pay rate on the Medicaid-eligible resident. The hearing officer ruled in the resident's favor, enabling the resident to stay in the nursing home indefinitely, using his monthly income each month to pay an amount equivalent to what would have been assessed as a Medicaid patient-pay deductible.

#### *Guaranteeing Readmission to Nursing Home after Temporary Hospitalization*

In another case, I represented a nursing home resident who had been dumped at a hospital by her nursing home. The nursing home claimed that it could not accept her back because it could not meet her needs, but this claim was belied by the fact that the nursing home was perfectly willing to refer her to another, similar nursing home. Most likely, the nursing home was discriminating against the resident because she was Medicaid-eligible and suffered from relatively significant dementia.

I obtained an order from the California Health Department that required the nursing home to readmit the resident, but the nursing home defied this order. I then obtained an order from the Superior Court, but the nursing home vacated this order by filing a notice of appeal. Finally, I obtained an emergency order from the California Court of Appeal, and the nursing home was forced to readmit the woman. After that, she remained indefinitely in the nursing home without problems.

*Protecting Social Security Income from Improper Suspensions*

The third example is drawn from the work of the National Senior Citizens Law Center (NSCLC), where I have worked since 2001. Along with four partner organizations, NSCLC receives funding under Title IV of the Older Americans Act to create and maintain the National Legal Resource Center (NLRC). NSCLC's primary responsibility under the NLRC is to provide individual consultations and trainings to aging services professionals, especially the attorneys providing Title III-B legal services. The NLRC's five organizations are responsible in addition for developing and disseminating resources, and providing technical assistance in legal systems development.

One of NSCLC's recent cases involves the improper suspension of benefits by the Social Security Administration (SSA). Under federal law, the SSA has the power to suspend the benefits of anyone "fleeing to avoid prosecution," and the SSA has used this power to impose suspensions broadly against anyone with an outstanding felony arrest warrant. This policy has resulted in suspensions against over 200,000 beneficiaries who in no way have been "fleeing."

In some cases, suspensions were based on misidentification. One Nevada retiree, a woman, had her benefits suspended based on a 1972 New York warrant issued against a man. The SSA evidently had imposed the suspension based on the fact that the retiree and the suspect had the same birthday, and the suspect and the retiree's ex-husband had the same last name. The retiree obtained a letter from the New York City Police Department, stating that she was not the person sought under the warrant, but the local SSA office stated that the letter was irrelevant. The matter was resolved only when a Nevada Title III-B attorney represented the retiree.

Other suspensions were based on old warrants that had been disregarded by law enforcement, due to the passage of time and the warrant's relative unimportance. For example, a 75 year-old woman who survives with an oxygen tank had her benefits suspended due to an unresolved charge from an automobile accident during the woman's move from California to Oklahoma in 2001. In Oklahoma, she could neither resolve the California warrant nor restore her benefits: the result was that for three years she had her benefits suspended and could not heat her home. After it was vandalized, she could not repair it; when her wheelchair broke, she could not replace it. Finally, she consulted a Title III-B legal services program, which in turn consulted with NSCLC.

NSCLC has been involved with this issue for many years, both representing clients directly in challenges to the SSA policy, and advising many Title III-B and other legal aid attorneys in their own challenges. Several times the issues were presented to a federal judge, and on each occasion the judge ruled against the SSA, finding that the SSA's policy improperly led to benefits to be suspended for many persons who were not in any way fleeing from law enforcement.

Despite losing every individual federal court challenge, the SSA nonetheless refused to change its policy, suspending benefits for thousands of additional innocent beneficiaries. To reverse this injustice, NSCLC filed a nationwide class-action lawsuit and forced the SSA to

change its policies across the country. The settlement will result in the reinstatement of potentially more than 200,000 persons, and back benefits potentially of more than \$500 million.

### Current Shortcomings of Title III-B Legal Services

As valuable as Title III-B legal services are to older Americans, the system is hampered by structural deficiencies that should be addressed in the reauthorization process. The overriding problem is the great variability in capacity and expertise from one legal services program to the next, due to the fact that Title III-B legal services providers are selected and directed by the local area agency on aging (AAA). Too often, the local AAA has little background or intuition in legal services, and the selection and monitoring of legal services is almost an afterthought, as compared to the other services coordinated through the local AAA.

As a result, legal services often are underfunded. Also, service provision is more likely to be distorted by an inordinate focus on the numbers of clients or service units, rather than a more comprehensive evaluation of the legal services' efficacy or any in-depth consideration of the importance of various types of legal cases. For example, some AAAs contract out legal services to private attorneys who are poorly versed in the relevant law, or who focus solely on issues generally related to seniors with means, such as estate planning. While private attorneys might on occasion provide a satisfactory level of services, the use of private attorneys increases the probability that services will be provided in a piecemeal fashion, without adequate examination of the type of legal representation that would be most important to the local elders. Other AAAs fail to understand case complexities and may count brief service cases, or hotline cases, with the same weight as very complex cases; consumer advice or wills cases should not be viewed with the same weight as an eviction defense case or Medicaid eligibility case.

In a related issue, because decision-making authority has been delegated to local AAAs, the targeting criteria of the Older Americans Act (OAA) are less likely to be honored. The OAA states that legal services, as well as other Title III services, should grant priority to persons who have low incomes or are otherwise disadvantaged. It also requires state and area agencies on aging to place special emphasis on low-income minority individuals, older individuals with limited English proficiency, and older individuals in rural areas. When legal services are a relative afterthought, and the legal services provider has limited capacity or expertise, the services are less likely to reach the priority populations identified by the OAA. In such situations, legal services too frequently are provided to a small in-the-know population, as other, more vulnerable persons are left without assistance, at their peril.

Finally, the delegation of authority to AAAs increases the risk of conflicts of interest. AAAs often are related to the agencies that provide health and social services—the same agencies likely to be involved in disputes with the area's older residents. As a result, a Title III-B attorney might have to advocate against the interests of the AAA to represent the client, with the danger that the attorney will provide less-than-adequate representation in order to protect the relationship with the AAA.

Recommendations

*1. Legal Services Should Be Targeted to Those with the Greatest Need; Implementation of Current Targeting Criteria Should Be Improved.*

Legal services should be targeted to those with greatest need, and to the protection of income, housing, health care, and other vital components of well-being. Outreach should be conducted to increase access for populations that historically have not been adequately served—for example, persons of color, persons with limited English proficiency, and the LGBT community. The AoA’s recent funding of the National Technical Assistance Resource Center for LGBT elders is a good step forward. NSCLC recently conducted an on-line survey of LGBT experiences in long-term care facilities, and was struck by both the discrimination reported, and by the lesser-in-number but encouraging reports of long-term care provided with sensitivity to LGBT-specific concerns.

The OAA already defines “legal assistance” as being provided “to older individuals with economic or social needs,” and requires that AAAs “give priority to legal assistance related to income, health care, long-term care, nutrition, housing, utilities, protective services, defense of guardianship, abuse, neglect, and age discrimination.”<sup>1</sup> These directives, however, are not well implemented at the AAA level. The AoA should take steps to assure that these priorities become reality within Title III-B programs. Improved implementation is addressed in the third and fourth recommendations, below, relating to the statewide coordination of legal services, and to the reinvigoration of the position of legal services developer.

*2. Legal Services Should Be Funded Sufficiently for Strong and Effective Advocacy.*

Legal services programs should have adequate funding to have multiple tools in their toolboxes, so that problems can be resolved as efficiently and comprehensively as possible. Some problems can be resolved through counseling or informal negotiation, while other problems require appearances before an administrative agency or the filing of a lawsuit. Litigation can be particularly important for intransigent problems, where a broad remedy is necessary to adequately represent the community’s older persons. Home-equity scam artists, for example, defraud consumers by tricking them into making payments from the equity in their homes, leaving the consumers with the debts. These scam artists often are relentless in targeting older Americans, and generally can be stopped only through aggressive litigation.

Public education also can be an important tool, to enable older Americans and their families to recognize legal problems and whenever possible to resolve them personally. Without such education, older Americans and their families too often do not realize when laws are being violated, or do not feel confident enough to stand up for themselves.

3. *Legal Services Should Be Coordinated at the Statewide Level.*

As discussed above, Title III-B legal services are hampered by a lack of organization and focus. Currently, programs too often are not linked with, or supported by, the state's other legal services providers. Also, the services often are not targeted to persons with the highest needs, or to the most pressing issues.

To improve quality, efficiency and impact of the Title III-B legal services, AoA-funded legal services should be coordinated at a statewide level into an integrated network. This network should include local programs, support centers, legal services hotlines, and the National Legal Resource Center, so that each can support the other to provide the best possible level of service. The coordination should take into account legal services not funded by the AoA—programs funded by the Legal Services Corporation, for example—for the most effective use of resources. In some states this coordination may best take place through a legal services developer, and in others through other state entities that provide coordination among legal services, such as legal support centers and the state bar.

The proposed coordination will continue the momentum generated by AoA's current grants for Model Approaches to Statewide Legal Assistance Systems. Based on the Model Approaches grants, AoA recognizes that legal services need statewide coordination. The reauthorized OAA should be amended to move this integration further forward.

4. *Legal Services Developers Should Be Better Funded and Supported.*

Legal services developers have been mandated by the OAA since at least 1992, but never have had a separate federal appropriation. As a result, the position has stagnated in many states, with state employees identified as legal services developers but spending relatively little of their time in legal services. A 2003 study found that most legal services developers spent less than half of their time in legal services development, and there is no indication today that these percentages have changed for the better.

The 2003 report recommended that “[e]very state should have a Legal Services Developer in function and not just in name,” and this recommendation is just as important in 2010.<sup>2</sup> Money for a legal services developer should be separately appropriated, and the legal services developer should be focused exclusively on legal services.

The upgrading of the position of the legal services developer should be accompanied by a comparable upgrading of the required qualifications. An ideal legal services developer should have a demonstrated commitment to legal services, preferably with significant legal services experience. A long-time tenure in state government, without more, is an insufficient qualification for a legal services developer.

The OAA since 1992 has required the AoA to “develop guidelines and a model job description for choosing and evaluating legal assistance developers,”<sup>3</sup> but neither of these tasks has been done. To fill this gap, the Center for Social Gerontology in 2004 published a blueprint for a legal services developers’ model job description.<sup>4</sup> The upcoming reauthorization of the

OAA should ensure, one way or the other, that the AoA develops or adopts standards for the work and qualifications of a legal services developer.

### Conclusion

The Older Americans Act sets worthy principles for the provision of legal services, but the OAA must be amended to assure that these principles actually are implemented. Services should be adequately funded, and given appropriate oversight so that those in greatest need are given priority. Services should be well-coordinated at a statewide level to assure vigorous advocacy and proper focusing of resources. To foster this coordination, legal services developers and other statewide coordination mechanisms should be greatly strengthened.

The bottom line is that the OAA should be amended as necessary to assure that legal services are available for the most vulnerable older Americans. Services should focus on the most critical issues, including income, housing, and health care. Services should also be targeted at generally underserved populations, including but not limited to persons of color, persons living in rural communities, and the LGBT community.

For many older Americans, legal services are a critical link in the safety net. By reemphasizing the principles of AoA-funded legal services, and improving the implementation of those principles, the OAA's reauthorization can make the safety net both stronger and more effective.

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<sup>1</sup> Older Americans Act, §§ 102(33), 305(a)(11)(E).

<sup>2</sup> Thomas & Ingham, State Legal Assistance Development Program Study (Sept. 2003)

<sup>3</sup> Older Americans Act, § 202(a)(23).

<sup>4</sup> Center for Social Gerontology, Best Practice Notes on Delivery of Legal Assistance to Older Persons, vol. 13, No. 1 & 2 (Dec. 2004), *available at* [www.tcsg.org/bpnotes/december04/dec04BPN\\_01.pdf](http://www.tcsg.org/bpnotes/december04/dec04BPN_01.pdf).