

Special In-Depth Commentary

Protecting Our Vulnerable Elderly:

**Why Additional Legislation Could Facilitate Informed Decision-Making
and Advance Elder Justice for U.S. Senior Citizens**

**Tabitha Smith, MJ,
Loyola Beazley Institute for Health Law and Policy
Licensed Nursing Home Administrator, Commonwealth of Virginia**

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According to the 2016 U.S. Census Bureau Report, 46.2 million people were 65 and older in the United States the year 2014.¹ This population grew from 44.7 million in 2013.² The same report projects that in 2060, 98.2 million U.S. residents will be 65 and older, including 19.7 million over the age of 85.³ Historically, this growing population has demanded community and social support programs to help it live the most informed independent life as possible; and it continues to do so.⁴ In 1965 President Lyndon Johnson saw that there was a great need for legislation and advocacy for the elderly community.⁵ The Older Americans Act of 1965 was enacted to assist in the development of social programs and to further improve programs that already existed to advocate for Senior Citizens in the community.⁶ Today the Department of Health and Human Services empowers the Administration on Aging to enforce and fund programs and provisions of the Older Americans Act (OOA).⁷ Its main objective is to ensure equal opportunity for all U.S. Senior Citizens in regards to housing, nursing facilities, employment, legal services, and retirement and healthcare services.⁸ In 2006 and most recently in 2016, the OOA was amended and reauthorized in an effort to be consistent with current regulations and trends in healthcare.⁹

The Federal government recognizes that Senior Citizens are a "special population," one of the most vulnerable populations in our country today.¹⁰ Due to various circumstances such as poor access to legal services, some senior Citizens are often forced to make uninformed decisions that can have tremendous effects and consequences to their finances and overall health.¹¹ While the OOA has served as a vehicle to shape advocacy for Senior Citizens, funding for legal and advocacy services remains stagnant, which often forces Senior Citizens to make decisions on their own without any guidance or the proper information. Not only is poor access to legal services a barrier that Senior Citizens face when making decisions, this special population traditionally has low health literacy rates. More often than not, Senior Citizens often become patients in fast-paced healthcare settings and are presented with documents to read and sign about their care that they don't fully comprehend.¹² This often leads to poor adherence to treatment and delayed diagnosis. Changes in recent legislation should cause us to explore its impact on Senior Citizen decision-making. Many Senior Citizens do not know how the Patient Protection and Affordable Care Act (PPACA) influences insurance benefit information. For instance, healthcare plans made available through the PPACA and Medicare Advantage plans are completely different and each one has different coverage and benefit advantages. Not knowing the difference can greatly impact

¹ <http://www.census.gov/newsroom/press-releases/2015/cb15-113.html>

² <http://www.census.gov/newsroom/press-releases/2015/cb15-113.html>

³ <http://www.census.gov/newsroom/press-releases/2015/cb15-113.html>

⁴ <https://aoa.acl.gov>

⁵ <https://aoa.acl.gov>

⁶ Older American Act of 1965 89 P.L. 73, 79 Stat. 218

⁷ Older American Act of 1965 89 P.L. 73, 79 Stat. 218

⁸ Older American Act of 1965 89 P.L. 73, 79 Stat. 218

⁹ <https://aoa.acl.gov>

¹⁰ [Article: Special Populations: Mobilization for Change, 25 Touro L. Rev. 467](#), 474

¹¹ <https://aoa.acl.gov>

¹² [Article: Special Populations: Mobilization for Change, 25 Touro L. Rev. 467](#),

healthcare coverage for Senior Citizens. Many Senior Citizens enroll in these plans without any assistance and wind up paying more out-of-pocket prescription and co-pay expenses than they expected.

This article will examine the need for more legislation to emphasize elder justice and informed consent for Senior Citizens in the United States and how this injustice consequently affects their healthcare and financial decisions. Sometimes Senior Citizens are forced to make uninformed decisions that have a huge impact on the care that they receive in various healthcare settings, estate planning and overall independence. Part I of this article will examine root causes as to why seniors are uninformed and the reasons why society has failed to support them. Social determinants of health such as a low health literacy, failed case management and discharge planning efforts are just a few of the factors that contribute to some seniors making uninformed decisions. Part II of this article will discuss in detail why seniors are prone to fraud and other vulnerabilities. Senior Citizens are at an age where financial planning is very pertinent.¹³ It entails everything from choosing the most appropriate health insurance and prescription plans, estate planning, advance directives, and even long term care planning.¹⁴ Although there are some community and advocacy programs that help educate and assist Senior Citizens with financial planning, more civil penalties and additional legislation should be in place to better safeguard Senior Citizens from the dangers of financial exploitation and healthcare abuse.¹⁵ Finally, Part III will explore existing legislative efforts and advocacy programs and how they can be more effective in helping seniors make informed decisions in their healthcare and finances.

I: Contributors to an Uninformed Senior Citizen Population

A. Increased General Low Literacy Rate Among Seniors

There are several social and economic determinants as to why seniors in the community often make uninformed healthcare decisions. One reason, perhaps the most significant, is the low literacy rate within the senior population.¹⁶ Statistics and studies have shown that approximately twenty-one percent of the adult population has low literacy skills, defined as "reading at the sixth grade level or below," and "twenty-seven percent of adults may have limited literacy ability, defined as lacking general reading and numeracy proficiency to function adequately in society." In a 2003 study, adults ages 65 and older had the lowest average prose, document, and quantitative literacy than any other age group. Furthermore, patients that do not have any health insurance and patients that are enrolled in Medicare and Medicaid have even lower health literacy rates than those with other insurances.¹⁷ While low literacy within the adult community a silent epidemic, many consider health literacy as a significantly larger problem when it comes to Senior Citizens making health decisions.¹⁸

¹³ [Article: Special Populations: Mobilization for Change, 25 Touro L. Rev. 467](#)

¹⁴ *Id.*, 467

¹⁵ Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic, 23 *Elder L.J.* 297

¹⁶ [SYMPOSIUM ARTICLE: SCOPING THE FIELD OF PUBLIC HEALTH LAW, POLICY, AND RESEARCH: The Potential of Shared Decision Making to Reduce Health Disparities, 39 J.L. Med. & Ethics 30, 31 *](#)

¹⁷ *Id.*, 31

¹⁸ [ARTICLE: It Takes a Village: Reforming Law to Promote Health Literacy and Reduce Orthopedic Health Disparities, 8 J. Health & Biomed. L. 333](#)

B. Poor Health Literacy Rate Among Seniors and the Informed Consent Doctrine

Health literacy is a huge social issue across the board. However, poor health literacy among Senior Citizens is important when obtaining genuine informed consent, as they are a growing and vulnerable population. According to the policy report *Healthy People 2010*, which is a policy report created by the U.S. Department of Health and Human Services, health literacy is defined as "the degree to which individuals have the capacity to obtain, communicate, process, and understand health information and services needed to make appropriate health decisions." A Senior Citizen that is a patient has the legal right to make informed decisions in regards to his/her care and health literacy is an important factor to consider if healthcare providers are truly obtaining informed consent from their patients¹⁹ Additionally, it is a patient's right to be informed of his/her healthcare status, refuse treatment and be involved in their healthcare plan.²⁰ The actual informed consent document in healthcare is one example of health information that is often presented to Senior Citizens that can be extremely difficult to understand because of the medical jargon used. So truly obtaining informed consent for healthcare treatment from a Senior Citizen with a low health literacy level can be even more challenging because more often than not they do not understand what health information they are reading. As healthcare policies evolve and change, the problem is only getting worse and the burden to understand information to make informed decisions about healthcare seems to be placed on the patient.²¹ One could argue that it is difficult to measure one's understanding of something; however, there are two tests that measure health literacy: the Test of Functional Health Literacy in Adults (TOFHLA) and the Rapid Estimate of Adult Literacy in Medicine (REALM).²² These assessments are attempts to measure if patients understood the materials they were reading in a healthcare setting. The TOFHLA assessment is a reading comprehension test that tests patients using common information found in healthcare settings.²³ If a patient has a score that deems them with a low literacy rate, this means they may have difficulty reading health information such as "pill bottles, consent forms, education brochures, and appointment slips."²⁴ If patients are having trouble understanding those documents, providers should not expect them to understand the medical and legal jargon in medical consent forms.²⁵ The consent form is seen as merely a legal document that is used to protect the physician and ensure that he had a conversation with his patient. While the legal concept of informed consent is viewed as "rhetoric of individual autonomy," our court system rarely addresses health literacy when examining patients' true informed consent. How can a patient exercise autonomy in making decisions about their healthcare, but not understand what is being presented to them? Health literacy is a huge oversight by our legal system because informed consent and comprehension of health risks are rarely considered in the U.S. court system, except in cases of emergency situations and incompetency. In the case *Natanson v. Kline* the court system however defines the reasonable standard of informed consent as "what information a reasonable prudent physician would have disclosed to the patient."²⁶ The court also articulated that the physician has

¹⁹ ARTICLE: Conflicts of Interest in Medicine, Research, and Law: A Comparison, 117 Penn St. L. Rev. 1293

²⁰ [STUDENT COMMENT: PERSONALIZING INFORMED CONSENT: THE CHALLENGE OF HEALTH LITERACY](#), 2 St. Louis U. J. Health L. & Pol'y 379

²¹ Conflicts of Interest in Medicine, Research, and Law: A Comparison, 117 Penn St. L. Rev. 1293

²² Conflicts of Interest in Medicine, Research, and Law: A Comparison, 117 Penn St. L. Rev. 1293

²³ Id., 1293

²⁴ Id., 1293

²⁵ Id., 1293

²⁶ [Natanson v. Kline](#), 186 Kan. 393, 350 P.2d 1093, 1960 Kan. LEXIS 310 (Kan. 1960)

an obligation to "disclose and explain to the patient in language as simple and necessary." Currently twenty-three states use the reasonable physician, as a professional standard for disclosure in informed consent cases.²⁷ Twenty-five states and the District of Columbia adopted the reasonable patient standard and was it articulated in *Canterbury v. Spence* as "the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the option available and the risk attendant upon each."²⁸ This standard considers the perspective of the patient and in some cases depending on the patient is more appropriate.²⁹ However, courts in all jurisdictions should consider and perhaps emphasize health literacy of Senior Citizen patients in all cases when considering informed consent³⁰

C. A Physician's Ethical Role With Respect to Informed Consent and Health Literacy

In regards to the doctrine of informed consent, physicians have an ethical duty to inform their patients of any risks of a treatment or procedure and explain any other treatment options. Physicians should view the informed consent process as a respect for their patients' autonomy and not just seen as a legal formality.³¹ Health literacy is a huge factor when considering if a patient was truly informed.³² If a patient cannot understand the pertinent information a physician presented or explained to him/her due to low health literacy, then informed consent is not achieved. "Thus, from the perspective of respect for patient autonomy, when inadequate health literacy prevents patients from understanding disclosure communications, informed consent has not been realized."³³ There is limited tort law that focuses on informed consent and limited case law that discusses health literacy. However, in the case of *Hidding v. Williams*, the court did consider general literacy when obtaining informed consent.³⁴ The court found that 59-year-old Paul Hidding's physician not only failed to obtain informed consent, but he also did not properly disclose all of the associated risks of his surgery.³⁵ Mr. Hidding was an orthopedic patient who was advised by his surgeon that he needed lumbar decompression surgery due to spinal stenosis or would be confined to a wheel chair for the rest of his life.³⁶ Mr. Hidding agreed to surgery and immediately thereafter loss control of his bowel and bladder.³⁷ It is important to note that Mr. Hidding died from an unrelated cause a few years later but his wife did in fact pursue a lawsuit against his surgeon Dr. Williams. During the trial the court noted that Mr. Hidding³⁸ had a sixth-grade education and minimal reading skills.³⁹ His wife testified during the trial that, she often accompanied him to his physician appointments and pre-operative visits at his request, as he

²⁷ [STUDENT COMMENT: PERSONALIZING INFORMED CONSENT: THE CHALLENGE OF HEALTH LITERACY](#), 2 St. Louis U. J. Health L. & Pol'y 379, 388

²⁸ [Canterbury v. Spence](#), 464 F.2d 772, 1972 U.S. App. LEXIS 9467, 150 U.S. App. D.C. 263 (D.C. Cir. 1972)

²⁹ [STUDENT COMMENT: PERSONALIZING INFORMED CONSENT: THE CHALLENGE OF HEALTH LITERACY](#), 2 St. Louis U. J. Health L. & Pol'y 379, 388, 390

³⁰ *Id.*, 390

³¹ *Id.*, 390

³² *Id.*, 390

³³ *Id.*, 390

³⁴ [Hidding v. Williams](#), 578 So. 2d 1192, 1991 La. App. LEXIS 999 (La.App. 5 Cir. 1991)

³⁵ *Hidding v. Williams*

³⁶ *Hidding v. Williams*

³⁷ *Hidding v. Williams*

³⁸ *Hidding v. Williams*

³⁹ *Hidding v. Williams*

wanted to make sure that he understood the physician orders and instructions.⁴⁰ Mrs. Hidding also testified that while the consent form was signed, Dr. Williams did not explain the risks of surgery in detail – specifically the potential risk of the loss of control of his bowel and bladder function.⁴¹ The court ultimately concluded that while a consent form was signed, informed consent was not established and Mrs. Hidding was awarded \$307,006.50 in general and medical damages.⁴² Health literacy and general literacy are two different things: however, they are closely related when considering a patient's comprehension level of consent documents for medical treatments.⁴³ If more courts considered health literacy when measuring informed consent, they may be persuaded in other cases where a signed consent form does not consider comprehension and informed consent; therefore, more civil penalties could be imposed on physicians to improve the process.⁴⁴

Another significant barrier that impacts low health literacy and informed consent in the Senior Citizen community is that providers do not always consider diverse background and cultural diversity when presenting risk and treatment options to their patients.⁴⁵ Physicians must be properly trained to identify general poor literacy and health literacy when appropriate.⁴⁶ Advocacies should propose more state legislatures to mandate universities and other healthcare institutions to incorporate such courses about cultural diversity and health literacy into their curriculum.⁴⁷ This effort would force medical schools to highlight the importance of a patient's cultural background, health literacy and how it contributes to poor healthcare outcomes within the Senior Citizen community.⁴⁸ The state of Maryland has passed a significant legislation within its Healthcare Services Disparities Prevention Act.⁴⁹ This law requires the Office of Minority and Health disparities to collaborate with universities and healthcare teaching institutions to develop classes with respect to "cultural competency, sensitivity, and health literacy that are designed to address the problem of racial and ethnic disparities in healthcare access, utilization, treatment decisions, quality, and outcomes."⁵⁰ Senior Citizen patients are more prone to chronic disease and utilize healthcare more than any other age group and therefore have a great need to comprehend their health information to make decisions as an informed patient. As a result of this communication gap between Senior Citizens and physicians, there is increased improper use of medication and underutilized medical treatments. Not only is the elderly population in the U.S. swiftly growing but also it will become increasingly diverse.⁵¹ In an effort to effectively communicate and discuss healthcare options with patients, physicians must prioritize communication to ultimately obtain informed consent from its patients.⁵² This effort could also

⁴⁰ [Hidding v. Williams](#)

⁴¹ [Hidding v. Williams](#)

⁴² [Hidding v. Williams](#)

⁴³ [ARTICLE: It Takes a Village: Reforming Law to Promote Health Literacy and Reduce Orthopedic Health Disparities, 8 J. Health & Biomed. L. 333](#)

⁴⁴ Id., 333

⁴⁵ Id., 333

⁴⁶ Id., 333

⁴⁷ Id., 333

⁴⁸ Id., 333, [Md. HEALTH-GENERAL Code Ann. § 20-902](#)

⁴⁹ [Md. HEALTH-GENERAL Code Ann. § 20-902](#)

⁵⁰ [ARTICLE: It Takes a Village: Reforming Law to Promote Health Literacy and Reduce Orthopedic Health Disparities, 8 J. Health & Biomed. L. 333](#)

⁵¹ [ARTICLE: INVISIBLE, UNEQUAL, AND FORGOTTEN: HEALTH DISPARITIES IN THE ELDERLY, 21 ND J. L. Ethics & Pub Pol'y 441, 451](#)

⁵² [ARTICLE: It Takes a Village: Reforming Law to Promote Health Literacy and Reduce Orthopedic Health Disparities, 8 J. Health & Biomed. L. 333](#)

highlight other health disparities that are barriers to informed consent in the Senior Citizen community. A recent study showed that Senior Citizens who are Medicare beneficiaries are uneasy about healthcare decisions and are more likely to delegate decision-making. Some commentators have also mentioned "the least educated users of healthcare often have the greatest health needs and are vulnerable both to risk-selection in insurance and to substandard provision of care." Healthcare consumers make more informed and educated decisions when their healthcare providers are culturally competent. Physicians recognizing diversity would be a huge step forward in balancing patient autonomy and physician-patient relationships.

D. Shared Decision-Making and the Patient-Physician Relationship

Again the informed consent process itself leaves much to be desired.⁵³ Perhaps another approach to improving communication between physicians and their Senior Citizen patients with low health literacy is to consider shared decision-making.⁵⁴ Shared decision-making is "a process in which a physician shares with a patient all relevant risk, benefits, treatment alternatives and the patient shares relevant personal information that might make one treatment or side effect less or more tolerable than others."⁵⁵ Recent pilot studies suggest that the use of shared decision aids has helped to bridge the communication gap between Senior Citizen patients and their healthcare provider and will also give assistance in improving patient adherence to treatment and overall health outcomes. Common examples of decision aids include detailed videos and pamphlets that better assist Senior Citizens with better understanding of their health information. Evidence from this pilot study suggests that Senior Citizens at a nursing facility had higher patient activation scores than those patients who did not view decision aids. Moreover, patients who reviewed three or more decision aids demonstrated better health outcomes after a 12-week and 6 months follow-up point. These results are certainly encouraging for those with low health literacy; however, effective change around improving health literacy for Senior Citizens may involve health aggressive law and public policy reform around shared –decision making between a physician and their patients.⁵⁶ Moreover, the National Quality Forum listed patient and family engagement as a significant way to decrease health disparities such as health literacy in the U.S.⁵⁷ The aforementioned research again, is showing the positive effects that shared decision aids have on patient comprehension.⁵⁸ These results should encourage public health effort around mandating the implementation of these tools into the informed decision-making process to attempt to bridge this communication gap.⁵⁹

⁵³ [SYMPOSIUM ARTICLE: SCOPING THE FIELD OF PUBLIC HEALTH LAW, POLICY, AND RESEARCH: The Potential of Shared Decision Making to Reduce Health Disparities, 39 J.L. Med. & Ethics 30](#)

⁵⁴ Id., 30

⁵⁵ Id., 30

⁵⁶ Id., 30

⁵⁷ [SYMPOSIUM ARTICLE: SCOPING THE FIELD OF PUBLIC HEALTH LAW, POLICY, AND RESEARCH: The Potential of Shared Decision Making to Reduce Health Disparities, 39 J.L. Med. & Ethics 30](#)

⁵⁸ Id., 30

⁵⁹ Id., 30

E. Arbitration Agreements

Another highly controversial document that Senior Citizens have difficulty comprehending is the arbitration agreement for a Long Term Care facility.⁶⁰ According to Cornell Law University, arbitration is an action with one or more persons hearing a dispute and rendering a binding decision.⁶¹ An agreement to arbitrate disputes can be made before or after a specific dispute arises. In short, arbitration is an optional alternative agreement that gives the nursing facility the legal option to resolve any legal issues that may arise through dispute resolution outside of the court system, as it is cheaper than litigation. While it is not mandatory for all skilled nursing home facilities to require their residents to sign an arbitration agreement, it does express the possibility of negotiation if necessary and encourages the resident unknowingly, to give up their rights to litigation and to file suit should an issue arise. It is yet another legal document that some nursing facilities present to their residents upon admission, in addition to the Facilities Admissions agreement packet.⁶⁰ Not only is this information often presented at a sensitive and often confusing time for the resident, the information is often difficult to understand. This packet usually contains financial disclosure documents, several medical consent and treatment forms and the arbitration agreement. Some facilities do inform their residents that they have the right to seek counsel regarding the arbitration agreement. However, the long-term care ombudsmen, the federally-mandated advocates for nursing home residents, could be employed in this process somehow to make sure that residents who do not have poor general and health literacy and/or a guardian to help them truly understand what they are signing for and the legal rights that they are giving up.

The Federal Arbitration Act (FAA) is the federal legislative framework enforces the use of arbitration agreements and provides guidance regarding arbitral awards in the United States.⁶² Although the U.S. Supreme Court is in favor of the Federal Arbitration Act and its general policies, some courts disagree that the arbitration agreement is not an appropriate resolution alternative for all types of cases and situations.⁶³ For example, in December of 2009, the U.S. enacted a law that barred government contractors from arbitration in situations where there are sexual assault claims, sexual harassment and employee civil rights claims.⁶⁴ Current legislation should be reformed to also limit arbitration agreements in skilled nursing and long-term care facilities in instances of a Senior Citizen's wrongful death, negligence or abuse claims.⁶⁵ Arbitration should not be deemed as an appropriate forum to examine these severe cases.⁶⁶ Additionally, some courts agree and do not favor arbitration in these types of cases, as it ignores nursing home abuse allegations and would interfere with administration of justice.⁶⁷ As it stands today, there are no legislative or regulations that protect the legal rights in regards to arbitration agreements of nursing home residents. The Fairness in Nursing Home Arbitration Act (FNHAA) was first introduced in July 2008.⁶⁸ The

⁶⁰ [ARTICLE: Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents, 22 Elder L.J. 141, 172](#)

⁶¹ <https://www.law.cornell.edu/wex/arbitration>

⁶² Federal Arbitration Act

⁶³ [ARTICLE: Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents, 22 Elder L.J. 141](#)

⁶⁴ [ARTICLE: Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents, 22 Elder L.J. 145](#)

⁶⁵ *Id.*, 145

⁶⁶ *Id.*, 145

⁶⁷ [Fairness in Nursing Home Arbitration Act of 2012, 112 H.R. 6351, 2012 H.R. 6351, 112 H.R. 6351](#)

⁶⁸ [Fairness in Nursing Home Arbitration Act of 2012, 112 H.R. 6351, 2012 H.R. 6351, 112 H.R. 6351](#)

FNHAA bill was introduced as an effort to protect nursing home residents and their families to "invalidate pre-dispute mandatory arbitration agreements in long-term care facility contracts."⁶⁹ It does so by prohibiting the enforcement of arbitration agreements in cases between residents and long-term care facilities when the agreement to arbitrate was entered into prior to the dispute."⁷⁰ Even though the FNHAA would provide adequate protection for our elderly nursing home residents and their guardians, the bill was reintroduced in 2009 and died, then again in 2012.⁷¹ The enactment of this bill would have ultimately amended the existing Federal Arbitration Act, and would have held nursing homes more accountable in the court system in alleged claims of abuse, neglect and substandard care. *Id.* Even though the FNHAA was not enacted, there is evidence that there is strong opposition to nursing home arbitration agreements.⁷² Some recognize this governmental oversight and have enacted their own legislation to remove arbitration from nursing home cases.⁷³ The Oklahoma Nursing Home Act and Illinois Nursing Home Act, are both efforts that exclaim "any waiver by a resident or his legal representative of the right to commence an action under [the state's Nursing Home Care Act], whether oral or in writing, shall be null and void, and without legal force or effect."⁷⁴ Unfortunately, there are various opinions within the U.S. court system in regards to enforcing nursing home arbitration agreements and there is little room to argue due to the Federal Arbitration Act.⁷⁵ Nursing facilities, elderly advocates and lawmakers should work towards to better informing our vulnerable Senior Citizens and their legal representatives of the ramifications of the arbitration for those residents who choose to sign it.⁷⁶ Moreover, elder law practitioners should encourage residents and their representatives against signing arbitration agreements since they are not mandatory admission requirements anyway.⁷⁷

F. Patient Rights and the Discharge Planning Process

The complexity around the hospital discharge planning process under the Medicare system and other "related statutory schemes is an important issue facing elderly patients."⁷⁸ The Centers for Medicare & Medicaid Services (CMS) has failed to provide clear guidance in respect to discharging and its Medicare beneficiaries to other Medicare participating healthcare settings.⁷⁹ Moreover, CMS has an opportunity to "expand beneficiary rights to the discharge and transition services."⁸⁰ This initiative would highlight patient rights, improve clinical outcomes and provide an opportunity for patient and family education.⁸¹ Hospitals have a fiduciary duty to provide a

⁶⁹ [Fairness in Nursing Home Arbitration Act of 2012, 112 H.R. 6351, 2012 H.R. 6351, 112 H.R. 6351](#)

⁷⁰ [Fairness in Nursing Home Arbitration Act of 2012, 112 H.R. 6351, 2012 H.R. 6351, 112 H.R. 6351](#)

⁷¹ [Fairness in Nursing Home Arbitration Act of 2012, 112 H.R. 6351, 2012 H.R. 6351, 112 H.R. 6351](#)

⁷² ARTICLE: Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents, 22 *Elder L.J.* 153

⁷³ ARTICLE: Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents, 22 *Elder L.J.* 153

⁷⁴ ARTICLE: Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents, 22 *Elder L.J.* 153

⁷⁵ *Id.*, 153

⁷⁶ *Id.*, 153

⁷⁷ ARTICLE: Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents, 22 *Elder L.J.* 153

⁷⁸ [ARTICLE:Breathing Life into Discharge Planning, 13 *Elder L.J.* 1,2](#)

⁷⁹ ARTICLE:Breathing Life into Discharge Planning, 13 *Elder L.J.* 1,2

⁸⁰ [ARTICLE:Breathing Life into Discharge Planning, 13 *Elder L.J.* 1](#)

⁸¹ [ARTICLE:Breathing Life into Discharge Planning, 13 *Elder L.J.* 1](#)

safe discharge plan for Senior Citizens.⁸² Shortly after a patient is admitted to the hospital, they are usually assigned a discharge planner and or social worker to assist the physician in developing a discharge plan for the patient.⁸³ It is likely that a medical care manager, who is a registered nurse, is in charge of most transfers to skilled nursing facilities.⁸⁴ A variety of things are considered in preparation for a patient to discharge home or to another level of care.⁸⁵ This process is often highly chaotic if a Senior Citizen is discharged to another skilled nursing facility. The medical care management department, physicians, and discharge planners are often under pressure by the hospital to transfer and discharge patients to often make room for patients who need acute care, in addition to reimbursement, and or utilization reasons.⁸⁶ Once a Medicare beneficiary no longer meets the criteria for an acute level of care, CMS requires that the beneficiary is presented with a notification of non-coverage letter at least two days before discharge.⁸⁷ Some advocates suggest that CMS should enforce stronger "timeliness requirements" as to when the actual discharge plan should be discussed with the family and the patient.⁸⁸ So often discharge planning is a hurried process, and post-hospital care options are presented last minute, leaving the patients and their families very little time to explore the proposed discharge plan.⁸⁹ Patients are not always told all of the facilities that have beds available and other important details. This complicated transition often can leave older Senior Citizens and their families uneasy and with many questions, and worse, the patient may go to sub-par healthcare facilities. Some may argue that the patient and family have an obligation to research their suggested discharge plan and local skilled nursing facilities in the area.⁹⁰ While this is true, the rushed discharge process is an opportunity for CMS to federally mandate advocacy support for the patients.⁹¹ One suggestion would be for ombudsmen, internal hospital patient advocates and other community Senior Citizen advocates to be available to work collaboratively with the medical care management staff to assist patients, especially Senior Citizens and their families, with post-hospital care decisions.⁹² Just as Senior Citizens have the right to choose a physician and exercise autonomy to make informed choices about their care, they also have the right to choose what nursing facility that they are discharged to. Many Medicare beneficiaries that have to be transferred to a skilled nursing facility need special care.⁹³ Fragmented and incomplete discharge planning in these instances can leads to repeat hospitalizations and poor healthcare outcomes.⁹⁴ CMS's failure to provide regulatory enforcement and guidance in regards to this sensitive transition of care raises basic due process issues.⁹⁵ In the meantime, community education in respect to discharge planning and post-acute care should be a public health imperative.⁹⁶ Ombudsmen, elder law attorneys, discharge planners

⁸² [4 South Carolina Elder and Special Needs Law § 5-E \(6th 2012\)](#)

⁸³ [4 South Carolina Elder and Special Needs Law § 5-E \(6th 2012\)](#)

⁸⁴ [ARTICLE:Breathing Life into Discharge Planning, 13 Elder L.J. 1, 3](#)

⁸⁵ [Id.,4](#)

⁸⁶ [ARTICLE:Breathing Life into Discharge Planning, 13 Elder L.J. 1, 8](#)

⁸⁷ [4 South Carolina Elder and Special Needs Law § 5-E \(6th 2012\)](#)

⁸⁸ [ARTICLE:Breathing Life into Discharge Planning, 13 Elder L.J. 1, 12](#)

⁸⁹ [ARTICLE:Breathing Life into Discharge Planning, 13 Elder L.J. 1, 4](#)

⁹⁰ [ARTICLE:Breathing Life into Discharge Planning, 13 Elder L.J. 1, 4](#)

⁹¹ [ARTICLE:Breathing Life into Discharge Planning, 13 Elder L.J. 1, 33](#)

⁹² [ARTICLE:Breathing Life into Discharge Planning, 13 Elder L.J. 1, 34](#)

⁹³ [ARTICLE:Breathing Life into Discharge Planning, 13 Elder L.J. 1](#)

⁹⁴ [ARTICLE: Breathing Life into Discharge Planning, 13 Elder L.J. 1, 29](#)

⁹⁵ [ARTICLE: Breathing Life into Discharge Planning, 13 Elder L.J. 1, 28](#)

⁹⁶ [ARTICLE: Breathing Life into Discharge Planning, 13 Elder L.J. 1, 52](#)

and other advocates could collaborate on training programs highlighting patient rights and the discharge planning process.⁹⁷

II: Seniors' Increased Need for Legal Assistance and Financial Planning

A. Benefit Eligibility and Counseling Assistance

"As life expectancy expands, and the pressure on healthcare costs grows" so does the need for legal services, specifically financial and estate planning services.⁹⁸ One of the many benefits of the ACA is that when it was implemented, it served as a vehicle to assist many Senior Citizens with out-of-pocket healthcare expenses. In some areas, this legislation has been successful in these efforts. On the other hand, there are caveats to the new laws that are not so apparent and can greatly affect Senior Citizens' finances. There are a lot of emphases on the fact that the Affordable Care Act (ACA) has expanded health insurance coverage across many patient populations.⁹⁹ While the ACA's healthcare expansion and patient protection efforts have several positive aspects, there have been intense debates that it has some drawbacks that are attached to these changes.¹⁰⁰ Some of these stumbling blocks are veiled and greatly affect Americans over the age of 65.¹⁰¹ For example, one significant issue that impacts our Senior Citizen patient population is the high out-of-pocket expenses, co-pays, deductibles for medical care and prescription drug expenses that are imposed on them.¹⁰² Many Medicare beneficiaries are diagnosed with at least one chronic condition that must be managed by a regular prescription drug regimen.¹⁰³ The original Medicare program does not entirely cover the cost of outpatient prescriptions, prescribed by physicians.¹⁰⁴ Statistics mentioned in *United States v. Aetna Inc.*, show that in 2016, Medicare Part A included a \$1,288 per year inpatient hospital deductible...monthly Part B premium cost of \$105...\$166 deductible per benefit period and 20% coinsurance rate for those covered medical services.¹⁰⁵ Many seniors have to purchase a Medicare supplement or sometimes informally called Medigap plan from private insurance companies to cover these out-of-pocket expenses for an added monthly premium of around \$150.¹⁰⁶ Medicare Part C, which is the Medicare advantage plan component of the Medicare program, enforced by the Medicare Prescription Drug Improvement, and

⁹⁷ *Id.*, 52

⁹⁸ [48-19 Univ of Miami Law Center on Est Planning P 1904 \(2015\)](#), 1904.4

⁹⁹ [ARTICLE: Analyzing the Impact of the New Healthcare Reform Legislation on Older Americans](#), 18 *Elder L.J.* 213

¹⁰⁰ [ARTICLE: Analyzing the Impact of the New Healthcare Reform Legislation on Older Americans](#), 18 *Elder L.J.* 213

¹⁰¹ [ARTICLE: Analyzing the Impact of the New Healthcare Reform Legislation on Older Americans](#), 18 *Elder L.J.* 213, 214

¹⁰² [United States v. Aetna Inc.](#), 2017 U.S. Dist. LEXIS 8490, 2017-1 Trade Cas. (CCH) P79,877, 2017 WL 325189 (D.D.C. Jan. 23, 2017)

¹⁰³ [ARTICLE: Analyzing the Impact of the New Healthcare Reform Legislation on Older Americans](#), 18 *Elder L.J.* 213, 16

¹⁰⁴ [United States v. Aetna Inc.](#), 2017 U.S. Dist. LEXIS 8490, 2017-1 Trade Cas. (CCH) P79,877, 2017 WL 325189 (D.D.C. Jan. 23, 2017)

¹⁰⁵ [United States v. Aetna Inc.](#), 2017 U.S. Dist. LEXIS 8490, 2017-1 Trade Cas. (CCH) P79,877, 2017 WL 325189 (D.D.C. Jan. 23, 2017)

¹⁰⁶ [United States v. Aetna Inc.](#), 2017 U.S. Dist. LEXIS 8490, 2017-1 Trade Cas. (CCH) P79,877, 2017 WL 325189 (D.D.C. Jan. 23, 2017)

Modernization Act of 2003.¹⁰⁷ In short, the ACA gives extra payments and incentives to private insurance companies to increase their Medicare beneficiary enrollment.¹⁰⁸ These governmental incentives have generated fierce competition among insurance companies such as Humana and Aetna for the Medicare consumer.¹⁰⁹ Many Senior Citizens eligible for Medicare often enrolled into Medicare advantage programs because such programs offered attractive prescription coverage benefits.¹¹⁰ Most Medicare Advantage programs cap out of pocket expenses at \$6,700 per year and cover Medicare Part A and Part B expenses at 100%.¹¹¹ But on the other hand, depending on the plan enrollees choose, they may lose important benefit coverage in certain healthcare settings that traditional Medicare covers.¹¹² Many managed care companies such as Humana, who has enrolled over 2.5 million Medicare advantage members, heavily marketed solutions to seniors claiming to decrease their out-of-pocket prescription drug cost using aggressive marketing tactics.¹¹³ Humana, like other Medicare advantage programs, did not emphasize the decrease in some benefit coverage one would possibly need, forcing uninformed seniors to reevaluate their choice depending on their circumstances.¹¹⁴ Medicare advantage programs simply do not appeal to everyone, and some seniors often switch back to traditional Medicare during open enrollment periods.¹¹⁵

¹¹⁶Indeed, there has been much debate with respect to whether or not the PPACA made positive changes to the Medicare program and if it is positively impacting its enrollees.¹¹⁷ Perhaps the bigger issue at hand is that CMS has failed to fully inform its beneficiaries about the original Medicare program; alternative Medicare advantage plans and various Medigap plan products.¹¹⁸ There is much to consider when enrolling into any of these plans, and Senior Citizens would benefit from a mandated benefit-counseling program.¹¹⁹ Research shows "that many patients "lack knowledge of key facts needed to make informed choices."¹²⁰ How can Senior Citizens effectively make informed decisions about their healthcare when many do not know much about their healthcare benefits-or lack thereof in some instances?¹²¹ Annually CMS sends out a "Medicare and You" handbook and refers its beneficiaries to the CMS website to answer any benefit coverage

¹⁰⁷ [108 P.L. 173, 117 Stat. 2066, 108 P.L. 173, 117 Stat. 2066](#)

¹⁰⁸ [ARTICLE: Analyzing the Impact of the New Healthcare Reform Legislation on Older Americans, 18 Elder L.J. 213, 216, 240](#)

¹⁰⁹ [United States v. Aetna Inc., 2017 U.S. Dist. LEXIS 8490, 2017-1 Trade Cas. \(CCH\) P79,877, 2017 WL 325189 \(D.D.C. Jan. 23, 2017\)](#)

¹¹⁰ [United States v. Aetna Inc., 2017 U.S. Dist. LEXIS 8490, 2017-1 Trade Cas. \(CCH\) P79,877, 2017 WL 325189 \(D.D.C. Jan. 23, 2017\)](#)

¹¹¹ [United States v. Aetna Inc., 2017 U.S. Dist. LEXIS 8490, 2017-1 Trade Cas. \(CCH\) P79,877, 2017 WL 325189 \(D.D.C. Jan. 23, 2017\)](#)

¹¹² [United States v. Aetna Inc.,](#)

¹¹³ [United States v. Aetna Inc.,](#)

¹¹⁴ [United States v. Aetna Inc.,](#)

¹¹⁵ [United States v. Aetna Inc.,](#)

¹¹⁶ [ARTICLE: Analyzing the Impact of the New Healthcare Reform Legislation on Older Americans, 18 Elder L.J. 213, 185](#)

¹¹⁷ [ARTICLE: Analyzing the Impact of the New Healthcare Reform Legislation on Older Americans, 18 Elder L.J. 213, 186](#)

¹¹⁸ [ARTICLE: Analyzing the Impact of the New Healthcare Reform Legislation on Older Americans, 18 Elder L.J. 213, 187](#)

¹¹⁹ [United States v. Aetna Inc.](#)

¹²⁰ [SYMPOSIUM ARTICLE: SCOPING THE FIELD OF PUBLIC HEALTH LAW, POLICY, AND RESEARCH: The Potential of Shared Decision Making to Reduce Health Disparities, 39 J.L. Med. & Ethics 30, 4](#)

¹²¹ [United States v. Aetna Inc.,](#)

questions that they may have.¹²² Neurological research indicates, "Older people have difficulty in processing new information" and "retain less detail about the information they do process."¹²³ This major communication gap imposes an undue burden on seniors and forces many to seek the counsel of "independent brokers and corporate sales agents about their healthcare options"¹²⁴ There are many seniors who do not have family members or guardians to assist them in making decisions about their healthcare coverage, social security, and other benefits they may be entitled to. CMS has a huge opportunity to enhance patient protections for Senior Citizens by expanding their communicative efforts regarding benefit enrollment.¹²⁵

This oversight is just one reason why many seniors to fall prey to financial exploitation and can become victims of consumer fraud.¹²⁶ This is a growing epidemic that is greatly affecting the senior population.¹²⁷ Greater access to financial planning services and advocacy programs would also educate and assist older Americans and perhaps decrease other types of financial abuse such as mail and telemarketing schemes and fright mail.¹²⁸

B. Financial Exploitation of Senior Citizens

Senior Citizens, especially the advanced aged, are often targeted and vulnerable to financial crimes.¹²⁹ While healthy citizens that live independently are less vulnerable to physical abuse, however, they are especially vulnerable to financial abuse, as they are often retired, and therefore more available.¹³⁰ They "account for 60% of the \$60 billion annual loss due to fraud."¹³¹ Elder financial exploitation is now recognized as one of the major problems that seniors face in America today.¹³² While there is an increased awareness within the last decade in this area, civil penalties for those who commit these crimes have not increased, nor has the access to civil legal representation for the victims of financial exploitation.¹³³ The Older Americans Act defines financial exploitation as "the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an older

¹²² [United States v. Aetna Inc.,](#)

¹²³ [How America's Newest Consumer Credit Statute Fails to Protect Its Oldest Consumers: A Critique of the Credit CARD Act of 2009*,, 64 Okla. L. Rev. 171](#)

¹²⁴ [United States v. Aetna Inc., 2017 U.S. Dist. LEXIS 8490, 2017-1 Trade Cas. \(CCH\) P79,877, 2017 WL 325189 \(D.D.C. Jan. 23, 2017\)](#)

¹²⁵ [ARTICLE: Analyzing the Impact of the New Healthcare Reform Legislation on Older Americans, 18 Elder L.J. 213, 214](#)

¹²⁶ [ARTICLE: Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse, 41 San Diego L. Rev. 507](#)

¹²⁷ [ARTICLE: Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic, 23 Elder L.J. 297](#)

¹²⁸ [ARTICLE: Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse, 41 San Diego L. Rev. 505, 16](#)

¹²⁹ [ARTICLE: Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse, 41 San Diego L. Rev. 505, 16](#)

¹³⁰ [ARTICLE: Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse, 41 San Diego L. Rev. 505, 517](#)

¹³¹ [ARTICLE: Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse, 41 San Diego L. Rev. 505, 516](#)

¹³² [ARTICLE: Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic, 23 Elder L.J. 297, 298](#)

¹³³ [ARTICLE: Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic, 23 Elder L.J. 297](#)

individual for monetary or personal benefit, profit, or gain, or that results in depriving an older individual of rightful access to, or use of, benefits, resources, belongings, or assets."¹³⁴ The Perpetrators of such acts may include caretakers, merchants, relatives and even strangers.¹³⁵ Financial exploitation is one of the most common forms of elder abuse.¹³⁶ What's worse is that research undeniably underestimates the number of seniors that fall victim to financial abuse or exploitation because many cases are not reported. Studies show that "By 2050, 88.5 million Baby Boomers will be entering their golden years with nearly \$30 trillion in investable assets" turning this already vulnerable population into a "highly desirable target" for financial exploitation.¹³⁷ Some critics suggest that they are targeted because they are "likely to have greater amounts of assets, frequent presence in the home, and their fear of losing their financial independence."¹³⁸ Additionally, they are targeted more frequently because they are less likely to report the crime for fear that it will impose on their overall independence.¹³⁹ Some criminals perceive the elderly as a population stereotypically: with limited cognitive and physical ability.¹⁴⁰ The Chief of the FBI's Financial Crimes argues that criminals "prey upon the elderly because of their relative affluence and good credit, general polite and trustworthy nature, reducing the likelihood of reporting the crime."¹⁴¹ Senior Citizens that are advanced in age are home more often due to lack of mobility and therefore are exposed to more direct aggressive marketing and solicitation by phone.¹⁴² Fright mail, telemarketing schemes and charity solicitations are all potential means of a fraudulent scheme.¹⁴³ The victims' caregiver, family members and other financial advisors that may be close to them can commit financial abuse.¹⁴⁴ Some may argue that all ages must be considered when it comes to financial exploitation prevention.¹⁴⁵ While this is true, the effects of elderly financial exploitation can be more devastating for elderly victims, particularly if they are on a relatively fixed income.¹⁴⁶ Some victimized seniors suffer financial losses that cause irreparable credit scores, increased reliance on family members, bankruptcies, homelessness, and sometimes an overall loss of independence.¹⁴⁷ Senior Citizens are also more likely to suffer from more adverse health consequences such as increased anxiety, depression, increased hospitalization and mortality risks.¹⁴⁸

¹³⁴ 89 P.L. 73, 79 Stat. 218, Older Americans Act

¹³⁵ [ARTICLE: Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic, 23 Elder L.J. 297](#)

¹³⁶ Id., 298

¹³⁷ Id., 303

¹³⁸ [NOTE: Incomplete Protection: The Inadequacy of Current Penalty Enhancement Provisions in Deterring Fraud Schemes Targeting the Elderly, 18 Elder L.J. 335, 336](#)

¹³⁹ [NOTE: Incomplete Protection: The Inadequacy of Current Penalty Enhancement Provisions in Deterring Fraud Schemes Targeting the Elderly, 18 Elder L.J. 335, 338](#)

¹⁴⁰ Id., 335

¹⁴¹ Id., 335

¹⁴² [COMMENT: How America's Newest Consumer Credit Statute Fails to Protect Its Oldest Consumers: A Critique of the Credit CARD Act of 2009*... 64 Okla. L. Rev. 171](#)

¹⁴³ [ARTICLE: Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse, 41 San Diego L. Rev. 505, 509](#)

¹⁴⁴ [ARTICLE: Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic, 23 Elder L.J. 297, 304](#)

¹⁴⁵ Id., 304

¹⁴⁶ [ARTICLE: Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic, 23 Elder L.J. 297, 305](#)

¹⁴⁷ Id., 304

¹⁴⁸ Id., 305

Sure, people of all ages have been the victim of said aforementioned schemes but financially exploiting a disadvantaged elderly person should have more severe criminal and civil penalties, as there are not many protective services for this population.¹⁴⁹ Society as a whole would benefit as a whole, if more states would criminalize elderly financial exploitation.¹⁵⁰ This would not only send a strong message to predators that this illegal and harmful crime will not be condoned, but increase protections among all age groups.¹⁵¹ Currently, 35 states have special laws in place that address financial exploitation, and only five other states have enhanced sentences for financial crimes of elderly victims.¹⁵² General laws for crimes such as, forgery, fraud, larceny and identity theft are used to prosecute financial exploitation of the elderly.¹⁵³ Unfortunately, many Senior Citizens do not press charges, either because they do not realize that they have been victimized or choose not to report the abuse, as the perpetrator is often a caregiver or family member.¹⁵⁴ Increased criminal prosecution of these crimes would also increase protection from caretakers and staff members who target elderly patients that are also nursing home residents.¹⁵⁵ In the case of *Tomlin v. Commonwealth*, Tomlin was a trusted social worker and senior advocate for a skilled nursing facility that financially exploited residents at the nursing home where she worked.¹⁵⁶ In short, she would often shop for residents that could not shop for themselves.¹⁵⁷ Tomlin obtained her nursing home residents' signatures that authorized her to make withdraws from the facility's personal patient fund account.¹⁵⁸ After purchasing items for the resident, she would then provide her previous employer, who oversaw the patient fund account, with receipts, then asserting that the residents were given the items.¹⁵⁹ After an audit was conducted, it was discovered that after purchasing these items she would return them the next day, and pocketed the money.¹⁶⁰ Eventually, Tomlin was terminated and prosecuted.¹⁶¹ The commonwealth focused its case on four transactions that took place over the course of 10 months, she was eventually convicted of embezzlement, grand larceny, and obtaining signatures by false pretenses.¹⁶² "Criminal prosecution can be a very effective tool in combating elder financial exploitation" and carry more advantages than civil prosecution.¹⁶³ Sometimes even the threat of criminal prosecution will motivate the abuser, especially if they are a family member, to return money or property stolen from its victims.¹⁶⁴ While Civil lawsuits may be more appealing to Senior Citizen victims and provide an option for victims to recover stolen assets, many Senior Citizens have little

¹⁴⁹ Id., 305

¹⁵⁰ Id., 305

¹⁵¹ [ARTICLE: Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse, 41 San Diego L. Rev. 505](#)

¹⁵² [ARTICLE: Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic, 23 Elder L.J. 297, 305, 306](#)

¹⁵³ Id., 306

¹⁵⁴ Id., 308

¹⁵⁵ Id., 309

¹⁵⁶ [Tomlin v. Commonwealth, 2017 Va. App. LEXIS 79 \(Va. Ct. App. Mar. 14, 2017\)](#)

¹⁵⁷ Id., 3

¹⁵⁸ Id., 3

¹⁵⁹ Id., 3

¹⁶⁰ Id., 4

¹⁶¹ Id., 3

¹⁶² Id., 2

¹⁶³ [ARTICLE: Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic, 23 Elder L.J. 297](#)

¹⁶⁴ Id., 307

access to legal resources to combat this issue.¹⁶⁵ Additionally, few states have specific statutes that address elder financial exploitation, "leaving gaps through which creative abusers can escape."¹⁶⁶ As a result, few cases are litigated.¹⁶⁷ Perhaps if there were a more strict uniformed system of comprehensive laws and a federal civil cause of action for financial exploitation, this would be a legal remedy for both attorneys and victims.¹⁶⁸

III: Improving Current Legislative and Community Programs

A. Older Americans Act and Senior Services Programs

The Older Americans Act was enacted in response to a lack of social policy and advocacy for the Senior Citizen community.¹⁶⁹ The OAA (Older Americans Act) empowers states through grant programs to create social programs, legal assistance, and education programs and conduct research to better advocate for the Senior Citizen community.¹⁷⁰ The OAA permits several service programs throughout 50 state agencies on aging.¹⁷¹ In the State of Virginia, Senior Services of Southeastern Virginia is a regional organization that supports and enriches the lives of seniors by offering community services that assist them with living independently providing programs such as meals on wheels, home healthcare services, wellness classes, limited legal resources and assistance with advanced care planning.¹⁷² Many would argue that this legislation has been proven very successful in advancing the social interest and justice gaps of the elderly.¹⁷³ However, its initiatives are severely underfunded.¹⁷⁴ The OAA was approved by senate for a three year authorization without opposition July 16, 2015, but perhaps the Administration on Aging (AoA) should propose an budget increase to fund the state grants for these much needed social programs.¹⁷⁵ The (AoA) authorizes grants that must be dispersed "throughout a network of 56 State Units on Aging, 665 Area Agencies on Aging, 244 Tribal and Native organizations, and 20,000 service providers" leaving many agencies to rely on volunteers to render services to this underserved population.¹⁷⁶

Senior services also have ombudsman's programs, which is an advocacy program that support seniors who live in nursing facilities or other senior living facilities.¹⁷⁷ In each senior services program, generally two ombudsmen usually are actually paid patient advocates; forcing

¹⁶⁵ Id., 331

¹⁶⁶ [ARTICLE: Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse, 41 San Diego L. Rev. 505,532](#)

¹⁶⁷ [ARTICLE: Making Elder Financial Exploitation Cases Part of a Sustainable Practice: Tips from the Experiences of the University of Illinois College of Law's Elder Financial Justice Clinic, 23 Elder L.J. 297, 330](#)

¹⁶⁸ [ARTICLE: Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse, 41 San Diego L. Rev. 505, 532](#)

¹⁶⁹ https://aoa.acl.gov/AoA_Programs/OAA

¹⁷⁰ https://aoa.acl.gov/AoA_Programs/OAA

¹⁷¹ https://aoa.acl.gov/AoA_Programs/OAA

¹⁷² <http://www.ssseva.org/about/index.shtml>

Senior Services of South eastern Virginia

¹⁷³ 1-4 Elder Law in Maryland § 4.01

¹⁷⁴ 1-4 Elder Law in Maryland § 4.01

¹⁷⁵ 1-4 Elder Law in Maryland § 4.01

¹⁷⁶ 1-4 Elder Law in Maryland § 4.01

¹⁷⁷ <http://www.ssseva.org/advocacy/index.shtml>

Senior Services of South Eastern Virginia Center for Aging

them often to rely on a team of inconsistent volunteers. These assist residents with patient rights inquiries, document comprehension and with other issues within the facility that may require mediation between the resident and the facility while in a nursing facility.¹⁷⁸ Increased funding to this program could emphasize a stronger advocate presence in hospitals, long-term care facilities and the overall Senior Citizen community.¹⁷⁹

B. Increased Need for Legal Services

The Administration on Aging's National Center on Law and Elder Rights is another program that empowers legal professionals with legal tools that would assist seniors with economic and social needs with legal services in making informed decisions.¹⁸⁰ Under the Administration on aging legal assistance program, there are over 1,000 legal services that are funded by the Older Americans Act.¹⁸¹ They also provide legal assistance for older Americans who need help with drafting legal documents and advanced directives, and designating responsible parties and surrogate decision makers to assist them with their healthcare decisions.¹⁸² These services are pertinent, as they really can set the foundation for their advanced healthcare needs, and give them the tools needed to make healthy, informed, and successful choices about their finances and healthcare. Had this information and service been known, many seniors would have made different choices in regards to prescription drug coverage, enrollment into medical replacement plans, and even made different decisions while in the hospital and other healthcare facilities regarding their care.¹⁸³ Even though many of these resources are available to older Americans, access to affordable legal services are still very limited for some Americans.¹⁸⁴ Many programs limit the services that they provide, as their funding is limited, leaving seniors needing assistance because they still have unanswered questions and don't have the resources to pay for the legal services that they need.¹⁸⁵ For example, the Administration on Aging provides hotlines that provide limited advice and legal assistance, but do not have the budget to offer full legal services to their clients.¹⁸⁶ The consequences to these unintended legal gaps can be devastating to some older Americans and disqualify them for other services that may be available to them or cause them to make urgent uninformed decisions.¹⁸⁷ Many universities over the years recognize that older Americans have poor access to these legal services.¹⁸⁸ Therefore, institutions such as William S. Richardson School of Law at the University of Hawaii operate law clinics that offer legal services to the economically challenged seniors in their communities.¹⁸⁹ They have worked

¹⁷⁸ <http://www.ssseva.org/advocacy/index.shtml>

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¹⁷⁹ <http://www.ssseva.org/advocacy/index.shtml>

Senior Services of South Eastern Virginia Center for Aging

¹⁸⁰ US Department of Human Services Administration on Aging. National Center on Law and Elder Rights

¹⁸¹ https://aoa.acl.gov/AoA_Programs/Elder_Rights/Legal/title_providers.aspx

¹⁸² US Department of Human Services Administration on Aging. National Center on Law and Elder Rights

¹⁸³ [ARTICLE: Expanding Access to Justice for Socially and Economically Needy Elders Through Law School Experiential Programs, 20 Elder L.J. 315, 318, 320,](#)

¹⁸⁴ Id., 330

¹⁸⁵ [ARTICLE: Expanding Access to Justice for Socially and Economically Needy Elders Through Law School Experiential Programs, 20 Elder L.J. 315, 318, 320, 330](#) Id.

¹⁸⁶ Id., 330

¹⁸⁷ Id., 319

¹⁸⁸ Id., 321

¹⁸⁹ Id., 329

hard to bridge the legal gap affecting seniors and have opened law clinics that offer pro-bono services to older Americans while benefiting law students in the process.¹⁹⁰ Other Universities that have taken part in this social initiative are Loyola University Chicago School of Law Elder Initiative.¹⁹¹ While these resources are providing much needed legal services to Older Americans, many are clueless about the availability of these resources.¹⁹² While we are increasing access to these services, perhaps we should focus also putting more emphasis on marketing efforts funding, to further promote the awareness of these much-desired services.¹⁹³ Many of these previously-mentioned resources are under-advertised in materials such as pamphlets in physician offices, pharmacies, churches, and community bulletins, and even by mail.

IV: Conclusion

In sum, the rapidly growing Senior Citizen population as mentioned earlier, is demanding more emphasis on elder justice and community advocacy programs.¹⁹⁴ The OAA and PPACA have been significant vehicles for advancing social programs and expanding healthcare coverage for the elderly.¹⁹⁵ However, there are still some deficits that need to be addressed in regards to elder justice and informed consent.¹⁹⁶ General literacy has a huge impact on health literacy and should be considered more in the medical malpractice and informed decision cases.¹⁹⁷ Doing so would merit a greater commitment from physicians to not only consider patient autonomy and shared decision-making, but also view the informed consent process as an ethical duty rather than a legal formality.¹⁹⁸ Additionally, there should be a strong conversation about whether arbitration is an appropriate resolution alternative, in cases of severe elderly abuse allegations.¹⁹⁹ While this alternative is cheaper than litigation, the court system would most likely hold nursing facilities more accountable.²⁰⁰ Also, there is much room for improvement in the hospital discharge planning process.²⁰¹ Federally mandating advocacy support for their patients would be advantageous for hospitals and patients, as it would improve the informed decision-making process and health outcomes of Senior Citizens.²⁰² Adopting a uniformed federal penalty system for financial exploitation crimes would significantly assist in the effort to combat financial elder abuse.²⁰³ This, along with increasing funding to community legal and advocacy programs, would be a huge step forward in closing the elder justice gap in the United States legal system.²⁰⁴

¹⁹⁰ Id., 330

¹⁹¹ Id., 331

¹⁹² Id., 334

¹⁹³ Id., 335

¹⁹⁴ <http://www.census.gov/newsroom/press-releases/2015/cb15-113.html>

¹⁹⁵ [Article: Special Populations: Mobilization for Change, 25 Touro L. Rev. 467](#)

¹⁹⁶ Id., 467

¹⁹⁷ [STUDENT COMMENT: PERSONALIZING INFORMED CONSENT: THE CHALLENGE OF HEALTH LITERACY, 2 St. Louis U. J. Health L. & Pol'y 379](#)

¹⁹⁸ Id., 379

¹⁹⁹ ARTICLE: Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between Nursing Homes and Their Residents, 22 Elder L.J. 153

²⁰⁰ Id., 153

²⁰¹ [ARTICLE: Breathing Life into Discharge Planning, 13 Elder L.J. 1,2](#)

²⁰² Id., 1

²⁰³ Id., 2

²⁰⁴ ARTICLE: Expanding Access to Justice for Socially and Economically Needy Elders Through Law School Experiential Programs, 20 Elder L.J. 331