As lawyers, we concern ourselves with how laws affect our clients. As senior lawyers, we are naturally attuned to how laws affect us and our families. We have a greater stake in this than in most legal matters. Will pensions and financial markets be regulated and Social Security monitored so that our retirement incomes are secure and sufficient? Will our spouses and life partners get the care they need when we are no longer living or able to provide care? How good will that care be and will our laws set good standards? What rights and protections can we count on as we ourselves need more protection in old age? And will our neighbors and friends—our communities—adapt to provide adequate laws and policies? Do you believe that in our final years we can all have lives of dignity and security?

Each great movement in history gives birth to new relationships, which are then reflected in movements in the law. The Industrial Revolution brought about the need for new corporate structures, for child labor laws, wage and hour rules, and occupational safety policies. The environmental degradation that followed from industrialization and modernization has, in turn, spawned essential new rules of law. Similarly, the demographic changes taking place in the world, in the profound aging of our societies, will also give rise to new laws and policies.

Our Rights as We Age—Are They Human Rights?

An exciting development is taking place on a level that few of us work on, or even think about—the level of international human rights. Several organizations have set a goal of having the United Nations adopt an international convention on the rights of older adults. The United Nations is working on a draft convention that would provide a comprehensive framework for the protection of human rights of older adults.
One strategy for improving laws regarding older adults has been to develop model acts that states can adopt in whole or in part.

Nations recently gathered fifteen people from all over the world who work in the field of aging and the law to discuss the possible convention on older adults. That convention—or treaty—is not, however, the subject of this article.

In our three-day meeting, we covered a wide range of topics, focusing on the fundamentals of good public policy toward an aging society. Our work was made easier by the United Nations’ rich history in this field, most recently in 2002 in the Madrid International Plan of Action on Ageing. This allowed us to focus on the next step—how to engage the member states of the United Nations in the process of moving toward adoption of a convention on the rights of older adults. (Readers can learn more about the United Nations’ process at www.un.org/esa/socdev/egms.html.)

As you know more than anyone, having a law on the books is only part of the story. One needs advocates, advisors, legislators, and judges who understand and enforce the law. We need good lawyers! This article will describe the tremendous progress that has been made to ensure that, as older adults, we will have someone to go to in order to learn and use and assert our rights. We must have skilled advocates. How have we built the capacity for advocacy in the United States?

How was this advocacy community built? How are U.S. laws affecting older adults being strengthened?

What Is the Field of Elder Law?
Training lawyers to better represent us as we age allows us to use existing laws and develop even better ones. Of course, having good laws and lawyers is just one part of achieving safe and healthy lives for older people. Communities, advocacy groups, and other parts of society must work together toward this goal.

Elder law is defined by the National Elder Law Foundation as 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 consideration to tax consequences.

Elder law attorneys, it has been said, must also recognize issues that arise during representation of older persons or their representatives, with respect to abuse, neglect, or exploitation of the older person, especially involving insurance, housing, long-term care, employment, and retirement. The core competencies can be simplified into these three: knowing the substantive rights of older people, knowing how to develop a strong bond with older clients, and knowing how to harness the supportive services they might need.

Because of the complex nature of older clients’ situations, which often involve nonlegal matters, an elder law attorney should also be familiar with professional and nonlegal resources and services publicly and privately available to meet the needs of older persons and be capable of recognizing the professional conduct and ethical issues that arise during representation.

Training Lawyers to Be Stronger Advocates for Older Adults
The number and skill level of advocates for older adults has increased in the United States for many reasons. Primary among these were the cost of health care and the complexity of health care laws, the growth in the number of people with dementia, and the inadequacy of guardianship laws.

Elder Law: The Early Years
Many attorneys who primarily serve older clients added this field of practice to their existing estate planning and probate practices. In other words, they already were helping clients plan for their property distribution at death and were handling these estates. It was predictable that these lawyers would start to see other issues as their clients grew older.

In particular, clients’ questions about paying for long-term care pushed lawyers to learn about federal laws on health care coverage. Also, ethical issues increased as attorneys saw more clients with mental impairments and family members...
who want to direct the older clients’ decisions. Another area that gained public attention was the field of guardianship laws. News reports revealed that guardianship laws often deprived older people of a fair chance to participate in court proceedings.

Elder Law’s Growth Spurt

The three key forces in developing elder law have been legal organizations, the federal government, and nonprofit organizations. Let us quickly review the key players from each of these.

The American Bar Association (ABA) provided leadership when, in 1979, it created the Commission on Legal Problems of the Elderly. Renamed some years later the Commission on Law and Aging, this group has a staff of several attorneys who get direction from a diverse group of commissioners. Readers of this publication are, of course, aware of the ABA Senior Lawyers Division (SLD), a voluntary organization of lawyers aged fifty-five and older.

Besides the ABA, the other organization that led in building a cadre of elder law experts has been the National Academy of Elder Law Attorneys (NAELA). NAELA was founded in 1987 and has about 4,500 attorney members in all fifty states. The group puts on several programs during the year, each generally lasting three to four days, and has chapters in several states that also sponsor training programs. NAELA also produces a scholarly journal, a magazine, several newsletters, an active e-mail listserv, and a weekly bulletin that is e-mailed to members. In addition, there are regular webinars and telephonic training events. Law students are invited to programs for free or at a reduced cost.

State and local bar associations have also been developing the field of elder law. Some of these bar organizations have elder law sections that sponsor training, symposia, newsletters, and e-mail listservs for member communication. Most bar associations have young lawyer sections, many of which have projects focused on the needs of older adults.

Private law firms’ pro bono programs offer free legal assistance. Just one example is the firm of Schulte Roth & Zabel, LLP, which has been helping the International Longevity Center and stakeholders interested in the United Nations’ work on aging issues. Some states are also adopting rules on pro bono activities for emeritus attorneys who give back to the community by providing legal assistance to older citizens.

The federal government has also been a key player in developing elder law. Federally funded “legal services developers” are found in all fifty states. They are responsible for providing leadership in developing legal assistance programs for persons sixty years of age and older and play a key role in assisting states in the development and provision of a strong elder rights system. The developer provides oversight of the Older Americans Act (OAA) Title III-B legal assistance programs and ensures that at-risk older people have access to the civil justice system. The activities of these legal programs and the legal services developer help in supporting the most vulnerable older people. This helps older people retain autonomy and remain in the community. It also assists in the prevention of many kinds of abuses against older people.

The Legal Services Corporation, or LSC, is the primary federal program that provides legal assistance on a wide range of civil matters to poor people. Some LSC programs have offices or at least specific attorneys who focus on the legal issues of older clients. Also, paralegals

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Ensuring justice for older adults must include an awareness of how the “business as usual” of our courts can effectively deny justice to older people.

often handle public benefits cases on an administrative level for older clients.

A variety of legal outreach or assistance programs are funded by the federal Administration on Aging. This includes hotlines, which are free services that allow older people to telephone for legal advice.

The third group to have launched elder law has been the nonprofit organizations in the field of aging. One leader was The Center for Social Gerontology (TCSG). Since 1972, TCSG has been training attorneys and advocates. The center receives grants and also, since 1985, funding from the federal Administration on Aging because it serves as a national support center in law and aging. A foundation that has helped to build the practice of elder law is the Borchard Foundation Center on Law and Aging. It provides several $40,000 annual fellowships for recent law graduates and is also conducting research on the teaching of elder law.

Improving the Standards of Practice in Elder Law

To help the public in selecting the best attorneys in the field, the board certification found in other areas of law practice can now be obtained in the field of elder law. Of course, certification also helps the practitioner who truly focuses on this kind of work to distinguish herself from those who merely pay dues to join an organization on elder law.

The National Elder Law Foundation (NELF) provides a certification to experienced attorneys who have a focus on elder law, pass a rigorous exam, and are acknowledged by their peers as being qualified in the field. There are 400 certified elder law attorneys, or CELAs, in the United States. NELF is the only national certification in elder law that is approved by the ABA. One state, Florida, has its own program for certifying attorneys in elder law. With the highest percentage of older adults of any state, Florida has been certifying elder law attorneys since 1998 and has seventy-one certified elder law attorneys. This year, North Carolina also began its own process to certify attorneys in this field.

Additional expertise in the field of law and aging is sometimes required for mediators. North Carolina recently adopted the option of mediation for estate or guardianship disputes. To be certified to handle such cases, a ten-hour training is required of mediators who have already taken the forty-hour training to become certified superior court mediators. This additional training covers such issues as medical conditions affecting mental capacity, how to accommodate older individuals in the actual mediation, family dynamics (including elder abuse), financial exploitation, community resources for older adults and caregivers, and procedural issues unique to guardianship and probate.

At least three law schools now offer attorneys the option of an advanced degree—an LLM—in elder law. It is likely that we will see more schools offering this option.

Raising a New Generation of Elder Law Advocates—Law Students

As the baby boomer generation is starting to retire, we already need more attorneys familiar with the needs of older clients. Fortunately, most law schools now offer courses that cover elder law. Some schools allow students to obtain a concentration or a certificate in elder law. There are distance learning courses offered in elder law as well.

A suggested curriculum was developed recently by the National Academy of Elder Law Attorneys (NAELA) and is sent annually to law schools for guidance. The core subjects are:

- any elder law specific course, including substantive courses, seminars, clinics, and internships
- trusts & estates (survey course)
- estate planning
- estate & gift tax
- bioethics or death & dying
- wills & trusts drafting
- interviewing, counseling, and negotiations
- administrative law
- public benefits or poverty law
- any writing requirement should be satisfied by writing on an elder law topic

NAELA also listed these courses as relevant to an elder law practice: trial advocacy, health law, housing and the law,
family law, consumer law, alternative dispute resolution, disabilities law, pension law or employee benefits, law practice management, financial planning, accounting and the law, and insurance law.

**Law School Elder Law Clinics: Three Models**

Clinic programs generally involve law students meeting with actual clients and providing legal assistance under the supervision of experienced attorneys. There are many ways that clinical or practical experience on elder law issues can be obtained. The three primary models are to put students with practitioners, to set up a law school-operated clinic, or to have students partner with advocacy organizations in the field of aging. Let’s look at each of these models.

Putting a law student with an existing law office is called an externship or placement clinic. Placed with a private practitioner or a legal services office, the student gets to see how a law office works and can handle a variety of elder law cases. Other externship clinics address mainly policy or legislative agendas with students helping community groups or advocacy organizations.

A second model is for law schools to operate their own elder law programs, known as in-house clinics. Full-time clinical professors teach the students. Some have a particular emphasis, such as consumer law.

The clinical program that I direct at Wake Forest University is unusual. We are located in a major teaching hospital (with 8,000 employees and 800 beds). Our location allows us to emphasize the teaching of health-related legal issues. For example, a geriatrician, neurologist, or forensic geriatric psychiatrist will teach our students about mental capacity issues. Then the students are better equipped to handle guardianship cases. Students also gain an understanding of health care laws, because some clients go from the hospital where the program is based into various levels of long-term care.

Many elder law clinics provide resources to the public and to lawyers who serve older clients through programming and Web sites.

A third model for clinical elder law training is the in-house clinic that focuses on policy work. These clinics often work primarily with organizations or legislative bodies. The Lowenstein Human Rights Clinic at Yale Law School, for example, has been working with the International Longevity Center for several years to develop draft language for a declaration on the rights of older persons.

**Programs by Lawyers to Involve Law Students**

A few years ago, NAELA created a committee aimed at recruiting law students into the field. A writing competition was developed with the winners getting cash prizes and having their articles published in a special issue of the *NAELA Journal*. Students are also invited to attend national conferences, either free or at a reduced cost. NAELA provides some of the students with scholarships for travel and hotel costs.

State bar elder law sections sometimes provide financial assistance to law students to attend training programs on elder law.

**Resources for Lawyers, Judges, and Law Professors**

There are now many treatises and books for the layman and the lawyer on legal issues of older adults. Some of the other resources that have enriched this area of practice include general resources on elder law and national conferences of multiple organizations in the field of aging.

The resources now available in the field of elder law are quite rich and include, of course, law reviews, Web sites, listservs, and blogs. Leading examples are *The Elder Law Journal*, the *NAELA Journal*, and the *Canadian Journal of Elder Law*; and Web sites for lawyers and law professors who teach in this field. Two good examples of Web sites are www.elderlawanswers.com and www.seniorlaw.com.

One of the most helpful developments has been the occasional law review dedicated to elder law topics. Many attorneys still consult a 1994 issue of the *Fordham Law Review* on ethical issues in representing older clients. In 2001, the *Georgia Law Review* covered a
symposium on legal/ethical issues in the progression of dementia. These and several other dedicated law review issues have greatly enriched the field of elder law.

National Conferences Sponsored by Multiple Organizations

The National Aging and Law Conference (NALC), held annually for the last eight years, takes place in the Washington, D.C., area and is sponsored by the leading organizations in the field of law and aging. This conference includes speakers and attorneys from the federal legal services programs and emphasizes the legal issues of low- and moderate-income seniors. Many of the presentations from the recent NALC conferences can be downloaded as podcasts from the Web site of the ABA Commission on Law and Aging.

The College of Probate Judges has been actively involved in improving the legal system as it relates to older adults. It offers training for judges and has been an invaluable participant in national law reform conferences.

In 2001, a national conference called Wingspan brought together experts from several organizations to focus on ways guardianship laws could be improved. It was a follow-up to the 1988 Wingspread Conference.

Resources on Improving Ethical Standards

A few years ago, NAELA took a close look at the appropriate professional ethical standards for lawyers who work with older adults. The NAELA Aspirational Standards provide practical and thoughtful guidance to lawyers, particularly on issues of “conflict of interest,” how to best assist mentally impaired clients, and other common dilemmas of our field. The standards have been critiqued and analyzed by our colleagues from the estate planning bar in the American College of Trust and Estate Counsel (ACTEC). That organization has long been a source of useful guidance to attorneys in the estate planning field.

The Fordham Law Review's special issue, mentioned above, is still an excellent resource, although it was published in 1994.

The ABA provided critical guidance to attorneys when it adopted a model rule on representation of the client with diminished capacity. Rule 1.14 provides that the lawyer shall make extra efforts to maintain as normal an attorney-client relationship as possible. It also clarifies when the attorney can take protective action, such as in an emergency, where the client is unable to make decisions.

Some years later, the ABA also gave lawyers a practical tool to use in meeting the sticky ethical challenges in elder law. It published a simple brochure directed at the family members of older clients. It is called “Understanding the Four C’s of Elder Law.” The brochure addresses the proper handling of four common issues: client identification, conflicts of interest, competency, and confidentiality. Lawyers who serve older clients should consider using it in their offices. It is available on the Web site of the ABA Commission on Law and Aging.

Partnerships With Other Disciplines

As we age, our legal problems often involve medical issues. By collaborating with health care professionals and social workers, U.S. elder law attorneys have found that they can better serve older clients. Several national meetings of elder law attorneys have been held in conjunction with other organizations. These include the National Association of Professional Geriatric Care Managers and the National Guardianship Association.

In a partnership with the American Psychological Association, the ABA Commission on Law and Aging (“the Commission”) developed a book on mental capacity assessments, It is available on the Commission’s Web site. The Commission has also done a significant amount of work with the medical community to remove legal barriers to better end-of-life care. For example, where laws on prescription drugs were making it difficult to prescribe adequate pain medicine, the Commission helped recommend changes. Similarly, laws on advance medical directives (such as living wills and health care powers of attorney) have been studied and improvements recommended by the Commission after it partnered with health care organizations.
Improving Existing Laws Through Model Acts

One strategy for improving laws regarding older adults has been to develop model acts that states can adopt in whole or in part. The primary organization to do this work is the National Conference of Commissioners on Uniform State Laws (www.nccusl.org/Update). While there is no guarantee that a model law will be adopted anywhere, the development of model or uniform laws does help create some momentum for positive change.

A recent example is the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). The UAGPPJA seeks to clarify jurisdiction and provide a procedural roadmap for addressing dilemmas where more than one state is involved and to enhance communication between courts in different states.

Policy Advocacy

Organizations of lawyers and law schools that train law students are not primarily focused on advocacy. The lawyers want to develop skills to enhance their practices while law students will learn about elder law issues but generally not focus on policy work. Certainly, most of the lawyers’ organizations have done some work on legislative and policy issues, but that has not been their main mission.

Fortunately, there are many organizations active in the area of policy advocacy regarding older adults. Some of the most notable are the ABA Commission on Law and Aging, the National Senior Citizens Law Center, the Center for Medicare Advocacy, the Leadership Council on Aging (a coalition of fifty-six of the most prominent organizations in the field of aging), the Political Action Committee of the National Academy of Elder Law Attorneys (NAELA-SR-PAC), and AARP’s Public Policy Institute.

Today, probably the most important organization for readers to know about is the Elder Justice Coalition. This coalition has been working in Congress for enactment of the Elder Justice Act. Information about the group and the bill can be found at www.elderjusticecoalition.org. The Elder Justice Act would be a significant step forward on several areas of law, primarily elder abuse prevention. One of the sponsors in the past several years was Senator Barack Obama, so advocates are optimistic that his administration will get the bill passed by Congress.

Improvements to Courts and Procedures

Ensuring justice for older adults must include an awareness of how the “business as usual” of our courts can effectively deny justice to older people. We have seen some progress in the ways that our courts are working to accommodate us as we age.

Alternative forms of dispute resolution offer a speedier and more informal way for older litigants to assert their rights. The Center for Social Gerontology, mentioned earlier, has been a pioneer in encouraging the use of mediation for the resolution of guardianship and other elder law disputes. This method of dispute resolution allows the parties (who are usually related in these cases) to try to reach a mutually satisfactory result with the help of a trained and impartial mediator. As mentioned earlier, North Carolina recently passed a law to allow mediation to be used in guardianship and estate disputes.

The ABA Commission on Law and Aging sponsors a free listserv for those interested in the use of mediation. The collaborate listserv on aging, disability, and dispute resolution includes over 185 mediators, lawyers, long-term care ombudsmen, aging and disability advocates, service providers, and academics. The objective is to promote the use of creative dispute resolution mechanisms in the aging and disability communities.

There are many other ways our laws and courts are becoming “age friendly.” For example, the physical and technological barriers of courtrooms are being assessed to address the needs of older litigants and witnesses. Stetson Law School pioneered the development of a barrier free courtroom. Also, some jurisdictions are providing for expedited trials or hearings that involve elderly or ill parties. For example, the federal agency that handles disputes over investments, the Financial Industry Regulatory Authority (FINRA), has such a procedural rule. Also, enhanced criminal penalties are

(Please see Legal Resources page 39)