

Elder Abuse In New Mexico



A Report of the
New Mexico Advisory Committee to the
U.S. Commission on Civil Rights

January 2018

Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

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**New Mexico Advisory Committee to the
U.S. Commission on Civil Rights**

The New Mexico Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding elder abuse issues in the state. In consideration of the troubling statistics on elder abuse both nationally and in New Mexico, the Committee selected elder abuse as a focus for inquiry. In this report, we describe the dimensions of the problem of elder abuse in New Mexico, present results from our analysis of data about elder abuse in New Mexico, and suggest avenues for action.

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TABLE OF CONTENTS

I.	Executive Summary.....	1
II.	Introduction.....	3
III.	Background	4
A.	The Magnitude of Elder Abuse	4
B.	Elder Abuse as a Civil Rights Issue	5
C.	Social, Political, and Economic Dynamics	5
1.	An Aging Population	5
2.	Disparities among Elders	7
3.	Physical and Cognitive Health.....	7
4.	Elders in New Mexico	9
D.	Existing Law	10
1.	Federal Legislation.....	10
2.	New Mexico Legislation.....	12
3.	Uniform Codes.....	14
IV.	Summary of Findings.....	15
A.	Poverty and Lack of Affordable Services	15
B.	Underreporting	18
C.	Weakness of the Healthcare System	19
D.	Enforcement of Existing Laws and Regulations	20
E.	Financial Exploitation	22
F.	The Right-to-Die	29
V.	Recommendations.....	31
VI.	Appendix.....	33

I. EXECUTIVE SUMMARY

This report by the New Mexico Advisory Committee to the U.S. Commission on Civil Rights examines the issue of elder abuse in New Mexico. To produce this report, the Committee reviewed data from a variety of sources and heard testimony at a public meeting. The Committee defines elder abuse as a civil rights issue because elders are targeted for abuse or affected by the issues discussed herein specifically because of their age status. While there have been a number of legislative efforts that provide enhanced protections for elders, significant gaps exist in those protections.

The Committee identified five dynamics that increase the risk of abuse for elders:

- Widespread impacts of poverty and lack of affordable services available to elders and their caregivers;
- Underreporting of abuse or suspicion of abuse by caretakers, providers, and elders themselves;
- Structural weaknesses in the healthcare system that allow abuse to go undetected;
- Lack of enforcement of existing laws and regulations designed to protect elders; and
- A variety of forms of financial exploitation through which individuals prey upon elders and steal or appropriate valuable financial and property resources.

The Committee provides the following recommendations to the Commission in order to improve protections for elders:

- More attention needs to be paid to ensure that elders have sufficient resources to support wellbeing as they age. This will require conversations about and concrete action to address elder poverty and health disparities;
- State and federal agencies need to bolster requirements for reporting and surveillance (data tracking) of cases of elder abuse;
- Opportunities for mediation involving family members and other interested stakeholders should be created in cases where there is a concern about an elder's capacity to control their finances;
- Additional mechanisms are needed to deter individuals from engaging in elder abuse;
- Increased transparency is required concerning the process of determining the need for court-appointed individuals or agencies to control the decisions and assets of elders;

- Existing legislation and regulations should be reviewed to determine if they are sufficient to protect the rights of elders;
- Statutes that protect elders from financial exploitation should be bolstered or enacted;
- In cases of alleged financial exploitation, a presumption of undue influence should be established, which would shift the burden of proof to alleged perpetrators of abuse once certain elements are met;
- Better tracking systems are needed to document elder financial abuse;
- Court costs, attorney's fees, and double or triple damages should be available in cases of willful coercion in relation to elder financial exploitation;
- Judgments specifically related to elder financial abuse should be tracked and registered;
- The maximum number of judgments related to elder financial abuse should be enforced and collected; and
- States should be required to take the actions recommended herein in order to receive federal funding.

II. INTRODUCTION

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice. The Commission has established advisory committees in each of the 50 states and the District of Columbia. These State Advisory Committees (SACs) advise the Commission regarding civil rights issues within the Commission's jurisdiction that are of concern in their respective states. Members of each SAC are appointed by the Commission and serve in a voluntary, unpaid capacity.

In February 2015, the New Mexico Advisory Committee (Committee) identified a concern in New Mexico over reported irregularities in the guardianship of elders. The Committee voted to investigate and report to the public on the issue of elder abuse. Because elders are at risk of abuse specifically because of their age status, elder abuse falls under the jurisdiction of the Commission as it studies and collects information relating to discrimination or denial of equal protection of the laws under the Constitution of the United States.

The Committee sought to gather direct testimonial evidence from experts, policy makers, community advocates, and individual community members to document the concerns and experiences of community stakeholders related to abusive treatment of elders in New Mexico, the challenges that exist in addressing the concerns they raise, and the need for improvements in policy, services, infrastructure, and public awareness. The Committee adopted this report and the recommendations included within it on December 13, 2017. The Committee submits this report detailing the dynamics of elder abuse in New Mexico for consideration by the public and by the Commission, and urges the Commission to revisit elder abuse as an issue of national significance.

On June 24, 2016, the Committee convened an all-day public meeting at the main branch of the Albuquerque Public Library to hear testimony on the issue of the abuse of elders and elder civil rights in New Mexico. Community stakeholders presented testimony followed by questions from Committee members. During the testimony, a court reporter transcribed oral presentations verbatim. Subsequent to the hearing, stakeholders were given the opportunity to submit written testimony as public comment.

To produce this report, members of the Committee reviewed the transcripts of oral and written testimony, and consulted public documents, media reports, and available population data. Two interns assisted us with research to include statistical information, demographic trends, and existing and forthcoming legislative efforts. Committee members identified themes and patterns in the data. We developed an analytical understanding of the issues involved through written summary and group discussion. Committee members and interns initially drafted portions of the report, and the full Committee reviewed these drafts. An "Elder Abuse Working Group" made up of a subset of the Committee developed the narrative in this report to reflect a coherent analysis

including background information, methodological detail, a discussion of our understanding of the specific dynamics and dimensions of elder abuse in New Mexico, and recommendations for action.

III. BACKGROUND

A. The Magnitude of Elder Abuse

There are an estimated 44 million people aged 65 and older in the United States.¹ Research suggests that one in ten adults are victims of abuse.² There are 450,000 new cases of elder abuse reported each year.³ Elder abuse is recognized as a critical social, economic, and health problem in the United States. There are five major types of elder abuse including physical abuse, psychological or verbal abuse, sexual abuse, financial exploitation, and neglect.⁴ Because of the nature of elder abuse and reporting, most experts believe that figures on elder abuse underestimate the problem. One report found an elder abuse incidence rate that was nearly 24 times greater than the number of cases served in the formal elder abuse service system.⁵ Elder women are more likely to be victims of abuse than elder men.⁶

The population in New Mexico is estimated to include over 350,000 adults over the age of 65, about 16.9% of the total population.⁷ For New Mexico the most frequently reported and substantiated allegations of elder abuse involve self-neglect (64%), followed by neglect (13%),

¹ U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates, at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

² Mark S. Lachs and Karl L. Pillemer, *Elder Abuse*, 373 The New England Journal of Medicine 1947-56 (2015), (hereafter cited as *Elder Abuse*) available at <http://www.nejm.org/doi/full/10.1056/NEJMra1404688#t=article>.

³ Terry Fulmer, *Elder Mistreatment: Training Manual and Protocol*, Hartford Institute for Geriatric Nursing, available at http://hartfordign.org/uploads/File/Fulmer_EM_full.pdf.

⁴ Lachs et al., *Elder Abuse* at 1947.

⁵ Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University, and New York City Department for the Aging, *Under the Radar: New York State Elder Abuse Prevalence Study* 55 (May 2011) (hereafter cited as *Under the Radar*) available at <http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf> (last accessed Sept. 26, 2018).

⁶ Lachs et al., *Elder Abuse* at 1949.

⁷ U.S. Census Bureau, QuickFacts – New Mexico, at <https://www.census.gov/quickfacts/fact/table/NM/AGE775216#viewtop> (last accessed Sept. 26, 2018).

exploitation (12%), and abuse (10%).⁸ More than 11,500 instances of elder abuse are reported to the New Mexico Adult Protective Services Division on an annual basis.⁹

B. Elder Abuse as a Civil Rights Issue

In addition to the social, economic, and health implications of the abuse of individuals who are in their elder years, elder abuse also has compelling civil rights implications—a fact that is not often considered in public discourse or in the design of public policy. Elder abuse is not random. It is specifically perpetrated against individuals in a manner that is directly related to and takes advantage of their age. Elder abuse is a form of age discrimination through which individuals are disproportionately targeted for abuse. As such, elder abuse requires legal remedies and specific social and political solutions that involve structural and policy mechanisms designed to protect elders' civil rights.

C. Social, Political, and Economic Dynamics

1. An Aging Population

By the year 2030, the United States is expected to be home to 72 million people aged 65 and above.¹⁰ The rapid increase in the number of elders—which is occurring today and is projected to expand in the coming years—reflects the fact that the millions of “baby boom” Americans who were born between 1946 and 1964 are now aging.¹¹ Increased longevity among this population has been positively influenced by medical advances that have extended human life, but also by

⁸ New Mexico Aging and Long Term Services Department, *New Mexico State Plan for Aging and Long-Term Services 2017-2021*, 28 (2016) (hereafter cited as *New Mexico State Plan*) available at http://www.nmaging.state.nm.us/uploads/FileLinks/868639a5dc0144c1b58a6f2f7ae1fdc6/2017_2021_State_Plan_1.pdf.

⁹ *Id.*

¹⁰ Department of Health, Education and Welfare, Administration on Aging, *Aging in the 21st Century: Strategic Directions for Research on Aging*, 28 (2014) (hereafter cited as *Aging in the 21st Century*) available at <http://hrsonline.isr.umich.edu/sitedocs/databook/inc/pdf/HRS-Aging-in-the-21St-Century.pdf> (last accessed Sept. 26, 2018).

¹¹ Interagency Agreement by the Federal Research Division, Library of Congress, *Domestic Trends to the Year 2015: Forecast for the United States*, 140 (1991) (hereafter cited as *Domestic Trends*) available at https://www.loc.gov/rr/frd/pdf-files/domestic_trends.pdf.

general improvements in living conditions and lifestyles.¹² A similar trend in growth of older populations is also occurring globally. The increase in the world's elders will continue to outpace that of the younger population over the next 35 years.¹³

While the fact that people are living longer is generally something to celebrate, increased longevity can create challenges for individuals, families, and society.¹⁴ An aging population places heavy demands on resources, both material and human, through expanded need for pensions, medical care, and caregivers.¹⁵ Increased longevity requires adjustments to social and public service systems, and impacts financial, labor, and capital markets.¹⁶ Tensions created by these demographic shifts are felt in a unique way at the household level. Challenges created by the need for services, resources, and care for elders as they age can be difficult to resolve and can have negative repercussions for elders and their families.

In the U.S., for every 100 individuals of working age there are 22.3 dependent elder individuals who require some sort of support.¹⁷ However, the composition of the dependency ratio is increasingly shifting toward greater elder dependence, placing a significant caregiving burden on the younger, actively economically productive population (18-64).¹⁸ In some contexts and cultures where extended families routinely share a common physical living space, elder care can be integrated into daily life without excessive disruption. In the increasingly urban and single-family household context of U.S. society, many among the younger population are unexpectedly finding themselves responsible for an elder's care at the same time that they may simultaneously have commitments to children who are their dependents.¹⁹ In other cases, elders may be in the position of caring for partners, also elders, at the same time that their own health and capacity are decreasing and that their household financial resources are becoming or have become depleted. Policy, infrastructure, and social adjustments to accommodate these changes are still

¹² Daniela S. Jopp, Kathrin Boerner, Oscar Ribiero, and Christoph Rott, *Life at Age 100: An International Research Agenda for Centenarian Studies*, 28:3 Journal of Aging & Social Policy (2016) (hereafter cited as *Life at Age 100*) available at <https://www.ncbi.nlm.nih.gov/pubmed/26984376>.

¹³ United States Department of Commerce, United States Census, *An Aging World: 2015*, 3 (2016) (hereafter cited as *An Aging World*) available at <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p95-16-1.pdf>.

¹⁴ *Life at Age 100* at 2.

¹⁵ *Domestic Trends* at 140.

¹⁶ *An Aging World* at 65.

¹⁷ *Domestic Trends* at 12.

¹⁸ *Domestic Trends* at 140.

¹⁹ *An Aging World* at 23.

forthcoming. Elders and their families experience negative impacts from these dynamics, as structural supports fail to make it possible for their needs to be reasonably met.

2. *Disparities among Elders*

Health, overall quality of life, and life expectancy are greatly influenced by social determinants such as socioeconomic status, geography, and race.²⁰ The U.S. Administration on Aging recently published a report titled *Aging in the 21st Century* which suggests that the U.S. is witnessing an increase in vulnerability among elders, with large numbers experiencing social isolation and living in poverty.²¹ The reality for these elders is poor health involving a higher disease burden, lower everyday quality of life, and decreased life expectancy.²² A disproportionate number of elders from historically marginalized populations find themselves confronting these challenges, and given demographic changes, this disparity is projected to increase.²³ And because the health and social services infrastructure in the U.S. is concentrated in cities, rural and frontier areas of the country experience unique challenges in responding to the needs of elders or even in identifying elders who require assistance and support. Distinctive emerging social, geographic, and economic characteristics of the elder population will require a reorientation of services and infrastructure.²⁴ Unfortunately, planning for these changes is currently insufficient and the likelihood is that disparities experienced by elders in the U.S. will grow and remain unaddressed.

3. *Physical and Cognitive Health*

We know that aging of the population is accompanied by a concomitant decline in levels of physical health.²⁵ Not only do general health and physical rigor decline, but it is common for elders to experience multiple coinciding chronic or specialized health conditions that increase with age.²⁶ Such co-morbidity, or even multi-morbidity, has higher prevalence among elders

²⁰ United States Department of Health and Human Services, National Institute on Aging, *Health and Retirement Study*, 20, (2007) (hereafter cited as *Health and Retirement Study*) available at https://permanent.access.gpo.gov/LPS113518/LPS113518/www.nia.nih.gov/NR/rdonlyres/D164FE6C-C6E0-4E78-B27F-7E8D8C0FFEE5/0/HRS_Text_WEB.pdf.

²¹ *Aging in the 21st Century*, *supra* n. 10.

²² *An Aging World* at 68.

²³ *Id.*

²⁴ *Aging in the 21st Century* at 14.

²⁵ *Health and Retirement* at 22.

²⁶ *An Aging World* at 48.

with low income and low levels of education.²⁷ Given that having multiple, simultaneous health needs necessarily increases health service utilization and the fact that there is a high rate of poverty among elders, declining physical health in a context where an elder has insufficient resources can have a dramatic impact on the risk of chronic disease and mortality.²⁸ Financial expenditures for medical services, together with an often increasing need for informal or formal caregiving has enormous social and economic costs.²⁹ The negative consequences of these dynamics are exacerbated by the disparities discussed above, including poverty, social isolation, and lack of infrastructure and resources in rural and frontier areas.

For instance, currently, more than 5 million Americans live with Alzheimer's disease.³⁰ While Alzheimer's is the most widely recognized cognitive disorder, 20-40% of elders diagnosed with cognitive decline have other forms of dementia—meaning that the number of elders impacted by cognitive decline is much higher than often assumed.³¹ Informal care required for people with cognitive disorders costs billions of dollars annually. In 2010, the estimated national cost of care for individuals with dementia was between \$157 billion and \$210 billion.³² But beyond the financial expense and potential financial risk, which can be challenging or even devastating for elders and their families, informal caregiving takes a toll on the caregivers, including overwork, depression, and physical and emotional impacts of stress. Individuals who provide care to elders are often overburdened, yet get no respite. As a result, caregivers are themselves susceptible to a variety of negative health outcomes that can create a cascading crisis of care within the family.³³

²⁷ *Id.*

²⁸ United Health Foundation, America's Health Rankings: Senior Report 2018, at <https://assets.americashealthrankings.org/app/uploads/ahrsenior18-finalv1.pdf> (last accessed Sept. 27, 2018).

²⁹ *Health and Retirement* at 74.

³⁰ United States of Health and Human Services, National Institute on Aging, *2014-2015 Alzheimer's Disease Progress Report: Advancing Research Toward a Cure*, 1 (Dec. 2015) (hereafter cited as *Alzheimer's Disease Progress Report*) available at http://www.questri.com/wp-content/uploads/2016/09/2014-2015_alzheimers-disease-progress-report.pdf.

³¹ *Id.* at 4.

³² Michael D. Hurd, Paco Martorell, Adeline Delavande, Kathleen J. Mullen, Kenneth M. Langa, *Monetary Costs of Dementia in the United States*, *New England Journal of Medicine*, 1326-34 (Apr. 2013), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3959992/>.

³³ *Life at Age 100* at 4.

4. Elders in New Mexico

In New Mexico, more than 430,000 people are 60 years old or older. That is roughly about 23.8% of the state's total population.³⁴ From 2000 to 2030, New Mexico's population of persons age 65 and older is projected to double. By the year 2030, New Mexico is projected to have the third highest population of people over the age of 60.³⁵ As in other states, the increase in the number and proportion of older adults in New Mexico reflects the aging of the baby boom generation, but the growth trend is further expanded by ongoing migration of retirees to western states.³⁶ Older adults are choosing to migrate to the West for a variety of reasons including retirement, lower cost of living, decreased tax burden, health concerns related to loss of functional independence that make warmer climates attractive, and public policy in states where retirees previously resided that is seen as disadvantageous.³⁷

New Mexico's elder population is culturally and ethnically diverse, reflecting the state's majority minority population composition. New Mexico is one of four majority minority states, and is the state with the highest proportion of Latinos at 48.5%.³⁸ Overall, 62.7% of the New Mexico population is from a recognized minority group. Of the elder population, 31.5% of persons age 60 and older are of Hispanic origin, 5.2% are Native American Indian, 1.3% is African American and 1% is Asian.³⁹

In New Mexico, one third of elders have a disability and 15% live in poverty at or below the federal poverty line.⁴⁰ Moreover, it is projected that by 2025, 43,000 New Mexicans will be diagnosed with Alzheimer's and other forms of cognitive impairment.⁴¹ The caregiving burden associated with this decline in cognitive health will require an additional estimated \$3.1 billion dollar expansion of state health and caregiving services for elders.⁴² Currently, one in five New

³⁴ *New Mexico State Plan* at 12.

³⁵ *New Mexico State Plan* at 14.

³⁶ *New Mexico State Plan* at 3.

³⁷ Retirement 101, *Arizona, New Mexico, Utah, and Southern Nevada*, (May 22, 2012), available at <https://www.topretirements.com/blog/great-towns/retirement-101-arizona-new-mexico-and-utah.html/>.

³⁸ Nadra Kareem Nittle, *Which US States Have the Highest Minority Populations?*, ThoughtCo., at <https://www.thoughtco.com/states-with-majority-minority-populations-2834515> (last accessed Oct. 4, 2017).

³⁹ *New Mexico State Plan* at 14.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

Mexicans provides informal care to a family member, subsidizing 274 million hours of unpaid care.⁴³ This number will necessarily rise significantly in the future to meet the care needs of New Mexico's growing elder population. Given that New Mexico is the fifth largest and sixth most sparsely populated state,⁴⁴ providing supports for caregivers in the vast rural and frontier areas of the state creates an additional level of complexity. Cultivating appropriate solutions for serving the physical and cognitive health needs of New Mexico's elders and their families is an ongoing and increasing challenge.

D. Existing Law

I. Federal Legislation

Elder Justice Act

The Elder Justice Act of 2009 (EJA), enacted on March 23, 2019, was part of the Patient Protection and Affordable Care Act (ACA, Pub. L. 111-148). It is encoded at 42 U.S.C. §§ 1397j-1397m-5. The EJA placed elder abuse on a par with previously recognized issues of child abuse and domestic violence.⁴⁵ This Act is a comprehensive piece of legislation that seeks to provide "a coordinated federal response" to prevention, detection, and treatment of elder abuse via multiple public health and social service approaches.⁴⁶ It creates an Elder Justice Coordinating Council connecting federal agencies "having responsibilities, or administering programs, relating to elder abuse, neglect, and exploitation."⁴⁷ Through technological capacity building, data sharing, and other means, it creates a more comprehensive recording system for elder abuse evidence and information. It also establishes and supports forensic centers for elder abuse, neglect, and exploitation, with the goal of identifying elder abuse incidents and recommending appropriate

⁴³ New Mexico Aging and Long Term Services Department, *New Mexico State Plan for Family Caregivers*, 9, (2016) (hereafter cited as *New Mexico State Plan for Family Caregivers*) available at <http://www.nmaging.state.nm.us/uploads/FileLinks/93d89f60b10b4732be44e6c31f403060/New%20Mexico%20State%20Plan%20for%20Family%20Caregivers%20-%20final.pdf>.

⁴⁴ *New Mexico State Plan* at 14.

⁴⁵ Kirsten J. Colello, Congressional Research Service, *The Elder Justice Act: Background and Issues for Congress*, 2 (2014) (hereafter cited as Colello, *Elder Justice Act*), available at <https://fas.org/sgp/crs/misc/R43707.pdf>.

⁴⁶ *Id.*

⁴⁷ 42 U.S.C. § 1397k.

interventions, including law enforcement reporting.⁴⁸ The EJA authorizes federal funding specifically to address elder abuse, including neglect and exploitation of different types.⁴⁹

The Act further authorized \$100 million in the first federal funding provided for state and local Adult Protective Services (APS) Programs, and authorized \$25 million for APS demonstration programs.⁵⁰

Older Americans Act

The Older Americans Act of 1965 (OAA) was the first piece of legislation for coordinating, organizing, and providing services for older Americans and their families. Enacted on July 14, 1965 as Pub. L. 89-73, it is encoded at 42 U.S.C. 3001 *et seq.* In 1972, the Long-Term Care Ombudsman Act was added to create a system of advocates for residents living in assisted living and adult care facilities.⁵¹ This legislation helps fund state and tribal initiatives to investigate, educate, and handle complaints regarding residents in long-term care facilities.

Adult Protective Services Act

The Adult Protective Services Act was passed in 1974, setting forth a plan whereby states could use Social Services Block Grants to fund protections for adults as well as children.⁵²

⁴⁸ 42 U.S.C. § 1397l.

⁴⁹ 42 U.S.C. §§ 1397k-3, 1397l(f).

⁵⁰ National Adult Protective Services Association, *Elder Justice Act*, at <http://www.napsa-now.org/policy-advocacy/eja-implementation/> (last visited Sept. 20, 2018).

⁵¹ See U.S. Department of Health and Human Services, Administration on Aging, *Long Term Care Ombudsman*, 1 (2016) (hereafter cited as Administration on Aging, *Ombudsman*), available at <https://aging.ny.gov/ProvidersandStaff/AAA Directors/References/What-is-the-Long-Term-Care-Ombudsman-Program.pdf> (last accessed Sept. 27, 2018).

⁵² Title XX of the Social Security Act, 42 U.S.C. §§ 1397-1397f; see also National Adult Protective Services Association, History: About Adult Protective Services from 1960 to 2000, 2017 (hereafter cited as *Adult Protective Services*) available at <http://www.napsa-now.org/about-napsa/history/history-of-adult-protective-services/> (last accessed October 4, 2017).

Senior Safe Act

The Trump-era Senior Safe Act⁵³ was passed to protect senior investors and victims of financial exploitation. It exempts financial institutions and their employees from liability when trained employees report suspected exploitation of older adults to government agencies.⁵⁴

Elder Abuse Prevention and Prosecution Act

The Elder Abuse Prevention and Prosecution Act⁵⁵ designates Assistant U.S. Attorneys as elder justice coordinators in each of the nation's judicial districts, and designates national elder justice coordinators at the Department of Justice and the Federal Trade Commission.⁵⁶ Further, it provides enhanced support to victims and improves processes and coordination of federal, state, and local data on elder abuse.⁵⁷

2. *New Mexico Legislation*

Long-Term Care Ombudsman Act

New Mexico's Long-Term Care Ombudsman Act is encoded at N.M. Stat. § 24-17. Federal funding goes to the state's Area Agencies on Aging, which create a state plan, develop programs, and implement services for older Americans.⁵⁸ Such funding is also used to protect and investigate alleged abuse and exploitation in the state's long-term care facilities.

The New Mexico Aging and Long-Term Services Department's annual allotment of the OAA Title III funds is allotted to two of New Mexico's four Area Agencies on Aging based on an intrastate funding formula.⁵⁹ The Navajo Area Agency on Aging receives OAA Title III funding through the

⁵³ H.R. 3758 (115th Cong.); passed as part of S. 2155, Economic Growth, Regulatory Relief and Consumer Protection Act, Pub. L. 115-174, May 24, 2018, tit. III, § 303.

⁵⁴ *Id.*

⁵⁵ Pub. L. 115-70, 131 Stat. 1208, Oct. 18, 2017.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *New Mexico State Plan.*

⁵⁹ *Id.* at 18.

state of Arizona.⁶⁰ New Mexico's Pueblos and Apache Nations receive OAA Title VI funding directly from the Agency on Aging.⁶¹

New Mexico Adult Protective Services Act

The New Mexico Adult Protective Services Act (APSA) is encoded at N.M. Stat. § 27-7-14, *et seq.* It provides that New Mexico's Adult Protective Services will receive funds to implement practices or partner with other administrative agencies to protect the welfare of elders. New Mexico Adult Protective Services creates standards for staffing levels and qualifications, standards of investigation, and mandatory service procedures. It monitors and evaluates provider agencies, promotes prevention endeavors, coordinates inter-agency data collection and trainings, maintains a health care worker registry, and builds relations with financial institutions for financial exploitation prevention information.⁶² A key concept laid out in the APSA is "informed consent." For an individual to give "informed consent" to receiving services, the consent must be within that individual's ability to understand the nature and consequences of proposed protective services or protective placement, and the individual must be able to communicate this informed decision.⁶³

Caregiver Aftercare Designation Act

In 2015, the Caregiver Aftercare Designation Act (CADA) mandated that hospitals provide patients or their legal guardian with the opportunity to designate a lay caregiver before patient discharge.⁶⁴ CADA also requires that hospitals consult with lay caregivers on a patient's discharge plan and aftercare needs. Consultation must consider cultural competency related to caregiving needs and tasks, medication management, aftercare guidelines, and healthcare provider specified tasks.⁶⁵

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² National Adult Protective Services Association, *History: About Adult Protective Services from 1960 to 2000*, 2000 (hereafter cited as *Adult Protective Services*), available at <http://www.napsa-now.org/about-napsa/history/history-of-adult-protective-services/> (last accessed October 4, 2017).

⁶³ *New Mexico State Plan* at 21.

⁶⁴ Caregiver Aftercare Designation Act, H.B. 139, 52nd Leg., 1st Sess. (N.M. 2015).

⁶⁵ *Id.*

3. Uniform Codes

Uniform Codes are proposed statutory forms developed by nationwide committees of legal experts. There are some important uniform codes that have been developed in relation to elder abuse.

Uniform “Guardianship & Protective Proceedings Act”

Developed in 1997, this uniform code concerns duties, liabilities, and powers for caring for individuals unable to care for themselves.⁶⁶ It includes procedures for court appointments of guardians and conservators⁶⁷ and conveys due process protection for incapacitated persons.⁶⁸ It suggests that court-appointed guardians and conservators must receive, invest, manage, and disburse resources and assets that are considered to be held in the interest of the protected person.⁶⁹

Uniform “Power of Attorney Act”

Introduced in 2006, this uniform code suggests how states should legally address and enhance surrogate decision-making.⁷⁰ A “Power of Attorney” is an inexpensive method for an individual to allow surrogates to make decisions on the individual’s behalf when required by necessity or incapacity.⁷¹ This is an alternative to guardianship, giving an agent endowed with Power of Attorney the legal authority to act on the principals behalf for an individual in financial matters, health care decisions, delegation to exercise voting rights or management rights, but such authority ends when and if the individual regains the ability to execute such decisions without assistance. The uniform committee suggests a Power-of-Attorney form that can be prescribed by a government subdivision or agency for a governmental purpose.⁷²

⁶⁶ Uniform Law Commission, Guardian and Protective Proceedings Act (1997), Summary, 2017 (hereafter cited as Uniform Guardianship Act), available at <http://www.uniformlaws.org/ActSummary.aspx?title=Guardianship%20and%20Protective%20Proceedings%20Act> (last accessed October 4, 2017).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Uniform Law Commission, Power of Attorney Summary, 2017 (hereafter cited as Uniform Power of Attorney), available at <http://www.uniformlaws.org/ActSummary.aspx?title=Power%20of%20Attorney> (last accessed October 4, 2017).

⁷¹ *Id.*

⁷² New Mexico Developmental Disabilities Planning Council, Laws-Uniform Power of Attorney Act, 2017, at http://www.nmddpc.com/laws - uniform_power_of_attorney_act (last accessed Sept. 27, 2018).

Uniform “Probate Code”

The Uniform Probate Code of 1991 is suggested as an updated national model for the improvement of state laws relating to succession of property.⁷³ It contains sections on guardianship and protective proceedings, power of attorney, and non-probate transfer of resources at death.⁷⁴ More specifically, Chapter 45 article 5, *Protection of Persons Under Disability and Their Property*, suggests how to deal with the substitution, review, and termination of guardianship of an incapacitated person.⁷⁵ It also suggests an Elder and Disability Court Initiative, which would investigate reports of adult guardianship and conduct 10-year reviews on guardianship.⁷⁶

IV. SUMMARY OF FINDINGS

A. Poverty and Lack of Affordable Services

New Mexico’s per capita income is ranked forty-eighth in the nation, almost 20% below the national level with a median income of \$35,965.⁷⁷ In 2015, there were over 400,000 people living in poverty in New Mexico, around 20% of the population.⁷⁸ This is one of the largest poverty rates in the nation, only after Mississippi and Puerto Rico.⁷⁹ In New Mexico, 12% of adults over the age of 65 live under the federal poverty line (FPL). An additional 11.9% live between 100% and 149% of that standard.⁸⁰ These households frequently depend on a fixed income that is insufficient to

⁷³ Uniform Law Commission, Probate Code Summary, 2017 (hereafter cited as Uniform Probate Code), available at <http://www.uniformlaws.org/ActSummary.aspx?title=Probate%20Code> (last accessed October 4, 2017).

⁷⁴ *Id.*

⁷⁵ Justia Law, 2011 New Mexico Statutes, Chapter 45: Uniform Probate Code, Article 5: Protection of Persons Under Disability and Their Property, Section 45-5-307: Substitution, review and termination of Guardianship, 2016 (hereafter cited as Chapter 45 Article 5) available at <http://law.justia.com/codes/new-mexico/2011/chapter45/article5/section45-5-307> (last accessed October 4, 2017).

⁷⁶ *Id.*

⁷⁷ New Mexico Work Force Solutions, *New Mexico Annual Social and Economic Indicators: Statistical Abstract for Data Users/2015*, 37 (2015), https://www.jobs.state.nm.us/admin/gsipub/htmlarea/uploads/ASEI_2015.pdf.

⁷⁸ United States Census Bureau, *Poverty: 2014 and 2015, American Community Survey Briefs*, 3 (September 2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/acsbr15-01.pdf> (hereafter cited as *Poverty: 2014 and 2015*).

⁷⁹ *Id.* at 3.

⁸⁰ U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates, at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

cover their basic needs, even without the extra expenses often incurred by members of the household who are not old enough to work or are unable to work. Food insecurity, housing insecurity, lack of access to health care, and lack of transportation are all significant concerns among this population. Therefore, the impact of poverty in the lives of elders and their families is made more dramatic by the need to spend scarce or nonexistent financial resources on medical and caregiving needs, which for elders can be substantial.

Although poverty is not a protected civil rights category, it serves as a proxy for a number of factors that impact the dynamics of elder abuse in New Mexico. The World Health Organization notes the compounding of adverse effects created by poverty status:

Poverty is associated with the undermining of a range of key human attributes, including health. The poor are exposed to greater personal and environmental health risks, are less well nourished, have less information and are less able to access health care; they thus have a higher risk of illness and disability. Conversely, illness can reduce household savings, lower learning ability, reduce productivity, and lead to diminished quality of life, thereby perpetuating or even increasing poverty.⁸¹

In the U.S., government programs that serve elders and many nonprofit social services agencies commonly rely on poverty status to determine eligibility. The *Poverty Guidelines* and *Poverty Thresholds* are both metrics of income used to define poverty status, with different values associated with family units of different sizes.⁸² The *Poverty Threshold* is issued by the U.S. Census Bureau and is generally utilized primarily for statistical reporting.⁸³ The Poverty Guidelines issued by The U.S. Department of Health and Human Services define the FPL that is used administratively to determine eligibility for programmatic benefits or levels of service.⁸⁴ In New Mexico, the fact that a large percentage of the elder population is low income (under 250% of FPL) means that access to services that cut-off eligibility at 100% of the FPL or below is inadequate. Such arbitrary eligibility criteria means that many elders who need support just do not qualify for services or benefits based on an underestimated level of need. Testimony from a stakeholder who works with an agency that provides legal services to elders stated the following:

⁸¹ World Health Organization, Health Topic: Poverty, <http://www.who.int/topics/poverty/en/> (last accessed May 2, 2017).

⁸² Office of the Assistant Secretary for Planning and Evaluation, Poverty Guidelines, (hereafter cited as Poverty Guidelines) at <https://aspe.hhs.gov/poverty-guidelines> (last accessed Sept. 27, 2018).

⁸³ Poverty Guidelines.

⁸⁴ Poverty Guidelines.

We have constant concerns that maybe the most vulnerable seniors are not able to access our services. We have to turn away seniors in rural counties that we serve due to income restrictions imposed by our grant funding... So that means that seniors that are just above that 200 percent level, we're turning them away, even though they need legal services.⁸⁵

Poverty and the way it is defined to determine program eligibility inhibit the types of resources and access to services available to elders. With the increase in the total number of elders living in New Mexico, and given the percentage of elders living in poverty,⁸⁶ in the absence of a sufficient level of and access to resources and services for elders, informal caregivers pick up the slack at the household level. As testimony stated:

Currently, the vast majority of care to elders is provided by family caregivers. Forty-nine million Americans provide more than \$520 billion in care to seniors and adults with disabilities every year. These caregivers fill a critical void, often because the lack of access to affordable services gives them no other choice.⁸⁷

In New Mexico, there are over 400,000 informal caregivers and they provide over 80% of elder long-term care.⁸⁸ One third of informal elder caregivers in New Mexico are responsible for the care of more than one person.⁸⁹ These informal caregivers provide approximately 18.5 hours of care per week, despite the fact that 75% of them also work full-time outside the home.⁹⁰ This situation creates a condition that can, at best, be considered inadequate or problematic care, and at worst, puts individuals in the household at risk for poor health outcomes, economic crisis, and a variety of forms of abuse.

⁸⁵ Nita Day, testimony, *Hearing before the U.S. Commission on Civil Rights, Albuquerque, NM*, Jan. 24, 2016, transcript, pp. 29-30 (hereafter cited as *Albuquerque Hearing*) available at <https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/t00000005evM/.EFd2aloJ0znu3Z2E FQ9iqS9q0S8n XNkL2urlRTI Q> (last accessed Sept. 27, 2018).

⁸⁶ *Id.* at 30.

⁸⁷ Reitzel Testimony, *Albuquerque Hearing*, pp. 11-12.

⁸⁸ *New Mexico State Plan for Family Caregivers* at 9.

⁸⁹ *Id.* at 12.

⁹⁰ *Id.* at 9, 12.

B. Underreporting

Despite the fact that current statistics on elder abuse in New Mexico are extremely disturbing, stakeholders who work with elder populations believe that elder abuse is routinely underreported. This means that the statistics we have do not adequately capture the magnitude of the problem in our state. Victims of elder abuse are unlikely to report the abuse themselves because they may take medication that impairs their memory, they may have trouble communicating, or they may suffer from dementia. Any of these conditions would legally complicate any allegation of abuse. Moreover, elders are unlikely to report abuse because the person on whom they rely for care may be the one who is abusing them. Thus, elders who receive care from family members or other providers have a tangible disincentive for reporting those upon whom they depend for their care.⁹¹

Mistrust of government agencies also contributes to underreporting, especially among immigrants who have migrated from a social and political context defined by corruption and violence. Historically disenfranchised or marginalized populations may perceive government or law enforcement as purposely designed to be unresponsive. For these populations, if there is also a history of social and political violence, government or law enforcement may be perceived as dangerous.⁹² Elders may have more fear of the repercussions of filing a report with an agency ostensibly tasked with protecting elder rights and wellbeing than they have of their abusers.

One of the reasons identified by stakeholders as contributing to the problem of underreporting is the lack of “cultural competence” on the part of healthcare and service providers who see elders and their families.⁹³ Inability of providers to understand culturally distinct practices, lifestyles, and traditions, or to relate to the experiential histories of elders and their families means that subtle signs of abuse often fail to be identified. Stakeholder testimony described how cultural influence can and does often influence the ways that abuse is enacted or experienced. We heard testimony that in New Mexico’s Asian community, for example, abuse is most often psychological abuse stemming from neglect rather than some form of outright physical abuse. Traditionally, Asian families tend to stay together and it is the children that have had the responsibility of care for elders. But among the younger generation, it is increasingly common for families to move away. Elders can be left completely alone. Socially isolated elders are often unable to navigate systems on their own and without help. They face language barriers, limits in access to services, poverty, and loneliness. Lack of interpretation services available in New Mexico exacerbates these

⁹¹ Liem Nguyen, Testimony, *Albuquerque Hearing*, pp. 39-54.

⁹² *Id.*

⁹³ Alex Romero, Testimony, *Albuquerque Hearing*, pp. 14-26; Sherrie Cordova, Testimony, *Albuquerque Hearing*, pp. 108-116 ; Nguyen Testimony, *Albuquerque Hearing*, pp. 39-54.

dynamics when interpretation provided is not at a sufficiently professional level (e.g., allowing minor children to do the interpretation) or when a family member who may be the one perpetrating the abuse is allowed to serve as interpreter.⁹⁴

Stigma is another barrier in reporting abuse. It is rare for an elder to personally report abuse. Elders often see the abuse as a problem they have to bear because they see themselves as a burden. Others will not report abuse because they see it as bringing shame on themselves or their family. Stigma in reporting abuse also has a generational dynamic. For an adult who has worked their entire life and achieved success, abuse can be associated with a perceived failure at self-protection that is experienced as shame. As one stakeholder stated:

So that is one of the biggest issues in the Asian community. And the things that they are afraid [of], like if they speak about the issue in the home, they are afraid that the community might know and that we give them bad reputations. So stigma is a very big issue for the Asian community here.⁹⁵

C. Weakness of the Healthcare System

The structure of the managed-care health services delivery model in New Mexico also contributes to underestimation of elder healthcare needs.⁹⁶ Managed-Care Organizations (MCOs) that provide health services are also responsible for administering health services for low-income elders through a contractual agreement with the state's Medicaid program. MCOs receive millions of dollars of public funding to coordinate care and provide Medicaid and Medicare-eligible coverage for New Mexico elders. The potential for a conflict of interest in how MCOs make determinations about an individual's healthcare is great and was identified by stakeholders as an area of concern. Matrices, formulas, and algorithms have been created by the MCOs to determine insurance rates, eligibility for services, access to types of services, insurance coverage levels, and access to specific providers or forms of care. Stakeholders believe that this process is a zero sum game where there is an incentive for the MCO to underestimate an elder's need for care or services. For example, Medicaid allows for an individual who requires in-home care to be eligible for a designated number of care hours. By using the health assessment process to underestimate need for care, the MCO can become responsible for less care hours, and therefore will retain more funds from the elder's "managed care" as profit. In addition, funding caps on services and cuts to benefit programs mean that insurers are not required to provide services that actually meet an elder's need if cost of the services exceeds a funding cap. This can mean that informal caregivers are in the position of

⁹⁴ Nguyen Testimony, *Albuquerque Hearing*, p. 150.

⁹⁵ *Id.* at 42.

⁹⁶ Day testimony, *Albuquerque Hearing*, p. 37.

providing care or resources that put high levels of strain on themselves or on the household. Stakeholders report that underestimation of need for services created by the structure of the healthcare delivery system in New Mexico therefore creates conditions in which elders are placed at risk of abuse, and that the underestimation of elder health needs by MCOs is actually a form of institutionalized or structural elder abuse where the MCO becomes a socially invisible abuser.

In New Mexico, there are over 4,400 services available to elders for different purposes. Despite this “wealth” of resources, however, the landscape of services for elders is problematic. Many elders seeking help are unable to access the care, services, or assistance they need, or to navigate the system. Duplication of services by state, city, county, or private agencies is common. There is often little connection or communication between service providers, and coordination of services is rare. The myriad of resources and services can itself be overwhelming. Thus, even when appropriate resources or services exist, the burden is placed on elders and their families to understand when, how, and in what form benefits can be accessed. And in relation to elder abuse, given the dynamics of underreporting that include fear and shame, the elder service labyrinth means that many elders and their families do not know where to turn for the help they need:

The top thing that our family caregivers said that they needed was not a new program, but information about existing resources. Many of you, based on your background, are familiar with how complicated the system of long-term service and support is nationally and here in New Mexico...We don't know where to turn for help. And once you get to one help, it doesn't always pass you on to the next thing that would be helpful. Our solution to that is the Aging and Disability Resource Center....One of the great things that our Aging and Disability Resource Center, which served almost 46,000 clients last year, does is to assess everything that the family caregiver is doing. And then they have 4,400 available resources that they connect folks with throughout the state to help meet those caregiving needs. They help with benefits, benefits assessment and qualification. It really is a godsend for folks who are trying to get their arms around family caregiving.⁹⁷

D. Enforcement of Existing Laws and Regulations

Input from community stakeholders identified lack of enforcement of laws and regulations that relate to elder abuse as a significant problem in New Mexico. Particularly egregious are enforcement infractions in elder care facilities that can take the form of failure to ensure required fire safety infrastructure and protocols, appropriate staffing levels and staff qualifications, or

⁹⁷ Myles Copeland Testimony, *Albuquerque Hearing*, p. 91.

proper oversight of the administration of medications.⁹⁸ Similarly, failure by the legal system to properly monitor a court-appointed guardian's management of an elder's finances has also been identified as enormous problem in New Mexico. Laws and regulations have been put in place to protect the safety and rights of elders. Whenever there is failure to enforce these laws or regulations, elders are the ones put at risk or who suffer the consequences.

In part, lack of enforcement reflects and is related to underreporting—it is difficult to enforce laws and regulations if the abuse is not reported. But failure to enforce existing laws and regulations also results from a lack of resources on the part of enforcement bodies or agencies. Current funding for enforcement is not sufficient to meet the needs of New Mexico elders. Stakeholders believe that lack of funding for agencies responsible for enforcing laws and regulations that pertain to elder rights is a key fact in the reported lack of response and enforcement. They suggest that without increased funding to these agencies, meaningful enforcement by responsible agencies is not realistically possible. They also suggest that revision of state statutes and legal codes to make civil enforcement easier would increase the responsiveness of the law enforcement system. This would result in criminal prosecution when warranted and create potential remedies for elders and their families.

Stakeholders also report that there are challenges to enforcement that are inherent in the nature of elder abuse itself.

Seniors do not report and when they do, cases are often not criminally prosecuted for many of the same reasons that civil lawyers find it difficult to bring civil actions.⁹⁹

Legally, the burden of proof required to provide evidence of abuse that would result in criminal conviction or a court finding is extremely high. This means that it can be almost impossible for an elder or their family to prove abuse, and receiving a judgment in their favor rarely happens. The low likelihood that anything will be done in response to the abuse or that the conditions of abuse will be corrected itself becomes another disincentive to reporting. This means that not only does much abuse go unreported, the lack of enforcement actually contributes to abuse being allowed to continue.

Problems with reporting and enforcement are exacerbated by a lack of community awareness regarding elder abuse. Conversely, the lack of community awareness means that there is often insufficient political will to enact legislation to protect elders, or that public outrage is not sufficiently vociferous to encourage enforcement.

⁹⁸ Reitzel Testimony, *Albuquerque Hearing*, p. 26.

⁹⁹ Day Testimony, *Albuquerque Hearing*, p. 34.

More than half of the substantiated cases of concern over elder wellbeing reported to New Mexico Adult Protective Services involve elder self-neglect, and only 6% of reports are from elders calling on their own behalf. This means that it is critical for people look out for each other as they age. Thus, public awareness is key, as it is incumbent on the community to look out for people who are vulnerable.¹⁰⁰

E. Financial Exploitation

Given the high rate of poverty among elders and their caregivers in New Mexico, when financial exploitation of elders occurs it is particularly egregious and has a dramatic impact on people's lives. Sadly, financial exploitation of elders, which can occur in a number of forms, is common, all too common, in New Mexico. It often goes unreported, and it is difficult to address.

Many who need care cannot afford services that would allow them to remain independent.¹⁰¹ Medicaid and support services available to them are often insufficient. As a result, it is common for family members to be unduly burdened and under-resourced in their care of elders. This situation creates conditions for elder abuse of all types, including financial exploitation.

A well-planned estate increases the ability of an individual to control what happens to their resources and how resources are expended in their elder years. Estate planning lessens the likelihood that elders will find themselves in situation of under-resourced care, eviction, or inappropriate use of funds by family members or caretakers.¹⁰² However, there are insufficient resources to assist New Mexico elders with estate planning, and few elders in New Mexico are able to make appropriate and sufficient financial plans for contingencies in their elder years.¹⁰³

¹⁰⁰ Copeland Testimony, *Albuquerque Hearing*, pp. 80-102.

¹⁰¹ See, e.g., Day Testimony, *Albuquerque Hearing*, p. 29 (income too high for free legal services but cannot afford private legal rates), p. 30 (sixteen percent of New Mexico seniors live in poverty); Reitzel Testimony, p. 12 (many who need care have "just enough money to be ineligible for Medicaid and the [caregiving] support services that would provide"); Yerby Testimony, *Albuquerque Hearing*, p. 68 (the protected person must have very low income and must be "financially eligible for Medicaid or a similar state resource" for legal fees of obtaining guardianship to be covered by the state).

¹⁰² See, e.g., Reitzel Testimony, *Albuquerque Hearing*, p. 143 (financial exploitation by guardian family member where senior "left the entirety of her estate to the church").

¹⁰³ See, e.g., Day Testimony, *Albuquerque Hearing*, p. 28 ("we do a lot of estate planning," but can only serve seniors under 200 percent of the poverty guideline).

Similarly, resources to help elders who experience financial exploitation are also insufficient.¹⁰⁴ There are some resources that are available to very low-income elders, but guidelines for the social and economic threshold for services are extremely restrictive.¹⁰⁵ Elders with resources at 250% of the FPL who are still for all intents and purposes “poor,” may not have the resources to pursue legal or administrative remedies without additional funds.

Financial exploitation of elders can involve hundreds of thousands of dollars, but in other cases could be \$3,000 or less.¹⁰⁶ Yet, if the person responsible for paying an elder’s housing costs fails to pay because they have siphoned-off funds or used resources for other purposes, the elder can become homeless over a mere \$3,000.¹⁰⁷ Even seemingly insignificant amounts of money or what might be seen as “harmless” forms of financial exploitation might have dramatic consequences.¹⁰⁸

The majority of cases of financial exploitation of elders in New Mexico are perpetrated by a family member or an individual close to the family.¹⁰⁹ Financial exploitation can be driven by competition between family members vying for control over resources or inheritance.¹¹⁰ Although it does occasionally occur, it is less likely for a spouse to be involved.¹¹¹

¹⁰⁴ See, e.g., Day Testimony, *Albuquerque Hearing*, p. 29 (“So what's the problem? We got it covered. We're doing a good job. Our problem is it's not enough.”); Nguyen Testimony, *Albuquerque Hearing*, pp. 39-40 (this is the only nonprofit organization that helps the Asian community in the State of New Mexico; there are large Asian populations, but “we don't have enough funding to help them all.”).

¹⁰⁵ Day Testimony, *Albuquerque Hearing*, p. 29; Crandall Testimony, *Albuquerque Hearing*, pp. 61-61 (presents many recommendations to reduce elder suicide-homicide cases, but not all receive funding); Reitzel Testimony, *Albuquerque Hearing*, p. 12.

¹⁰⁶ See Frazier Testimony, *Albuquerque Hearing*, pp. 142-44, 155; see also Crandall Testimony, *Albuquerque Hearing*, p. 59 (lethal physical abuse over the value of a Social Security check).

¹⁰⁷ See Frazier Testimony, *Albuquerque Hearing*, p. 155.

¹⁰⁸ See, e.g., Crandall Testimony, *Albuquerque Hearing*, p. 59.

¹⁰⁹ See, e.g., Day Testimony, *Albuquerque Hearing*, p. 33; Crandall Testimony, *Albuquerque Hearing*, pp. 55-56, 61, 62; Yerby Testimony, *Albuquerque Hearing*, pp. 64, 65-66.

¹¹⁰ Frazier Testimony, *Albuquerque Hearing*, pp. 147-49.

¹¹¹ See, e.g., Day Testimony, *Albuquerque Hearing*, p. 33.

Elders may not be aware of financial exploitation,¹¹² but even when they are, they rarely report it¹¹³—and when it is reported, the perpetrator is unlikely to be criminally prosecuted.¹¹⁴ The burden of proof for financial exploitation is high and therefore it is difficult to substantiate.¹¹⁵ Moreover, there is often an attitude within families that, “well it will all be mine [or ours] anyway,” so family members do not necessarily construe use of an elder’s resources as inappropriate.¹¹⁶ And, there is a perception of financial abuse as “not so bad” in comparison to cases of physical abuse.

Financial exploitation of elders can also involve healthcare fraud. Unethical healthcare providers and caregivers are known to double bill an elder for services or fraudulently bill the government for Medicaid benefits on behalf of the elder.¹¹⁷ Healthcare providers that operate as Managed Care Organizations (MCOs) receive millions of dollars to coordinate care for elders,¹¹⁸ who often have complex health care needs. In-home care is sometimes available, but there is a financial cap on the amount of services that can be provided.¹¹⁹ Therefore, MCOs responsible for conducting needs assessments for elders have an incentive to underestimate need.¹²⁰ This corporate financial exploitation of elders then creates a cascade of health and economic problems for elders and their families who are forced to fund health services from already scarce resources, or to forgo health services in lieu of basic needs.¹²¹

¹¹² See, e.g., Nguyen Testimony, *Albuquerque Hearing*, pp. 40, 45; Day Testimony, *Albuquerque Hearing*, p. 46.

¹¹³ See Day Testimony, *Albuquerque Hearing*, pp. 33-34; Williams Testimony, *Albuquerque Hearing*, p. 161 (domestic violence survivor does not report husband when he stops paying bills and taxes); Yerby Testimony, *Albuquerque Hearing*, pp. 65-66, 73 (on reluctance to prosecute, especially when the alleged perpetrator is in the family).

¹¹⁴ See Frazier Testimony, *Albuquerque Hearing*, pp. 151, 152 (cases ultimately referred to Attorney General, who does not prosecute); Yerby Testimony, *Albuquerque Hearing*, pp. 65-66 (checks and photo evidence of son expropriating elder mother’s funds for casino, but unable to convince state police to arrest or prosecute). See also Williams Testimony, *Albuquerque Hearing*, pp. 98-100; Copeland Testimony, *Albuquerque Hearing*, p. 100.

¹¹⁵ Day Testimony, *Albuquerque Hearing*, p. 34.

¹¹⁶ See Frazier Testimony, *Albuquerque Hearing*, pp. 142-43; Yerby Testimony, *Albuquerque Hearing*, p. 73.

¹¹⁷ Reitzel Testimony, *Albuquerque Hearing*, p. 10; see also Frazier Testimony, *Albuquerque Hearing*, pp. 146-48 (family members with income from home of elder in Medicaid-funded facility effectively cheat government through monthly spend-down doing useless and duplicative improvements).

¹¹⁸ See Day Testimony, *Albuquerque Hearing*, p. 36.

¹¹⁹ Day Testimony, *Albuquerque Hearing*, p. 37.

¹²⁰ See generally Day Testimony, *Albuquerque Hearing*, p. 36.

¹²¹ See, e.g., Nguyen Testimony, *Albuquerque Hearing*, pp. 43-44 (senior couple has only \$100-\$200 to spend on health and food after paying housing costs).

The Committee received testimony from a family who found a care facility for an elder.¹²² It was expensive, requiring \$100,000 cash up front, plus a significant monthly fee of \$3,800 per month.¹²³ To obtain space in this facility, the family had to sell the elder's assets in addition to raising other funds. The elder had planned well for retirement, and the family believed they were making good, sustainable decisions about the elder's care. For the first years, the care the elder received in the facility was excellent, as had been expected.¹²⁴ However, when ownership of the facility changed, the care became substandard—which was not what had been agreed upon in the contractual obligation created for the elder's care.¹²⁵ However, because the lifetime agreement that the family made was made with the original owners of the facility, when ownership of the facility changed, the legal standing of their contractual arrangement with the new facility owners was not clear.¹²⁶ Advocates claim there is insufficient legal regulation regarding the changes that can be made to contractual agreements in elder care facilities and there was not appropriate legal recourse available to the family.¹²⁷

Many elders give a Power of Attorney (PoA) to another individual to assist them to manage their finances, complete financial transactions, and make specified decisions.¹²⁸ In other cases, elders deemed to be incapable of self-care are placed into legal guardianship or conservatorship.¹²⁹ The elder's guardian or conservator can be a family member, but in many cases, the court appoints an organization or a professional in that role.¹³⁰

¹²² Romero Testimony, *Albuquerque Hearing*, p. 16.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*, p. 17.

¹²⁶ *Id.*, pp. 17-18.

¹²⁷ Romero Testimony, *Albuquerque Hearing*, p. 25.

¹²⁸ See Day Testimony, *Albuquerque Hearing*, pp. 28, 31-32; Chirigos Testimony, *Albuquerque Hearing*, p. 186.

¹²⁹ See Yerby Testimony, *Albuquerque Hearing*, pp. 67, 73; see generally capacity issues in Copeland Testimony, *Albuquerque Hearing*, p. 94; Day Testimony, *Albuquerque Hearing*, p. 33; Ford Testimony, *Albuquerque Hearing*, p. 41; Frazier Testimony, *Albuquerque Hearing*, p. 142.

¹³⁰ See generally Yerby Testimony, *Albuquerque Hearing*, pp. 63-70 (discussing private agency guardianship laws, policies, and best practices in New Mexico).

Unfortunately, individuals with PoA or those who serve as guardians or conservators often engage in abuse of an elder's financial assets.¹³¹ In some cases, family members place an elder in a facility and seek financial control explicitly as a means of obtaining access to the elder's assets. Some individuals who are given responsibility for paying an elder's housing costs or facility fees for an elder's care use the funds for their own expenses.¹³² In situations where there are insufficient funds left to pay for the elder's own expenses, the elder can be evicted from a living space or lose their space in a care facility. Identity theft and fraud are also commonly perpetrated by individuals with power over an elder's assets.¹³³

Over the past year, The Albuquerque Journal published a series of hard-hitting, investigative journalism pieces dealing with the financial lives of elders.¹³⁴ These articles have demonstrated that there is reason to be concerned that financial exploitation and abuse perpetrated by court-appointed guardians and professional conservators is rampant in New Mexico. Egregious and heart-breaking instances of elder financial exploitation are depicted, with catastrophic impact on the wellbeing and financial security of elders and their families. The Journal's reporting shows that there are not appropriate systems in place to protect the financial interests of elders, and that existing rules and guidelines are either insufficient or are being ignored.

Abuse perpetrated via PoA, guardianship, or conservatorship is difficult to remedy, and recovery of personal assets in these cases is rare.¹³⁵ In New Mexico, there is no realistic legal process to collect on judgments against perpetrators in these contexts.¹³⁶ Usually this sort of financial exploitation occurs when elders are incapacitated, especially mentally incapacitated.¹³⁷ This makes financial abuse by individuals with PoA, guardianship, or conservatorship over an elder's assets

¹³¹ See, e.g., Day Testimony, *Albuquerque Hearing*, pp. 31-33 (abuse of powers of attorney; guardianship and conservatorship); Yerby Testimony, *Albuquerque Hearing*, p. 70 (Yerby claims that guardianship is “definitely last resort. Corporate guardianship,” undertaken by someone other than a friend or family, is the “last resort after that.”).

¹³² See, e.g., Yerby Testimony, *Albuquerque Hearing*, pp. 65-66.

¹³³ See, e.g., Nguyen Testimony, *Albuquerque Hearing*, p. 44.

¹³⁴ Diane Dimond. *Who Guards the Guardians?*, ALBUQUERQUE JOURNAL. Nov. 2 – Dec. 1, 2016, available at <https://www.abqjournal.com/898385/who-guards-the-guardians-a-5-part-series-by-diane-dimond.html> (last accessed Sept. 27, 2018).

¹³⁵ Day Testimony, *Albuquerque Hearing*, p. 33; Frazier Testimony, *Albuquerque Hearing*, pp. 151-55 (“in some cases you’re never going to get the money back,” p. 154).

¹³⁶ Day Testimony, *Albuquerque Hearing*, p. 33.

¹³⁷ Day Testimony, *Albuquerque Hearing*, p. 33; see also Yerby Testimony, *Albuquerque Hearing*, p. 64. Cf. spousal relationship, when a mentally incapacitated spouse with dementia controls and misuses the family finances; see Williams Testimony, *Albuquerque Hearing*, p. 161 (domestic violence survivor does not report husband when he stops paying bills and taxes), p. 161.

difficult to prove. The elder may not be able to give testimony or is not a “good” (in the sense of being reliable) witness,¹³⁸ and the abuser can easily claim that the elder gave permission to spend the money or make purchases of gifts or property. In some of the cases described in the Journal, fraudulent or misleading reports submitted by court-appointed guardians or conservators were apparently not reviewed by those charged with overseeing the activities of guardians and conservators.¹³⁹ In other cases, the legal authority of the guardian or conservator was sufficiently broad or vague to make it possible for them to use funds in ways that went against the spirit of protecting the elder’s financial rights or interests without necessarily being outside of the law.¹⁴⁰

Because of the potential for abuse, elder rights organizations advocate that guardianship or conservatorship should only be granted by the court as a last resort.¹⁴¹ These legal processes impinge upon the elders’ civil liberties and take away their ability to make decisions.¹⁴² This is a situation which may facilitate abuse, especially, as we have seen, where insufficient legal remedies and oversight are in place.

Another area of concern in relation to financial exploitation of elders is real estate. In New Mexico, there are many corporate and out-of-state landlords with whom it is difficult to communicate.¹⁴³ Many elders are not able to navigate the layers of bureaucracy and phone or internet connections that are required to communicate if there is a problem or to ask a question.¹⁴⁴ In addition to being at risk of eviction if a person controlling an elder’s assets neglects to pay the rent or mortgage or uses the funds for a different purpose, elders can also face eviction because of the behavior of a family member.¹⁴⁵ An elder who lives with someone caught with drugs or abuse of firearms can be evicted from some properties.¹⁴⁶ Real estate is also an asset that can be transferred for less than

¹³⁸ Day Testimony, *Albuquerque Hearing*, p. 33; see generally Williams Testimony, *Albuquerque Hearing*, p. 49.

¹³⁹ Dimond, *supra* n. 135.

¹⁴⁰ *Id.*

¹⁴¹ See Day Testimony, *Albuquerque Hearing*, p. 32; Copeland Testimony, *Albuquerque Hearing*, p. 94; Yerby Testimony, *Albuquerque Hearing*, p. 70 (corporate guardianship comes even after family or friend guardianship as the very last resort).

¹⁴² Day Testimony, *Albuquerque Hearing*, p. 32; Yerby Testimony, *Albuquerque Hearing*, p. 67.

¹⁴³ See Day Testimony, *Albuquerque Hearing*, p. 51.

¹⁴⁴ See generally Williams Testimony, *Albuquerque Hearing*, 100-101, on seniors’ difficulty in communicating or knowing of resources for problems.

¹⁴⁵ See, e.g., Day Testimony, *Albuquerque Hearing*, p. 32; Yerby Testimony, *Albuquerque Hearing*, pp. 65-66.

¹⁴⁶ See generally Crandall Testimony, *Albuquerque Hearing*, p. 62 (“firearms should be removed from living spaces when individuals show signs of dementia” or else “put into locked spaces” with ammunition stored separately).

fair market value or no value at all.¹⁴⁷ An unscrupulous person can exploit an elder's lack of understanding of financial transactions or inability to control personal assets in order to obtain real estate for less than it is worth—in effect, cheating the elder out of the fair price of their property. In other cases, family members with access to an elder's assets may use the funds to remodel the elder's home¹⁴⁸ in order to make the property more valuable for when they inherit it. Testimony was provided that competition for resources within families can also take an abusive turn. A family member may be able to obtain a lien on the elder's property so that when they die, the property becomes the sole property of that person rather than being divided among other inheritors or potential inheritors.¹⁴⁹

Financial exploitation of elders can also take place through market-based interactions. Aggressive sales people use tactics to push elders into purchasing things they do not need or worse, into signing ongoing contracts for services that they do not need.¹⁵⁰ Many times an elder agrees to a contract and is then unaware that the seller will continue to impose charges for services through a credit card, on an ongoing basis.¹⁵¹ Testimony suggested that in New Mexico, there is insufficient consumer advocacy that focuses on issues related to financial exploitation of elders.¹⁵² It was suggested that there should be a three-day (or longer) right of rescission on a contract made by an elder.¹⁵³ It was suggested that the legislature could extend the Unfair Practices Act to include the right of rescission for door-to-door sales to a period of a week or to have some other creative trigger to make it easier to set aside contracts for undue influence related to age.¹⁵⁴ Another suggestion was to cap contracts to one or two years so that they need to be renewed more frequently.¹⁵⁵

Many elders become victims of financial exploitation through debt collection.¹⁵⁶ Elders may find themselves responsible for credit card debt created by a family member or caregiver who gained

¹⁴⁷ Day Testimony, *Albuquerque Hearing*, p. 32.

¹⁴⁸ See Frazier Testimony, *Albuquerque Hearing*, pp. 146-48.

¹⁴⁹ Frazier Testimony, *Albuquerque Hearing*, pp. 147-48.

¹⁵⁰ See, e.g., Williams Testimony, *Albuquerque Hearing*, p. 49 (94 year old dementia patient purchases an iPhone with 2-year contract, and is unable to use it).

¹⁵¹ See Nguyen, *Albuquerque Hearing*, p. 44.

¹⁵² Day Testimony, *Albuquerque Hearing*, pp. 51-52; Yerby Testimony, *Albuquerque Hearing*, p. 73

¹⁵³ See, e.g., Day Testimony, *Albuquerque Hearing*, pp. 51-52.

¹⁵⁴ Day Testimony, *Albuquerque Hearing*, pp. 51-52.

¹⁵⁵ Day Testimony, *Albuquerque Hearing*, p. 52.

¹⁵⁶ See, e.g., Day Testimony, *Albuquerque Hearing*, p. 31; Nguyen Testimony, *Albuquerque Hearing*, p. 44.

access to their card without their knowledge or consent.¹⁵⁷ The person may make purchases that the elder did not authorize or even necessarily know about. In most cases, the elder either pays the bill rather than contest a purchase, but more often they are unaware of the purchases and they pay the bill believing that it is for their own purchases.

Another form of financial exploitation through debt occurs when family members convince an elder to co-sign a loan for real estate or a vehicle.¹⁵⁸ If the family member defaults on the loan, the elder can be held financially accountable. Again, many elders have no idea what to do about such a situation and when it happens, they just pay.

In cases of credit card or loan debt that the elder cannot pay, the elder may be forced to sell fixed assets or property, and may even lose the home where they live.

It is rare for an elder to report debt collection abuse.¹⁵⁹ Many elders do not know what steps to take or they may not even be aware that they have been victimized.¹⁶⁰ Other elders may know, but because they are ashamed of being taken advantage of or because they do not wish to get a family member or caregiver in trouble, they do not do anything to challenge the debt.¹⁶¹

New Mexico relies on statutes to direct public agencies to manage elder abuse. Testimony suggested that statutory law in New Mexico is not adequate to address the situations of elder financial exploitation that occur with regularity in our state.¹⁶² Legal remedies are not sufficiently clear or they do not exist, and resources to support elders and their families to prevent, counter, or challenge incidences of elder financial exploitation are insufficient. Elders are falling through the cracks in the system.¹⁶³

F. The Right-to-Die

The issue of death is one that is often thought of in relation to elders and their rights. The idea of a “right to die” is referred to in different contexts as “assisted suicide,” “aid in dying”, “death with dignity,” “medically assisted dying,” “physician aid in dying,” or “medical assistance in dying.”

¹⁵⁷ Day, *Albuquerque Hearing*, p. 31; Nguyen, *Albuquerque Hearing*, p. 44.

¹⁵⁸ Day Testimony, *Albuquerque Hearing*, p. 31.

¹⁵⁹ See, e.g., Nguyen Testimony, *Albuquerque Hearing*, p. 44.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See Day Testimony, *Albuquerque Hearing*, pp. 34-35, 48.

¹⁶³ Day Testimony, *Albuquerque Hearing*, p. 34.

Debates about death and the nature of a person's rights are particularly salient for thinking about elder rights, but at this time, there is no public consensus in New Mexico regarding the nature of a right-to-die or its legal standing.

According to news reports,¹⁶⁴ this issue of a right to die with medical assistance came to New Mexico's state courts in *Morris v. Brandenburg*,¹⁶⁵ when civil rights organizations in New Mexico joined a terminally ill woman and her doctors in a challenge to the state law that outlawed physician aid in dying. Although plaintiffs were successful at the trial court, the New Mexico Supreme Court ultimately reversed the decision of the lower court, holding that the law was not unconstitutional, and that aid in dying was not a fundamental right.

Strong views are a defining feature of this issue, for while illness and death are not optional, approaches to it are. Marcia Angell, former editor of the New England Journal of Medicine, and of the Harvard Medical Faculty, put it sharply: "Why should anyone in the states, the medical profession, or anyone else presume to tell someone else how much suffering they must endure as their life is ending?"¹⁶⁶ On the other side, an attorney for Alliance Defending Freedom, supporting the New Mexico Court of Appeals decision to find no right to aid in dying, reportedly called the Supreme Court decision "a win for all New Mexicans."¹⁶⁷ These sharply opposed positions also diverge on questions of who qualifies as a terminally ill patient, what would be the criteria for determining patient competency to make an end-of-life decision, what medical practices are acceptable, and what medication is safe, among others. This sharp divide was raised by Justice Edward Chavez of the New Mexico Supreme Court, author of the Court's opinion, who wrote these concerns require "robust" debate in the executive and legislative branches of government.¹⁶⁸ As such, a right to die could be established by democratic process. However, many voices on this issue suggest that a democratic approach is unsuited to the individuality of the decision of life or death, and are seeking a blended process of legal findings, legislation, and social dialogue. In the meantime, some stakeholders see a right-to-die as a core civil right for elders who are more likely to face such a decision.

¹⁶⁴ Scott Sandlin, *New Mexico Assisted Suicide Law Affirmed*, Albuquerque Journal, June 30, 2016, <https://www.abqjournal.com/801082/nm-supreme-court-rules-on-aid-in-dying-workers-comp.html>.

¹⁶⁵ *Morris v. Brandenburg*, 376 P.3d 836 (2016).

¹⁶⁶ Marcia Angell, *May Doctors Help You to Die?*, New York Review of Books, Oct. 11, 2012, available at <http://www.nybooks.com/articles/2012/10/11/may-doctors-help-you-die/> (last accessed Sept. 27, 2018).

¹⁶⁷ Sandlin, *New Mexico Assisted Suicide Law Affirmed*.

¹⁶⁸ *Id.*

V. RECOMMENDATIONS

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the federal government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.¹⁶⁹

In keeping with these responsibilities, and in consideration of the testimony heard on the topic of elder abuse, the New Mexico Advisory Committee submits the following recommendations to the Commission:

- More attention needs to be paid to ensure that elders have sufficient resources to support wellbeing as they age. This will require conversations about and concrete action to address elder poverty and health disparities;
- State and federal agencies need to bolster requirements for reporting and surveillance (data tracking) of cases of elder abuse;
- Opportunities for mediation involving family members and other interested stakeholders should be created in cases where there is a concern about an elder's capacity to control their finances;
- Additional mechanisms are needed to deter individuals from engaging in elder abuse;
- Increased transparency is required concerning the process of determining the need for court-appointed individuals or agencies to control the decisions and assets of elders;
- Existing legislation and regulations should be reviewed to determine if they are sufficient to protect the rights of elders;
- Statutes that protect elders from financial exploitation should be bolstered or enacted;
- In cases of alleged financial exploitation, a presumption of undue influence should be established, which would shift the burden of proof to alleged perpetrators of abuse once certain elements are met;
- Better tracking systems are needed to document elder financial abuse;

¹⁶⁹ 45 C.F.R. § 703.2(b)-(c).

- Court costs, attorney's fees, and double or triple damages should be available in cases of willful coercion in relation to elder financial exploitation;
- Judgments specifically related to elder financial abuse should be tracked and registered;
- The maximum number of judgments related to elder financial abuse should be enforced and collected; and
- States should be required to take the actions recommended herein in order to receive federal funding.

VI. APPENDIX

- A. June 24, 2016 Briefing Agenda

<https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/t00000005h37/RIS2.zEFEfIGcrkKl1AxVW0.4GPauMpl9g7AMjRMq5g>

- B. June 24, 2016 Briefing Transcript

https://gsa-geo.my.salesforce.com/sfc/p/#t0000000Gyj0/a/t00000005evM/.EFd2aloJ0znu3Z2E_FQ9iqS9q0S8n_XNkL2urlRTIQ

New Mexico Advisory Committee to the United States Commission on Civil Rights



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