

Chapter 12 Personal and Legal Rights

Introduction	12-1
AARP Principles	12-1
Elder Abuse	12-2
Advance Planning and Guardianship	12-5
Probate	12-9
Civil Rights	12-9
Age Discrimination	12-11
Protections for People with Disabilities	12-11
Federal and State Identification and Verification Requirements	12-12
Patients' Rights	12-13
Individual Enforcement of Legal Rights	12-16
Alternative Dispute Resolution	12-19
Legal Services	12-21
Criminal Justice	12-23
Legal Rights of Grandparents	12-25
Figure 12-1 Substantiated Reports of Mistreatment of Adults Age 60 and Older, 2003	12-2

INTRODUCTION

People have the right to be free from discrimination, crime, physical and emotional abuse, neglect, intimidation, and financial exploitation. Older people may experience violations of their personal and legal rights in many settings—in the community and in institutions—and in many roles.

Older people, like everyone, need effective mechanisms to assert their rights. These mechanisms include the enforcement of rights by federal, state, and local agencies that oversee programs for older people or that have the authority to enforce laws and regulations on behalf of older people. Of equal or greater importance is the ability of individuals to bring lawsuits to seek redress when their rights have been violated. In some instances older people who are unable to protect their rights will suffer more severe consequences than other people when their rights are violated. Thus, additional efforts are necessary to protect vulnerable older people.

AARP PRINCIPLES

AARP's policies on personal and legal rights are guided by six principles.

Protections against discrimination—strong and expansive legal protections against discrimination

Freedom from exploitation and abuse—strong legal protections against, and effective protective services addressing, all forms of exploitation and abuse of incapacitated and vulnerable adults

Safeguarding rights—strong procedural and substantive safeguards to protect individual rights

Choice—support for the individual's right to make personal and financial decisions and to carry out their wishes and preferences in the event of future incapacity through effective planning tools

Enforcement—rigorous enforcement of civil rights and other statutes protecting the rights and safety of individuals

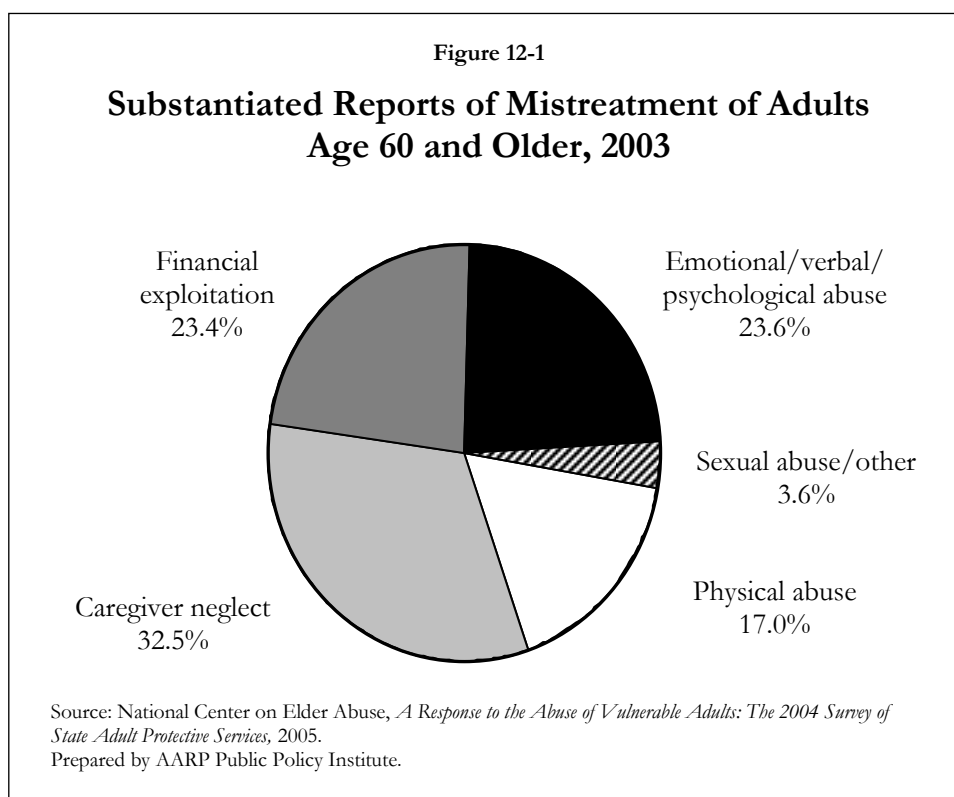
Redress and support for victims—full availability of the court system to obtain redress for rights violations, not limited by circumstances such as disability or ability to pay.

ELDER ABUSE

Elder abuse, like many other forms of domestic abuse, is an often hidden phenomenon that affects hundreds of thousands of older Americans. State adult protective services (APS) laws generally provide safeguards for adults who cannot protect themselves from physical and emotional abuse, neglect, intimidation, or financial exploitation. Many of these statutes specifically target older people age 60 or 65 and over, but some states provide the same protections for all adults who are incapacitated or

otherwise vulnerable. A 2004 survey of state APS agencies revealed that they collectively received 565,747 reports of elder and vulnerable-adult abuse in domestic and institutional settings during fiscal year 2003. Reported cases are only the tip of the iceberg.

Elder abuse can be physical, financial, or psychological and may take place in a home or an institutional setting (Figure 12-1).



Elder abuse occurs without reference to race, religion, income, education, place of residence, or living arrangement. Because abuse commonly goes unreported, information on who is likely to suffer a particular type of abuse is unavailable. It is known, however, that physical abuse is more likely from a spouse, an adult child, or other family member than from a nonrelative. Incapacitated elders are also at risk of abuse, neglect, and exploitation by guardians, agents under durable powers of attorney, and other fiduciaries with the authority to make surrogate personal and financial decisions.

Prevention—Detecting and preventing elder abuse involves increasing awareness among the general public and professionals. In-home services, such as meals-on-wheels or home health care, are significant

in preventing and treating abuse of the frail elderly. Beyond these services essential to daily life, a broad range of protective services are needed, ranging from simple household-chore services to money management and guardianships. Community-based programs, which provide services such as counseling, information and referrals, and personal money management, can help prevent and stop abuse. Teams of multidisciplinary professionals can address elder abuse issues that cannot be effectively resolved by workers in a single field (e.g., teams of accountants, banking professionals, and attorneys can address financial abuse, while teams that include police, medical examiners, attorneys, and others can conduct retrospective review of deaths resulting from elder abuse).

Legal protection—Laws addressing elder abuse in domestic and institutional settings exist in all 50 states, the District of Columbia, Puerto Rico, the US Virgin Islands, and Guam. Typically APS laws enable protective services agencies to offer victims a variety of remedial services. In addition, statutes, which may be part of the APS law or of separate criminal laws, impose criminal penalties for various forms of elder abuse. A state’s basic criminal laws also can be used to prosecute perpetrators of abusive acts against elderly people. Some states have adopted enhanced criminal penalties to deter abuse, neglect, and exploitation of vulnerable adults. For example, some states specify that enhanced penalties apply when the vulnerable individuals are unable by reason of mental or physical incapacity to protect themselves from abuse, neglect, or exploitation or to provide for their own health, safety, or welfare. Civil and criminal actions against abusers may also deter victimization of the vulnerable.

Prosecuting alleged abusers is difficult for numerous reasons: Victims may be unable or unwilling to testify as a result of incapacity, fear, shame, or misguided loyalty, and law enforcement staff and prosecutors may lack the training, interest, and resources for these difficult cases. However, a number of states and local jurisdictions have made significant progress in introducing and implementing new techniques for investigating and prosecuting abuse cases, increasing the chances for successful prosecutions. Training for law enforcement and prosecutorial staff is a key part of this strategy (see also this chapter’s section, Criminal Justice).

Silver alerts— As many as 30 states have systems like the “AMBER alert” program for missing children. Known as “silver” or “senior” alerts, they quickly send out bulletins when a vulnerable older

person or, in some states, a younger person with a disability goes missing. They also create more awareness among law enforcement officials regarding the issues of older Americans.

Looking toward the future—AARP is concerned that in recent years Congress has not significantly increased federal resources to help states protect vulnerable adults. And some funding sources have decreased. Adequate federal support is needed for protective services for at-risk people in institutional settings, for enhancing guardianship monitoring, and for developing models for state-local coordination to prevent, identify, and treat abuse victims.

The Older Americans Act Amendments of 2006 authorizes the Department of Health and Human Services to coordinate federal elder-justice activities, which include annual data collection on elder abuse, neglect, and exploitation. The law also requires a national incidence and prevalence study. This research will contribute to the groundwork needed for policy development to prevent elder abuse and strengthen protective services. Congress has yet to authorize funds for the national incidence and prevalence study.

The Elder Justice Act (EJA) became law on March 23, 2009, as part of the Patient Protection and Affordable Care Act. The EJA is the most comprehensive federal legislation to combat elder abuse, neglect, and exploitation. Among other provisions, the EJA creates the Elder Justice Coordinating Council, made up of representatives from federal agencies that play a role in elder justice; authorizes dedicated funding for adult protective services on the state level; and authorizes grants to support the Long-Term Care Ombudsman Program.

ELDER ABUSE: Policy		
Preventing, detecting, and addressing abuse	FEDERAL STATE	<p>Congress should appropriate funds to implement all provisions of the Elder Justice Act.</p> <p>Federal agencies, including the Departments of Health and Human Services and Justice, should assist state and local agencies in preventing, detecting, and prosecuting all forms of elder abuse. These efforts should include facilitating uniform definitions of abuse, neglect, and exploitation; collecting data on abuse prevalence; providing victim assistance; and supporting training of law enforcement and judicial personnel to increase the quality of investigations and prosecutions.</p> <p>States should develop public awareness programs and expand in-home services, including respite care, to help prevent, identify, and address cases of elder abuse.</p>

<p>Adult protective services (APS)</p>	<p>FEDERAL STATE</p>	<p>States should enact, implement and fully fund adult protective services (APS) laws that apply in the community and long-term care settings and provide for:</p> <ul style="list-style-type: none"> • prompt investigation; • access to the alleged victim by agency personnel, law enforcement, and other relevant entities; • intervention in emergency and nonemergency situations of abuse, neglect, or exploitation of vulnerable individuals; • use of the least-restrictive protective action that meets the specific needs of the vulnerable individual; • a balancing of the individual’s autonomy and self-determination with the state’s need to protect those people who cannot protect themselves; and • programs for abusive family members and caregivers aimed at curbing future abuse. <p>States also should work to ensure that domestic violence and APS agencies are responsive to the particular needs of older abused spouses and partners.</p>
<p>Criminal and civil penalties</p>	<p>STATE</p>	<p>States should enact and enforce laws that:</p> <ul style="list-style-type: none"> • make it a criminal offense, with enhanced penalties, to abuse, neglect, or exploit a vulnerable individual; • provide victims and their legal representatives adequate civil procedures and remedies (including a shift in the burden of proof, award of attorney’s fees and costs, expedited hearings, and posthumous recoveries for pain and suffering) against perpetrators of abuse, neglect, or exploitation; and • make institutions liable for criminal and civil penalties for victimization of those in their care (see also Chapter 8, Long-Term Services and Supports: Quality and Consumers’ Rights Across Settings).
<p>Multidisciplinary approaches to fight elder abuse</p>	<p>STATE</p>	<p>States should support the formation and ongoing operation of multidisciplinary teams to address elder abuse issues that cannot be effectively resolved by a single discipline and train professionals from a variety of disciplines (including prosecutors, police officers, sheriffs, lawyers, employees of financial institutions, and APS agencies) to improve detection, investigation, and enforcement regarding cases of abuse, neglect, and exploitation.</p>
<p>Silver alerts</p>	<p>STATE</p>	<p>States should devise “silver alert” or similar programs only if appropriate limitations are included:</p> <ul style="list-style-type: none"> • The individual who is eligible to be the subject of an alert has been adjudicated by a court to be incapable of managing his or her own personal affairs, such as through a guardianship proceeding, or has a documented diagnosis of a mental illness, injury, or condition that causes the individual to be incapable of making personal care decisions. • The individual who initiates an alert must have one of the following relationships to the subject of the alert: be a legal guardian or close family member; live in the same household; or be a caregiver who has had very recent contact with the subject. • The alert system protects the privacy, dignity, independence, and autonomy of the subject of the alert.

Data collection on elder abuse	STATE	States should establish mechanisms to measure the occurrence of all forms of elder abuse and neglect including collection of data (such as reports to APS agencies) and incidence and prevalence studies, and address issues of cultural diversity in data collection and programs to combat elder abuse and neglect.
Social Services Block Grant and Older Americans Act programs	FEDERAL	Funding for Social Services Block Grant and Older Americans Act programs that deal with abuse must respond to the increasing number of extremely vulnerable elderly people. Additional sources of funding should be developed.

ADVANCE PLANNING AND GUARDIANSHIP

With people living longer and increased age often accompanied by diminished decisionmaking ability, older people must engage in advance planning. When someone is incapable of managing his or her personal decisions or property, there are several alternatives for authorizing another person or corporate entity to act on his or her behalf. While still capable of decisionmaking, a person may grant such authority voluntarily, utilizing powers of attorney, health care proxies, trusts, and other devices. These allow individuals to specify how personal and financial decisions will be made and by whom, potentially avoiding court intervention. When an individual loses capacity and has not delegated authority for decisionmaking, a court may appoint a guardian or conservator with specified decisionmaking powers. All of these arrangements carry risks and require careful scrutiny and monitoring. Risks range from mismanagement of fiduciary responsibility to physical harm to the incapacitated individual. Thus powers of attorney, trusts, and guardianship arrangements should be monitored and authority ended for those who abuse or neglect, either through action or inaction, the people in their charge.

Powers of attorney—A power of attorney is a signed document or other record in which a principal appoints another person to act as his or her agent. The grant of authority can be limited, for a particular purpose or period of time, or general, allowing the agent to act indefinitely with regard to all matters. Increasingly, such powers are made “durable” by an express statement that the principal intends the authority to remain effective even if he or she subsequently becomes disabled or incapacitated. Frequently durable powers of attorney are “springing” and do not take effect until the individual granting the power becomes incapacitated.

States do not have uniform standards and regulations to protect the rights of people granting such powers.

In 2006 the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved a revised Uniform Power of Attorney Act, which includes a presumption that the document is “durable,” safeguards against and remedies for abuse by agents, provisions to encourage acceptance of an agent’s authority by banks and other institutions, and other provisions to address numerous concerns raised by existing state laws. By 2010 seven states and the US Virgin Islands had adopted the act and others were considering adoption.

Sometimes an agent acting for an elderly or disabled person (with or without a power of attorney) may be appointed a representative payee by the Social Security Administration (SSA), thereby gaining authority to oversee and manage the individual’s Social Security benefits on behalf of the beneficiary. As a matter of policy the SSA declines to recognize powers of attorney and makes its own appointment of representative payees, determining their rights and responsibilities. The Department of Veterans Affairs also declines to recognize powers of attorney and appoints its own fiduciaries.

Trusts—Trusts are sometimes seen as alternatives to powers of attorney and guardianship. A person forms a trust when he or she transfers property to another person “in trust” for his or her own benefit or for the benefit of others (“beneficiaries”). A trust may be established in an *inter vivos* agreement with a trustee by a person while living (these “living trusts” are effective during the person’s lifetime) or in a last will and testament (a “testamentary” trust, for the administration of property after the individual dies). Trusts are commonly used to provide for property management in the event of incapacity; to avoid probate, as part of an individual’s estate plan to stipulate terms upon which heirs will benefit from an estate; and in some instances to obtain favorable tax consequences.

While the use of trusts has been increasing, they can also pose problems for older individuals. Living trusts may in fact provide a means for management of property during a person’s lifetime. But too often such trusts are touted as a means for avoiding probate upon death, are not properly funded during life, and are established for individuals who neither need them nor understand the costs and procedures involved. State laws governing trusts vary considerably, and this inconsistency may present problems for people who move to another state upon retirement. In many states much of the law governing the rights and responsibilities of trustees is traditionally found in court decisions rather than in legislation.

In 2000 the NCCUSL adopted a Uniform Trust Code to help improve the certainty and predictability of trust interpretation by the courts and reduce trust preparation costs for consumers. However, adoption of the uniform code by state legislatures is proceeding slowly because of resistance from corporate trust companies and some attorneys who oppose court oversight.

Guardianship—In guardianship proceedings (known as “conservatorship” in some states) a court oversees the transfer of authority for property or personal decisionmaking (or both) when an individual is deemed incapable of managing his or her own affairs. Adults placed under guardianship, often referred to as wards or incapacitated individuals, may lose their basic civil liberties, such as the right to vote and marry and to make decisions about where to live, how to spend their money, and what type of medical treatment they should have. The protection for these rights varies by state. As the need for guardians has grown, courts have found it more difficult to find family members or friends able and willing to accept the responsibilities of guardianship. As a result, states have significant unmet needs for public guardianship and other surrogate decisionmaking services. Public guardianship programs are frequently understaffed and underfunded, and oversight and accountability of public guardianship is uneven.

After a guardian has been appointed, courts are responsible for monitoring their performance and ensuring that incapacitated wards are protected and

treated appropriately. Although all states have laws requiring periodic reporting and accounting by guardians, a 2006 AARP Public Policy Institute study found that oversight practices vary dramatically. More than 40 percent of survey respondents said no one is assigned by their court to visit the ward, and over one-third stated that no one is designated to verify the information in reports and accountings. Although many states recently have reformed their guardianship laws, some older people continue to be placed under guardianship with little or no evidence of need and as a first, rather than last, resort. Moreover once people become wards, courts may lose track of them, their money, and their guardians.

To improve the quality of guardianship and prevent abuses, a few states have developed standards and certification requirements for guardianship services programs. Advocates for incapacitated people are focusing new attention on the need to train guardians and certify professional guardians to ensure that all are better informed about their responsibilities and the requirements for caring for incapacitated people.

An added problem is that guardianship laws are unclear on which state has jurisdiction when the proposed ward has ties to more than one state. The NCCUSL has adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) to address the issue of jurisdiction with regard to guardianships. This act aims to provide uniformity and reduce conflicts among the states. The UAGPPJA will also save time for those who are serving as guardians and conservators, allowing them to make important decisions for their loved ones as quickly as possible. To maximize its impact, all states need to adopt the act. By 2010, 19 states and the District of Columbia had adopted UAGPPJA and numerous other states were considering adoption.

Jurisdictional issues become even more complex internationally. Although there are no established procedures to resolve international disputes concerning the authority of guardians and agents with financial or health care powers of attorney, the US Department of State has negotiated an international convention that establishes policies and protocols for the recognition of other countries’ orders and laws.

ADVANCE PLANNING AND GUARDIANSHIP: Policy		
Durable powers of attorney	STATE	States should expand their laws on durable powers of attorney to deter wrongdoing by agents, to provide legal remedies for such wrongdoing, and to provide third parties with incentives to rely on

Durable powers of attorney (cont'd.)	STATE	the powers without fear of liability, except for their own wrongdoing. These protections and remedies should be at least as stringent as those in the updated Uniform Power of Attorney Act.
Uniform trust code	STATE	States should codify, simplify, and clarify trust laws by modeling them on the Uniform Trust Code promulgated by the National Conference of Commissioners on Uniform State Laws.
Effective guardianship	FEDERAL STATE	<p>The federal government should encourage the expansion of:</p> <ul style="list-style-type: none"> • programs that provide alternative protective arrangements less restrictive than guardianship (such as representative payment); • educational and support programs to assist guardians, particularly family members, in carrying out their responsibilities; and • effective programs to monitor guardians and other fiduciaries to ensure that they utilize their authority and fulfill their responsibilities appropriately. <p>States also should enact laws or court rules that:</p> <ul style="list-style-type: none"> • require all guardians to receive adequate training and information about their duties and responsibilities; • mandate certification of guardians who serve multiple, unrelated incapacitated people (certification programs should include training, testing, and accountability requirements); • protect the privacy of alleged incapacitated people and wards by prohibiting electronic posting of sensitive information in guardianship case records; and • provide clear procedures when wards, their property, or their care has ties to more than one jurisdiction or state by adopting the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. The act addresses the initial jurisdiction to decide capacity, recognition of foreign guardians' authority, transfer of cases when wards or guardians move, and related issues.
Protecting due process rights	STATE	<p>States should enact guardianship and conservatorship laws that protect older people's due process rights. These safeguards should include, at a minimum:</p> <ul style="list-style-type: none"> • a mandated right to legal counsel (including a right to have counsel appointed by the court and present at all proceedings); • timely notification of proceedings in understandable language; • consideration by the court of less-restrictive alternatives to guardianship (such as money management, powers of attorney, advance directives, and trusts) in determining whether appointment of a guardian is necessary; • a process for emergency proceedings that includes actual notice to the respondent, mandatory appointment of counsel, proof of respondent's emergency, appropriate limitations on emergency powers, and termination upon showing that the emergency no longer exists; • investigation of the background and qualifications of prospective guardians and conservators; • proof that the respondent lacks decisionmaking capacity and requires a guardian by clear and convincing evidence; • protections against conflicts of interest in the selection of guardians and conservators;

Protecting due process rights (cont'd.)	STATE	<ul style="list-style-type: none"> • periodic accounting and reporting on personal status by guardians and thorough oversight of guardianship by the court, with appropriate civil or criminal penalties for guardian malfeasance; • retention by the ward of all rights and authority except those expressly delegated to the guardian due to the ward's functional limitations; and • assessment by the court of the ward's capacity to vote, and retention of the ward's right to vote unless the court makes a specific finding of incapacity to vote (see Chapter 1, Government Integrity and Civic Engagement, for policy on voting and mental incapacity).
Public guardianship	STATE	States should establish and adequately fund public guardianship programs to provide free or nominal-cost services for adults with limited resources who lack qualified relatives or others to serve as a guardian or conservator. States should require that these programs meet minimum standards, including limits on the number of wards served, by using specific staff-to-ward ratios; maintenance of adequate liability insurance for the protection of wards and their property; mandatory conflict-of-interest standards; and oversight by the guardianship court tailored to the particular needs of wards served by public guardianship programs.
Coordination on guardianship issues	FEDERAL STATE	<p>Federal-state coordination of federal representative payment programs and guardianship should be strengthened and streamlined through such means as increased communication between and among courts and federal agencies (such as the Social Security Administration and the Department of Veterans Affairs) to ensure appointment of appropriate guardians and representative payees, to monitor the activities of those fiduciaries, and to maximize services to individuals with diminished capacity.</p> <p>The federal government should convene an interagency-interstate court study group to develop options for improved information sharing and coordination.</p>
International Convention on the Protection of Incapacitated Adults	FEDERAL	After gaining the advice and consent of the Senate, the president should ratify the International Convention on the Protection of Incapacitated Adults negotiated by the US Department of State.
Funding for guardianship and alternatives	FEDERAL	<p>Congress should allocate funds to:</p> <ul style="list-style-type: none"> • train guardians, agents under durable powers of attorney, judges, and court personnel regarding their powers, duties, and ethical standards; • create demonstration projects on model guardianship monitoring practices; • provide for authorized fiduciaries, including public guardians; • study state fiduciary laws, including guardianship and power of attorney laws, and the roles and responsibilities of government entities regarding fiduciaries; and • set up a uniform system of data collection on key aspects of the guardianship process.

PROBATE

Probate laws, which govern the transfer of property at death, vary significantly from state to state. The variations in and complexity of such laws contribute to misunderstanding about this process. Delays and costs in state probate processes have generated such dissatisfaction among heirs, beneficiaries, and estate administrators that the Joint Editorial Board for the Uniform Probate Code (UPC) developed uniform model legislation to simplify and clarify the probate system for the average consumer.

The UPC addresses not only transfers of individually owned property at death, but also nonprobate transfers and guardianship. Nonprobate transfers—such as payment-on-death accounts, accounts passing by beneficiary designation, and joint accounts passing by right of survivorship—do not involve the court system and thus give older people a way to transfer control of personal assets without the costs and other unwanted side effects of probate litigation (for a discussion of estate planning and recovery for

Medicaid, see Chapter 8, Long-Term Services and Supports—Medicaid: Strengthening Financial Protections for Beneficiaries and Their Families).

The UPC has been adopted in whole or part by about 20 states. Many additional states recognize the need to simplify their probate systems to facilitate the orderly transfer of property at death, while also addressing equitable assignment of costs, the need for qualified staff, and access to the courts for resolution of disputes involving inheritance or debts of decedents. Some states have enacted legislation authorizing nonprobate transfers of real property using transfer-on-death (or beneficiary) deeds. The real property owner may deed the property to a named beneficiary; the transfer becomes operative on the owner's death (avoiding probate) and is revocable until then. The National Conference of Commissions on Uniform State Laws began drafting a uniform transfer-on-death deed statute in 2007.

PROBATE: Policy		
Simplifying probate	STATE	<p>States should at minimum adopt one of the following options: the 1990 Uniform Probate Code (UPC), suitable legislation, or court rules establishing probate procedures that simplify, expedite, and reduce the costs of settling estates in probate. Changes should allow informal or administrative (rather than adjudicative) procedures for probating wills and appointing personal representatives, and provide oversight for the unsupervised or independent handling of estates.</p> <p>States should enact legislation to simplify, modify, and clarify estate planning. These laws should be modeled after the UPC revised Article II (Uniform Act on Intestacy, Wills and Donative Transfers) and Article VI (Uniform Non-Probate Transfers at Death Act). The statutes on nonprobate property transfers include the Uniform TOD (Transfer-on-Death) Security Registration Act, the Uniform Multiple-Person Accounts Act, and the Uniform Custodial Trust Act.</p> <p>States should also enact legislation that authorizes transfer-on-death (or beneficiary) deeds to enable revocable nonprobate real property transfers.</p>

CIVIL RIGHTS

AARP believes in the fundamental right of all people to be free from discrimination. This right is protected by various civil rights laws that prohibit discriminatory conduct by federal, state, and local governments and in some instances by private people

and businesses on the basis of age, gender, race, ethnicity, religion, disability, sexual orientation, gender identity, or other forms of group identity. The effectiveness of antidiscrimination provisions frequently depends on policies or programs to

provide equal opportunities to groups that have suffered or are suffering discrimination. Identifying problems and developing remedies often depends on the ability of enforcement agencies (such as the Equal Employment Opportunity Commission) to collect data on discriminatory practices.

Discrimination takes many forms. It may be manifested in acts against groups or individuals that deny access to valuable opportunities or benefits such as work, credit, or public or private goods or services (see Chapter 5, Employment, regarding Title VII and the Americans with Disabilities Act). It includes prejudicial targeting of groups or individuals for harsh or unequal treatment (for example,

predatory financial products or even hate crimes). It also may be found in policies or practices that appear neutral but whose effects are grossly unequal, at least where an alternative and equally effective approach is available and less unfair in result. One example would be the failure of a community to provide accessible transportation to people with disabilities when it otherwise provides transportation service to its residents (for related policy see Chapter 9, Livable Communities). Private enforcement of antidiscrimination laws is an appropriate and necessary complement to government enforcement actions in achieving a society without discrimination and obtaining redress for victims of discrimination.

CIVIL RIGHTS: Policy		
Enforcing civil rights laws	FEDERAL STATE LOCAL	<p>Government agencies should vigorously enforce the fundamental right of all people to be free from discrimination. Civil rights statutes should be vigorously enforced to assist in the elimination of practices, such as predatory financial practices, that target specific groups and communities for exploitation. Data on discriminatory practices should be collected to identify problems and assist in developing effective remedies.</p> <p>Government agencies and entities should comply with all applicable federal, state, and local civil rights laws. State governments should waive their sovereign immunity to suits for damages under these laws to ensure that their own employees are protected to the same degree that fair employment laws protect all other employees.</p> <p>Policies and programs that seek to redress past and current discrimination through active measures to ensure equal opportunity in all areas of American life should be enacted and enforced.</p> <p>Government agencies should provide for outreach to bilingual communities to educate and inform them about how to obtain enforcement of their civil rights.</p> <p>Government agencies should nominate and appoint to enforcement or implementation positions only people who have a commitment to vigorous enforcement and meaningful implementation of civil rights laws.</p> <p>Congress and state legislatures should be vigilant in monitoring effective administration of civil rights laws, consistent with their broad remedial purposes, and should amend civil rights laws as needed to restore important civil rights protections, which from time to time are diminished by unduly restrictive interpretations of such laws by the US Supreme Court and state supreme courts.</p>
Protecting against hate crimes	FEDERAL STATE LOCAL	Legislation should be enacted to address hate crimes and strengthen existing laws against such crimes.

Age Discrimination

The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in federally funded programs. Congress intended the act to apply broadly to all federally funded areas, such as education, health services, housing, and social services. Undercutting the act’s effectiveness is the fact that Congress failed

to provide victims of age discrimination with adequate means to enforce their rights under the act. As a result victims have used the act infrequently (see the discussion on the US Supreme Court’s decision in *Gross v. FBL Financial* in Chapter 5, Employment: Employment Discrimination—Preserving and Strengthening Statutory Protections).

AGE DISCRIMINATION: Policy		
Age discrimination	FEDERAL	Congress should amend the Age Discrimination Act to strengthen the law’s definition of “discrimination” and ensure that victims in federally funded programs have available appropriate relief, including money damages and a private cause of action in federal court.

Protections for People with Disabilities

The incidence of disability increases with age. The Americans with Disabilities Act of 1990 (ADA), as amended by the Americans with Disabilities Amendments Act of 2008, protects people of all ages who have physical or mental disabilities, or a record of such disability, or who are perceived as having such disability. The ADA prohibits discrimination in employment, public services, public accommodations, transportation, and telecommunications. It affords protections equivalent to those granted under prior civil rights laws to people facing bias on the grounds of race, color, gender, religion, or national origin and seeks to end a legacy of segregation and degradation. The ADA also requires employers, public officials, and private entrepreneurs to make reasonable adjustments in their policies and practices to accommodate people with disabilities (for further discussion of the ADA, see Chapter 5, Employment; Chapter 8, Long-Term Services and Supports; and Chapter 9, Livable Communities). In 1999 the US Supreme Court ruled

in *Olmstead v. L.C. and E.W.* that the ADA’s integration mandate requires public agencies to provide services and care for people with disabilities in the most integrated community settings (for further discussion of *Olmstead*, see the section Expanding Home- and Community-Based Services in Chapter 8, Long-Term Services and Supports: Reforming Long-Term Services and Supports).

In 2001 the US Supreme Court ruled in *Board of Trustees v. Garrett* that workers may not sue employers for damages under the ADA. In 2004 disability rights advocates succeeded in persuading the Supreme Court not to extend *Garrett’s* reasoning. In *Tennessee v. Lane* the Supreme Court approved damages suits against states that discriminate against people with disabilities in their services and programs. Expansion of *Tennessee* would benefit people with disabilities by permitting full relief in suits challenging other forms of disability bias in state programs and services. Thus far, many federal courts, but not all, have allowed victims of disability bias by state agencies to bypass *Garrett* and sue state entities for damages under Section 504 of the Rehabilitation Act.

PROTECTIONS FOR PEOPLE WITH DISABILITIES: Policy		
Funding and enforcement	FEDERAL STATE LOCAL	Congress should provide adequate funding and personnel for the effective enforcement of the Americans with Disabilities Act (ADA). The federal government should broadly interpret and require vigorous enforcement of the ADA as well as the Fair Housing Amendments Act of 1988; Sections 501, 503, and 504 of the Rehabilitation Act of 1973; the Architectural Barriers Act and the Air Carrier Access Act. The federal government should make federally funded buildings and programs accessible to people with disabilities and should enforce

Funding and enforcement (cont'd.)	FEDERAL STATE LOCAL	the accessibility obligations of private providers of public accommodations, transportation, and telecommunications. In addition to complying with and enforcing the ADA, the Rehabilitation Act, and other federal disability rights statutes, state and local governments should implement state and local disability access and other antidiscrimination requirements that mandate greater and more comprehensive protection than that provided by federal law.
Assistive technology	FEDERAL	The federal government should encourage and expedite funding for priority research, demonstration projects, and referral programs for the design and distribution of technological devices that assist people with disabilities in leading meaningful and independent lives.

Federal and State Identification and Verification Requirements

Congress has enacted or considered several provisions, including the REAL ID Act, that would create stricter standards, procedures, and requirements for proving identity and other prerequisites for accessing certain government services or for other federally regulated purposes, such as boarding a commercial aircraft, entering a federal building, receiving certain federal or federally funded benefits (such as Medicaid), voting, and maintaining employment at US ports.

States also have enacted or considered similar identification and verification requirements. Under these provisions individuals would have to provide proof of vital personal information, such as citizenship (or legal presence in the country), address, date of birth, and Social Security number, by producing specific documents, such as birth certificates, utility bills, bank statements, or Social Security cards. In some cases these documents would be necessary to obtain an identification card that would then be used to prove citizenship or legal residence. Individuals who are unable to meet these stricter standards for proving their identity would not be issued federally compliant identification cards and would therefore be denied certain government services (see Chapter 1, Government Integrity and Civic Engagement: Voting, for a discussion of state restrictions on the fundamental right to vote based on ID requirements).

Some states as well as the District of Columbia have

opposed the federal REAL ID Act through resolution or resolutions. Concerns about the REAL ID Act and its implementation include the following:

- The implementation process would impose a burden on older people and other consumers. Individuals would likely face higher fees and longer lines at state motor vehicle offices and be unable to obtain same-day licenses.
- There would be an increased risk of identity theft (see Chapter 11, Financial Services and Consumer Products: Information Privacy).
- The act would impose an unworkable funding burden on states (states are concerned that its deadline would be impossible to meet).
- Providing required documents could prove difficult for many individuals, particularly older, lower-income, minority, or rural individuals.

A 2006 survey by the Center on Budget and Policy Priorities points out the significance of the last point. The survey found that about 11 million US citizens have neither a birth certificate nor a passport in their home. Moreover, the center noted:

- Low-income people are nearly twice as likely to lack these documents as people with higher incomes.
- Older residents are much more likely to lack these documents than younger residents.
- African-Americans are much more likely to lack these documents than whites.
- Rural residents are more than twice as likely to lack a birth certificate or passport as nonrural residents.

FEDERAL AND STATE IDENTIFICATION AND VERIFICATION REQUIREMENTS: Policy

Identification and verification requirements	FEDERAL STATE	<p>Congress, state legislatures, and administrative agencies should not devise identification and verification requirements for individuals to deal with eligibility and national security concerns unless appropriate limitations are included to address:</p> <ul style="list-style-type: none"> • burdens on older people and others, including the possible hampering of access to government programs and services by otherwise eligible individuals, and onerous administrative processes for obtaining licenses and other government-issued identification; • the privacy and security of personal information; • the impact of state-implementation costs on states and individuals; and • timeline considerations for implementing the requirements.
--	---------------	---

PATIENTS' RIGHTS

Patients are routinely subjected to policies and practices that infringe on their fundamental and personal rights, thereby denying them the freedom and dignity they are entitled to under law. Such practices include barring patients' participation in and control over decisions about their care plan and medical treatment, denying them the right to control their personal and financial affairs, and violating confidentiality in such matters.

Hospitals sometimes discriminate against patients by refusing to admit or care for them on the basis of race, income, or source of payment. Patients also sometimes suffer discrimination at the hands of health insurance providers that attempt to limit coverage based on preexisting conditions. Hospitals also discriminate against patients when they fail to respect their wishes concerning who may visit them and deny visitation by close friends, partners, and other nonfamily members. Limitations on hospital visitation may jeopardize the health and emotional well-being of patients in several ways—by denying them emotional support during times of need, depriving medical professionals of vital sources of information, and interfering with advance directives and other wishes that patients may express. In April 2010, a memorandum was issued by the Administration requesting that the Secretary of the Department of Health and Human Services initiate appropriate rulemaking to ensure that hospitals that participate in Medicare or Medicaid respect the rights of patients to designate visitors.

Respect for autonomy and self-determination is as critical for the dying individual as for the patient who

is expected to recover. Ethicists and patient advocates have defined a set of principles regarding patient autonomy to allow individuals to live in accordance with their own religious, philosophical, and personal values—even when these differ from values held by others. There is increasing evidence, however, that health care providers and institutions fail to implement the decisions of competent patients.

Who makes treatment decisions? When adults lack decisionmaking capacity or the ability to communicate their decisions, the duty to decide on treatment falls to others. Although this may raise ethical considerations, concern for the individual's wishes, values, and welfare remains at the heart of surrogate decisionmaking. The most crucial questions are who should make treatment decisions for incapacitated adults and what criteria should they employ in making those decisions. The Patient Self-Determination Act requires health care providers to inform individuals about their rights under state law to make decisions about their own health care and to formulate advance directives. The act has no provisions allowing individuals to file a legal complaint or grievance if an obligation is unmet.

Currently every state permits competent adults to execute advance directives, either in a living will or a durable power of attorney for health care. These documents allow people to make known their treatment wishes under specific medical circumstances and appoint a surrogate decisionmaker to act for them should they become incapacitated. There are, however, gaps in state laws, confusion as

to which type of directive is most appropriate, and questions about the implementation of advance directives by health care providers. The National Conference of Commissioners on Uniform State Laws has adopted model legislation (the Uniform Health Care Decisions Act) that takes a comprehensive approach to health care decisionmaking. It includes provisions for:

- oral and written instructions;
- single advance directives that permit health care instructions, as well as the choice of an agent to make decisions and the appointment of a surrogate decisionmaker in the absence of a more complete advance directive;
- compliance by health care providers and institutions;
- procedures for dispute resolution; and
- portability of advance directives between states.

Despite the proliferation of laws on advance directives and the growing embrace of the less legally focused concept of advance care planning, questions remain as to their impact on actual treatment decisions. An emerging strategy for determining patients' wishes and ensuring that patients receive quality end-of-life care congruent with those wishes

was developed in Oregon in the early 1990s. Called Physicians Orders for Life-Sustaining Treatment (POLST), the protocol translates the wishes of patients with advanced chronic progressive illness into medical orders that health care systems understand. It complements advance care planning and advance directives by ensuring that care plans addressing a high probability set of life-support interventions are discussed, informed by the patient's wishes and reflected in a highly visible set of medical orders that follow the patient across care settings. Since Oregon developed the POLST form, 12 states, and other locales, have taken legislative or regulatory steps to implement similar protocols. Studies show the effectiveness of the protocol in ensuring that patients' wishes are carried out during the last stage of life.

(See Chapter 7, Health, and Chapter 8, Long-Term Services and Supports, for a discussion of the 2010 Patient Protection and Affordable Care Act (ACA), information on state and local ombudsman programs that help enforce laws protecting patient rights, and a statement of AARP's principles regarding the rights of Medicaid and Medicare patients. Chapter 8 also discusses ensuring quality in nursing homes, home care, and supportive housing.)

PATIENTS' RIGHTS: Policy		
Protecting patients' rights	FEDERAL STATE	<p>The federal government should play a strong role in protecting patients' rights.</p> <p>Congress should enact legislation that sets minimum standards for hospitals and other facilities with regard to patient treatment (both medical and nonmedical), including a requirement that all nonprofit hospitals have an obligation to care for indigent patients.</p> <p>The federal and state governments should ensure that all patients have the right to designate the visitors they want in the hospital, without regard to marital status, status as a family member, sexual orientation, or other factors. Designated visitors should include individuals designated by legally valid advance directives such as health care powers of attorney.</p> <p>Federal legislation should require that all Medicare and Medicaid providers inform patients, both orally and in writing, of their rights upon admission. Written consent forms should be detailed and specific, so that a patient's consent is truly informed, and clearly provide patients with the right to refuse certain medical practices without fear of reprisal or discontinuation of medical treatment.</p> <p>Federal and state legislation should include:</p> <ul style="list-style-type: none"> • a mechanism that lets patients and residents play an independent role in enforcing the law and regulations, • penalties severe enough to protect those who complain and to deter offensive conduct, and • a grievance mechanism with an appropriate appeals procedure.

Protecting patients' rights (cont'd.)	FEDERAL STATE	States should enact legislation that protects the rights of terminally ill patients to be treated at all times with dignity, respect, and kindness; maintained in a comfortable state without pain; and permitted to refuse medical treatment.
Advance directives and advance care planning	FEDERAL STATE	<p>States should enact laws with a comprehensive approach to health care decisionmaking, such as the provisions in the Uniform Health Care Decisions Act. State law should allow competent adults to execute advance directives (living wills, health care powers of attorney, or combined forms) that allow patients to communicate their medical treatment wishes and appoint a surrogate to make treatment decisions for them in the event of their incapacity. Covered treatment decisions should include (but not be limited to) the use, withholding, or withdrawal of artificial nutrition and hydration.</p> <p>In addition states should enact laws that:</p> <ul style="list-style-type: none"> • establish a nonjudicial means (such as mediation) for resolving disputes that may arise in the implementation of advance directives, • provide guidelines for advance directives—such as nonhospital “do not resuscitate” orders—that protect incapacitated adults’ right to refuse life-sustaining treatment when they are not in a health care facility, and • ensure that any advance directives accompany a person who moves from one facility to another. <p>The federal government and states should encourage advance care planning, and establish and support decisionmaking protocols such as Physicians Orders for Life-Sustaining Treatment (POLST) to ensure that the wishes of patients with advanced chronic progressive illnesses are appropriately translated into visible and portable medical orders that address such medical contingencies as hospitalization, cardiopulmonary resuscitation, artificial nutrition and hydration, antibiotics, and ventilation.</p>
Default surrogacy laws	FEDERAL STATE LOCAL	<p>Legislation should authorize nonjudicial surrogate decisionmaking in the event that an incapacitated patient has not executed an advance directive. Such legislation should:</p> <ul style="list-style-type: none"> • include a definition of and nonjudicial process for determining incapacity; • detail who, in order of priority, may make health care decisions for the incapacitated individual, including provisions for “unbefriended” patients without relatives or friends; • establish the standard that surrogates should use in making decisions—preferably the patient’s expressed wishes, the “substituted judgment test” (i.e., what the patient would have wanted, if the wishes were known to the surrogate), or if the wishes are unknown, the patient’s best interests, based on all relevant information available to the surrogate; • include provisions for the resolution of disputes that may arise; and • provide that a surrogate decisionmaker’s authority is equal to that of an agent or proxy appointed in an advance directive.

Minimum standards of care for all patients	FEDERAL	Congress should enact legislation that sets minimum standards for hospitals and other facilities with regard to patient treatment (both medical and nonmedical), including a requirement that all nonprofit hospitals have an obligation to care for indigent patients.
--	---------	---

INDIVIDUAL ENFORCEMENT OF LEGAL RIGHTS

Many attempts have been made over the last several years to restrict people’s ability to use the courts to assert their legal rights or obtain relief under the law. The most public campaigns have focused on lawsuits involving personal injury, malpractice, or defective products under the general rubric of “tort reform.” Other attempts to restrict access to legal remedies may be more technical, but are just as important and often thwart Congress’s attempts to address longstanding problems or individuals’ assertions of fundamental rights. These limitations come in the guise of restrictions on legal principles such as standing, jurisdiction, and issues of state and federal comity.

Tort reform—Attempts to restrict peoples’ ability to file lawsuits in civil cases are generally referred to as “tort reform.” Torts are noncriminal claims (such as for medical malpractice and deceptive sales practices) that do not involve contracts and for which relief (usually damages) can be awarded. Tort reform can affect everyone and have particular implications for older people. In some cases older people have been treated differently from others in similar situations because of their age; moreover advanced age can have an adverse impact on the amount of damages older people are awarded. Tort law permits individuals to sue for damages if they have been hurt as a result of the negligence or intentional conduct of another person (or corporation). While many tort cases are resolved before trial (e.g., they are settled or dismissed), many others are resolved by a judge or a jury.

Tort reform proposals include:

- alternatives to the court system, such as mandatory arbitration;
- limits on attorney’s fees;
- limits on punitive damages and awards for pain and suffering;
- changes in the legal doctrine governing such civil wrongs as personal injury (both in tort and product liability law), including replacing “joint and several liability” (under which each and every defendant is liable for all the damages a plaintiff suffers) with liability that is several only; and

- limitations on class action lawsuits.

Reform proponents include many corporations, municipalities, professionals, and insurance companies. They argue that courts and legislatures have greatly broadened the circumstances under which they can be found liable, and that when they have to pay victims of their wrongdoing, it increases their costs of doing business. These proponents propose restricting plaintiffs’ abilities to seek joint and several liability and to further limit their ability to bring class actions in either state or federal court. Reform proponents would also limit the size and type of awards available to plaintiffs.

Opponents of reform contend that some proposals jeopardize the rights of the injured to seek redress. These advocates believe that restrictions on joint and several liability could leave injured parties without effective remedies. Moreover, penalties exist for people who bring frivolous lawsuits, and this issue is best left for judges and juries to determine. They also argue that punitive damages are important because they are meant to deter future bad acts and provide a critical economic incentive for corporations and others to act properly to avoid causing harm. For example, punitive damages provide an incentive for manufacturers to produce safe products and remedy discovered defects before anyone is hurt.

Compensatory damages are based on the value of the loss and include such factors as loss of companionship and support, loss of society (for instance, what a grandchild might have learned from a grandparent), and loss of future enjoyment of avocational activities. Older litigants may receive low or reduced awards due to a number of factors, including prejudicial assumptions about the value of their life and the court’s or jury’s failure to substitute a relevant factor for one that no longer pertains to an older person, such as lost earning capacity for a retiree (see Chapter 5, Employment: Age Discrimination in Employment, for a discussion of federal taxation of punitive damage awards).

Private rights of action—Many federal and state laws provide individuals with a right to sue when those laws are violated. If the law does not provide a private right of action, the individual must depend on federal or state officials and regulatory schemes for enforcement when the law authorizes it. The efforts and resources spent on enforcement may depend on the political climate, budgets, and competing priorities, among other factors, making it uncertain whether relief will be sought in any given case. This uncertainty underscores the importance of private rights of action. Recent US Supreme Court decisions in *Alexander v. Sandoval* (2001) and *Gonzaga University v. Doe* (2002), however, significantly restrict the availability of private rights of action to enforce federal laws. These decisions narrow private citizens' access to the courts and thus their ability to seek judicial enforcement of federal programs that people with disabilities, the aged, and others depend on. The decisions also underscore the importance of—and the need for Congress and state legislatures to explicitly provide—private rights of action in legislation intended to protect individuals.

Class action lawsuits—Class action lawsuits are an important tool for resolving the claims of numerous people harmed by the same wrongful practices and for stopping those practices in one lawsuit. They are often referred to as “private attorney general” actions because private individuals bring a lawsuit that will benefit a significant number of people. Class actions are particularly important when people have relatively small claims, as often happens in consumer protection cases, and no single person would be able to seek relief individually due to the cost involved and other factors. Unless individuals are able to join together in a class action, a company that causes a small amount of harm to many people, as opposed to a large amount of harm to a few people, will escape liability and be allowed to continue its unlawful practices. Class action suits have challenged age discrimination in employment, sweepstakes and telemarketing fraud, unfair lending practices, poor access to affordable medication, and denials of contractually guaranteed pension benefits. Many cases, which resulted in significant relief for those affected, were decided in state courts, based on state law.

Critics of class actions, including large corporations and their trade associations, have argued that plaintiffs' attorneys benefit more than the plaintiffs, and that certain state courts became “magnets” for class actions because they allow such suits to proceed as class actions (by “certifying the class”) and award large amounts to class members. In response Congress enacted the Class Action Fairness Act

(CAFA) in 2005, which greatly expanded federal jurisdiction of class actions. The act, requires that many cases that previously could have been filed in state court be filed in federal court (even when they involve only state law claims) and permits defendants to remove many class action suits that are filed in state court to federal court. Unfortunately CAFA was based on a small, unrepresentative number of “horror stories” involving state courts' handling of nationwide class actions.

It is too soon to evaluate CAFA's full impact, since it has been in effect for a short time and many critical rulings in class actions do not occur until long after the case is filed. Studies do show, however, that since CAFA's enactment, many more class actions have been filed in federal court and many that were filed in state court have ended up in federal court, with potentially adverse consequences. These include the fact that state courts generally are more familiar with and better able than federal courts to evaluate and apply state laws, and there are many more state court judges, creating potential backlogs in the federal courts and delayed resolution of cases. In addition, federal courts historically have been less willing to certify class actions and when denied certification, many victims of corporate wrongdoing who cannot bring an individual lawsuit will be unable to obtain relief and the harmful conduct will continue unchecked.

Federal preemption of state law—Under the US Constitution's Supremacy Clause, federal laws are the supreme law of the land. Thus, state laws that conflict in particular ways with valid acts of Congress or congressionally authorized federal agency regulations are preempted, and courts must follow the federal, rather than state, law. Preemption invalidates state laws in three circumstances. Some federal statutes contain explicit language indicating congressional intent to preempt state laws. Other federal schemes make it clear that Congress intended to regulate a particular field exclusively, leaving no room for state regulation. And last, there is implied preemption. This occurs when an individual cannot comply with both a state and federal law at the same time, or when the state law stands in the way of accomplishing the federal government's purpose. The intent of Congress to preempt state law is a determinative factor in any preemption analysis; intent is determined by looking at the language, structure, and purpose of the federal statute.

Historically, federal preemption was used to protect individual rights. By outlawing discriminatory practices that were allowed in some states, for example, the federal government preempted state laws and strengthened civil rights. More recently,

however, federal preemption has been used in the opposite manner, to undermine state laws that are more protective than federal legislation of individuals' health, safety, and welfare. Corporate defendants in product liability cases are successfully using federal preemption to escape state laws that establish higher consumer safety standards and provide for compensation of victims.

Pharmaceutical and medical device manufacturers are avoiding liability for faulty products or labeling because the Food and Drug Administration's approval has been found to preempt state regulation. Similarly, many lenders have associated with national banks in order to avoid coverage of state usury laws, which are preempted by the National Bank Act. Cigarette manufacturers, automobile manufacturers, and countless other corporate entities have benefited from federal preemption of state law claims in recent years. The preemption debate is affecting almost all areas of the US economy, including telecommunications, securities regulation, prescription drug marketing, consumer credit, employee retirement benefits, pesticides, and energy regulation.

Advocates for increased federal preemption argue that inconsistency in state laws allows states to regulate activities outside their jurisdictions and forces industries to comply with varying laws in different states or meet the strictest, and often most expensive, state regulations. They argue that there is a federal interest in protecting carefully designed regulatory compromises that occur at the national level.

However, excessive federal preemption thwarts the traditional role of state governments in protecting constituents from corporate misconduct and other issues that the federal government is unable or unwilling to address. In a recent case, *Cuomo v. Clearing House Association*, the Supreme Court seemed to signal limits on recent expansive interpretations of federal preemption, finding that while the National Bank Act (NBA) generally preempts "administrative oversight" of national banks by states, "judicial enforcement actions" are consistent with the NBA and the Court's prior decisions. The decision upholds states' authority to protect their citizens by enforcing valid, nonpreempted state laws against national banks.

INDIVIDUAL ENFORCEMENT OF LEGAL RIGHTS: Policy		
Access to the legal system	FEDERAL STATE LOCAL	The civil justice system should encourage fair and noncoercive settlements, improve access for people with small claims, and generally streamline the judicial process, making it less costly and more effective for all parties. The courts, not legislatures, should decide whether lawsuits are frivolous and should dispose of cases that lack merit before either party incurs significant expense. States and localities should make their justice systems more accessible, less expensive, and easier to use for people seeking enforcement of their rights.
Damages in civil proceedings	FEDERAL STATE	Congress and state legislatures should not limit the amount of punitive damages or joint and several liability or create unreasonable limits on damage awards for pain and suffering. They should ensure that judicial proceedings are fair, both in the administration of justice and the calculation of damages in civil proceedings.
Removing age bias from legal decisions	FEDERAL STATE	Courts and juries should determine damage awards free from all forms of age bias, including devaluation of the quality of an older person's life or the value of his or her nonremunerative activities.
Class action lawsuits	FEDERAL STATE	Congress and state legislatures should not restrict the rights of individuals to bring class action suits. Legislative and regulatory strategies that would limit access to the full range of remedies now available under various laws and delay the time for resolving class action suits should be opposed. Congress should either repeal the Class Action Fairness Act or amend it significantly to restore the rights of individuals to seek full relief in state courts under state laws.

Private rights of action	FEDERAL STATE	Congress and state legislatures should explicitly provide a private right of action in all legislation intended to protect individual rights.
Uniform Marital Property Act	STATE	States should adopt legislation, such as the Uniform Marital Property Act, that treats all property (except gifts and inheritance) acquired during marriage as the joint property of both spouses, regardless of who holds title to it.
Federal preemption of state law	FEDERAL	Federal laws enacted to protect individual rights should be the floor, not the ceiling, so as not to preempt state laws that provide more protections or remedies.

ALTERNATIVE DISPUTE RESOLUTION

Federal and state laws provide important protections for individuals in a wide range of activities, including seeking and maintaining employment, purchasing products and services, and obtaining health care, either in the community or in institutional settings. Access to the court system is critical for individuals to seek redress when their rights under these laws have been violated and to stop harmful practices. Alternative dispute resolution (ADR) mechanisms provide ways of resolving conflicts outside the court system. Individuals should be aware that contracts increasingly require the use of various forms of ADR to resolve conflicts in all areas; they should know what their contracts provide and be certain that these mechanisms allow them to enforce their rights and be treated fairly.

The two major forms of ADR are mediation and arbitration, which differ widely in the way they are implemented and the rights and protections they provide. Whether litigation in court or ADR is appropriate in a particular situation depends on many factors, including the issues involved, the relief sought, whether the parties will need to maintain an ongoing relationship, and the need to establish legal precedent. These considerations also are relevant in deciding what form of ADR, if any, is appropriate.

Mediation—Mediation involves a trained, neutral third party who helps the disputing parties reach their own decisions. Mediation is less formal and less costly than a lawsuit. Typically the parties choose mediation after a dispute has arisen. It allows them more active participation and control over the outcome and helps them preserve their relationship.

Arbitration—In arbitration a third party or panel makes a decision for the parties. There is wide variation in how much evidence an arbitrator reviews and whether the parties are allowed to appear at a

hearing. The process is more formal and more expensive than mediation, but not always less costly and faster than litigation, as its proponents proclaim. In fact individuals often have to pay much more to pursue arbitration than they would to bring a court case (typically an individual has to pay only a filing fee to bring a court case, while arbitration involves a filing fee, a room fee, and the arbitrator's fee, which is often several hundred dollars an hour).

Binding mandatory arbitration—During the last 20 years or so, many industries began including binding mandatory arbitration (BMA) clauses in their contracts, requiring individuals to submit all future disputes to arbitration as a condition of doing business. BMA clauses appear in contracts involving, among other activities, purchasing or leasing goods and services, obtaining and retaining employment and related benefits, and securing health care (including insurance coverage and admission to nursing homes and other facilities). BMA provisions often are written in small print that is buried in multipage legal documents, and individuals do not know they have forfeited their right to go to court until after a dispute arises, they file a lawsuit in court, and the company tries to force them into arbitration. Even when they are aware that the contract includes a BMA clause, consumers rarely understand what it means and the important rights they will lose. In addition few, if any, people seeking nursing home admission, applying for a job, shopping for a cell phone, etc., anticipate that they will need to sue the company at some point in the future. Yet BMA clauses are imposed as a condition of doing business, before a dispute has arisen, when it is impossible for people to evaluate the facts and circumstances, and potential advantages and disadvantages, of pursuing litigation, in-court arbitration, or other forms of dispute resolution.

The arbitration process itself has many disadvantages for individuals, including:

- high up-front costs, typically much higher than lawsuit-filing expenses, that may not be recovered by a consumer who wins in arbitration, as they usually are in litigation;
- limited access to documents and other information;
- limited knowledge on which to base the choice of an arbitrator;
- the absence of a requirement that arbitrators follow the law or issue written decisions; and
- the extremely limited grounds for appealing an arbitrator’s decision (even mistakes of law are not appealable).

Arbitration laws—The primary law governing arbitration is the 1925 Federal Arbitration Act (FAA), which was designed to reverse courts’ unwillingness to enforce arbitration agreements. The act was intended to govern transactions between commercial parties that had comparable sophistication and bargaining power. Despite this the US Supreme Court has issued a considerable number of decisions on the act’s scope and applicability that have severely limited the grounds for challenging arbitration

requirements even in contracts between parties with great disparities in bargaining power. These rulings have invalidated state laws that either prohibited the use of arbitration in certain types of contracts or mandated particular disclosures or other requirements (large print, separate signatures, etc.). The Supreme Court has stated, however, that BMA clauses may be challenged on the same grounds as any other contract, such as fraud, duress, and unconscionability. The availability of these legal challenges is important, since contracts are a matter of consent, and individuals can challenge the enforceability of contract terms that are misleading or particularly unfair or one-sided. In a BMA clause this may arise when arbitration costs are onerous and will prevent the individual from pursuing arbitration, when the clause limits remedies available under the statute the individual is seeking to enforce, or when the clause bans class actions. These factors underscore the need to ensure the fairness of both the contract-formation process and the arbitration process (see also Chapter 5, Employment, regarding age discrimination in employment; Chapter 7, Health, regarding quality care and medical malpractice; and Chapter 10, Utilities: Telecommunications, Energy and Other Services, regarding financial services).

ALTERNATIVE DISPUTE RESOLUTION: Policy		
Ensuring fairness in alternative dispute resolution (ADR)	FEDERAL STATE	<p>Voluntary nonbinding forms of alternative dispute resolution (ADR), such as mediation, should be available to resolve a range of disputes, including those regarding employment, health care, and purchases of goods and services. However, acquiescence to binding mandatory arbitration (BMA) should not be imposed as a condition of obtaining or retaining employment, health care, goods and services and the like. Thus, AARP supports statutory and other appropriate remedies to prohibit predispute BMA.</p> <p>Moreover, when an employee or consumer is asked to use a form of ADR after a dispute has arisen, certain mechanisms must be available to help ensure the fairness of the process. At a minimum they should include the following:</p> <ul style="list-style-type: none"> • Parties must receive reasonable notice of the ADR process, an explanation of its rules and consequences, and an opportunity to consent to any ADR procedures. • Arbitrators and mediators must be neutral, well qualified, trained in ADR skills, and knowledgeable about the laws involved in the dispute. • ADR access should not be denied on the basis of ability to pay. • Mediators and arbitrators must not be affiliated with either party involved in the dispute. • Parties must have the right to counsel during the proceedings.

<p>Ensuring fairness in alternative dispute resolution (ADR) (cont'd.)</p>	<p>FEDERAL STATE</p>	<ul style="list-style-type: none"> • Mediation procedures should ensure confidentiality of both parties. • Participants must be allowed to engage in reasonable discovery with an arbitrator authorized to subpoena documents and witnesses. • Evidentiary protections, including the right to cross-examine witnesses, must be guaranteed to both parties. • Documentary evidence and a statement of arguments to be used at the hearing must be given to both parties and to decisionmakers before the proceeding. • Arbitration decisions must be in writing, include findings of fact and the basis for the decision, and be fully accessible to the public, except where a compelling need exists to maintain privacy. • Court review of arbitration decisions must be available to either party. • Consumers and employees should have the right to act individually or seek class certification and class-wide relief. • Consumers and employees should be able to recover the full range of remedies, legal and equitable, afforded by the statute or common law under which the claims arise. • The forum should be convenient, i.e., located in the consumer's or employee's home state. • The consumer or employee should have to pay only reasonable costs, which should be no greater than those that would be incurred to bring a court action. • The parties should be entitled to all state and federal constitutional rights, except those they have knowingly, voluntarily, and intelligently waived.
--	----------------------	--

LEGAL SERVICES

Because of their unique health, income, and social needs, and because they often depend on services provided by government agencies with complex requirements, older people must have access to competent legal assistance. Elder law has emerged as a recognizable specialization within the legal profession, with appropriate certification and professional organizations such as the National Academy of Elder Law Attorneys. Recognizing the need for legal representation tailored to the specific situations of older people, the Older Americans Act (OAA) provides funding for such services. However, the OAA now permits states to meet the service needs through pro bono or reduced fee services rather than use appropriated funds; the original statutory floor for funding legal assistance to the elderly no longer exists and states are encouraged to maintain service levels through sources other than OAA funding. In addition to OAA legal services, low-income older people are eligible for help from

Legal Services Corporation (LSC) grantees; in 2008, 12.9 percent of LSC clients were age 60 and older.

Funding for the LSC and legal services under the OAA is far short of the amount needed to meet the minimum access goal. In 2009, LSC programs served only half of those seeking legal assistance, and programs often must settle for providing applicants with less than full legal representation. The legal service needs of the institutionalized poor in nursing homes, mental hospitals, and licensed board and care facilities are not included in the calculations for LSC funding. In recent years there have been repeated efforts to eliminate legal services provided through the LSC. While such efforts have failed, tactics to limit the LSC's effectiveness have taken a toll.

Eliminating LSC services would have serious implications for low-income older people. Legal services under the OAA (Title III-B), which would be the primary remaining source of legal assistance

for older people, would be insufficient, and the present funding level is inadequate to meet current needs. Moreover the OAA program does not require recipients to meet an income standard and does not give priority to such critical programs as housing and public benefits. Finally OAA legal assistance funds are generally subject to state discretion, despite the recognition that legal assistance receives as a priority service under federal law.

Another emerging strategy for delivering crucial legal services to vulnerable older people is medical-legal partnership (MLP). MLP is an innovative healthcare

delivery model that integrates legal assistance as a vital component of patient care. MLPs serve our nation's most vulnerable individuals and families by providing legal remedies to social problems that adversely affect health outcomes. MLPs are community-based, locally administered programs that operate according to a set of nationally established best practices and values.

Drawing from a broad range of community stakeholders, MLPs link healthcare institutions (including Federally Qualified Health Centers, hospitals and medical schools) and legal institutions (including legal aid, law schools and private law firms).

LEGAL SERVICES: Policy		
Legal Services Corporation	FEDERAL	<p>Legal services programs should remain strong and fully funded. At a minimum Congress should restore funding for legal services programs provided through the Legal Services Corporation (LSC) and the Older Americans Act (OAA) to 1981 inflation-adjusted levels without additional restrictions.</p> <p>Congress and the LSC should improve and strengthen LSC services by:</p> <ul style="list-style-type: none"> • increasing funding to LSC programs; • establishing a national clearinghouse for legal services; • developing and maintaining state and national support and training centers; • ensuring that there are no LSC restrictions on receiving attorney's fees, and removing restrictions on lobbying for indigent clients' rights and bringing class action suits, and on the types of low-income clients who can receive assistance, the types of issues LSC lawyers can address, and the use of private funds for providing legal assistance; • ensuring a fair, competitive bidding process for grants; • improving grant oversight of LSC grantees; and • providing funding targeted to institutionalized poor people and those in board and care homes who can be served only through specially designed outreach programs.
Legal services for older people	FEDERAL STATE	<p>Congress should strengthen assurances that legal assistance to older people under the OAA can deliver levels of service consistent with the growth of the older population, serves those most in need, and gives priority to securing rights to critical services such as quality health care and treatment, housing, and public benefits.</p> <p>Federal policymakers should help expand the use of qualified nonlawyer advocates and encourage all attorneys in private practice to serve low-income people through reduced-fee lawyer referrals, pro bono service, and education and training programs.</p> <p>Legal services programs should not be prohibited from bringing class action suits or otherwise be restricted from providing the scope and types of representation available to clients of privately paid attorneys.</p>

<p>Legal services for older people (cont'd.)</p>	<p>FEDERAL STATE</p>	<p>Congress and the Executive Branch should institute policies to encourage the implementation of medical-legal partnerships and to promote, through technical assistance, best practices in linking health and legal services within the healthcare setting.</p> <p>States should:</p> <ul style="list-style-type: none"> • establish legal services programs to assist the low- and moderate-income elderly at reasonable cost and require such programs to use trained older people to the extent possible in providing legal services; • support reforms to legal practices that would reduce clients' costs, such as authorizing legal assistants and paralegals to provide simple legal services at reduced fees; • encourage law firms to develop active pro bono practices; • encourage and support the development of alternative mechanisms for funding legal services programs for low-income people; and • support unrestricted use of Interest on Lawyers' Trust Accounts funds for legal services programs. <p>States should support legislation that would require area agencies on aging (AAAs) to allot sufficient Title III-B funding for each legislative priority, including legal services, and ensure that all AAAs comply with the national priorities set out in the OAA.</p>
<p>Outreach to vulnerable groups</p>	<p>FEDERAL</p>	<p>Special outreach efforts on legal issues should target vulnerable people in institutions, those who cannot leave their homes, and those who are otherwise isolated, especially minorities.</p>

CRIMINAL JUSTICE

The aging of America's population, particularly the growth in the number of people over 75, presents unique challenges for the criminal justice system. Among these are detecting and prosecuting crimes resulting from abuse and neglect, deterring an ever-changing variety of frauds and scams aimed at vulnerable older people, and fostering partnerships with an array of public, private, and nonprofit agencies and organizations designed to make communities safer for older people living in all types of settings.

Abuse and neglect—The secrecy, personal embarrassment, and fear that often surround abuse and neglect have significant implications for the detection and successful prosecution of such cases. Older victims must be removed from an offender's reach, and specialized techniques are often required when victims are unable to testify on their own behalf due to cognitive impairment or poor physical health. Not too long ago it was difficult, if not impossible, to get an abuse case investigated and prosecuted. Fortunately that situation has changed, but there is still a great need to train

police officers and prosecutors to facilitate successful prosecutions and encourage further development of case law. There are also many gaps in the network of services for abused and vulnerable adults. These include a lack of emergency temporary housing and in-home care for abuse victims; responsible guardians; coordination among federal, state, and local agencies; and reliable national and state data (see also this chapter's section Elder Abuse).

Fraud—Although violent crime receives the most attention, fraud is an increasingly serious crime, and older people are often its target (see also Chapter 11, Financial Services and Consumer Products). For example the National Consumer League's National Fraud Information Center reports that half of all complaints of telemarketing fraud made in 2003 were by victims age 50 and older. In 2010 a survey by the Investor Protection Trust found that 20 percent of Americans age 65 and older "have been taken advantage of financially in terms of an inappropriate investment, unreasonably high fees for financial services, or outright fraud."

In addition a recent analysis by the Federal Trade Commission of consumer complaints from its Consumer Sentinel Database shows that Internet-related complaints accounted for a significant share of complaints from consumers age 50 and older. Some 41 percent of all reported fraud complaints (excluding identity theft) from consumers age 50 and over were Internet-related in 2004, with monetary losses of more than \$43 million. The Federal Bureau of Investigation also reports that the proportion of individuals losing at least \$5,000 to Internet fraud is higher for victims 60 and older than it is for any

other age category. This age group also reported higher average losses for this type of fraud than did any other age group.

Violent crime—The Violent Crime Control and Law Enforcement Act of 1994 allows local governments to use funds from crime prevention block grants for a variety of programs, including efforts based on the “triad” model, which addresses not only street crime but fraud (including telemarketing fraud) and abuse, particularly against older people living in isolation.

CRIMINAL JUSTICE: Policy		
Preventing abuse and neglect	FEDERAL	<p>The federal government should provide greater assistance to states and local agencies for crime prevention and deterrence activities, including programs designed to detect and prosecute crimes resulting from abuse and neglect, and to deter fraud.</p> <p>The federal government should provide assistance to crime victims, including in-home care and emergency housing as needed, for abuse victims.</p>
Preventing violent crime	FEDERAL STATE	<p>The federal government should foster and fund partnerships designed to make communities safer for residents living in a variety of settings, particularly those who live alone or are isolated.</p> <p>The federal government should assist states and local agencies in improving data collection and coordination, increasing older people’s participation in crime prevention programs, and educating law enforcement officials about the special needs of older people—especially minorities and people with disabilities—for protection and support after victimization.</p> <p>Congress should eliminate gaps in and strengthen enforcement of the Brady Handgun Violence Prevention Act and other federal gun laws.</p> <p>States should enact legislation to eliminate gaps in and strengthen enforcement of federal and state gun laws, particularly with regard to possession by juveniles, convicted domestic abusers, and those under domestic violence restraining orders.</p> <p>States should improve training opportunities for law enforcement personnel and adult protective services providers, particularly on dealing with older victims, techniques to assist victims who are cognitively impaired or in poor physical health, and the prevention of crimes most frequently committed against this segment of the population.</p>
Assisting crime victims	STATE	<p>States should establish and improve victim information systems.</p> <p>States should require consideration of victim-impact statements (oral or written) at critical proceedings such as hearings on bail, charging, sentencing, and parole. These statements should be consistent with guidance under the 1982 Federal Victim and Witness Protection Act and contain information concerning any harm to the victim (financial, social, psychological, and physical), as well as information concerning restitution needs.</p>

Assisting crime victims (cont'd.)	STATE	<p>States should review criminal codes and procedures for court scheduling, sentencing, and parole to ensure appropriate opportunities for victim participation and consideration of the consequences of violent crimes against vulnerable victims and of their special needs.</p> <p>States should sufficiently fund state victim compensation programs, provide expedited compensation in emergencies, and consider the victim's age and physical health in deciding on such payments.</p> <p>States should develop assistance programs for victims of serious crime. Programs to serve victims may be implemented by bills of rights, laws, or constitutional amendments that require certain minimum services and rights for all victims of serious crime.</p> <p>Services to crime victims should include:</p> <ul style="list-style-type: none"> • counseling referrals and related services to help victims cope with the tragedy of the crime; • information about how the criminal justice system works, including the roles, rights, and obligations of victims, witnesses, and defense and trial counsels; • court accompaniment and support during trials for those severely traumatized by the crime; • transportation to court and other proceedings for older and disabled victims and witnesses, as required by their particular circumstances; • training of hospital staff in collecting and preserving crime evidence and the special needs of vulnerable victims; • intercession with employers and creditors, if required; • information on major case developments and decisions at all critical proceedings, as well as information on the offender's status from arrest through release (including the minimum time that those convicted must serve if sentenced to incarceration); • advance notice of court appearance dates, scheduling changes and continuances; • protections for victims who are threatened or subjected to intimidation; and • expeditious return of property when no longer needed as evidence.
Fraud prevention	FEDERAL	The federal government should provide greater assistance to states and local agencies for crime prevention and deterrence activities, including programs designed to detect and prosecute crimes to deter fraud.

LEGAL RIGHTS OF GRANDPARENTS

An area of civil justice of particular concern to older people is the legal authority they have as grandparents. An increasing number of children are living with their grandparents or other relatives. According to the 2000 census, the number of children residing in grandparent-headed households was about 4.5 million. Another 1.5 million children

are living with other relatives. More than 2.4 million grandparents report that they are responsible for most of the basic needs of grandchildren living with them. Nineteen percent of these grandparents live in poverty. About one-third of these families have no parent present in the home. These relatives are key providers of care and can be a stabilizing force for

children whose parents have divorced, become incapacitated, or died (see Chapter 6, Low-Income Assistance, regarding programs for children in the care of grandparents and other relatives).

Many such caregivers, grandparents and other relatives, have partial or total responsibility for children but none of the legal authority necessary to provide care. For example caregiver relatives do not always have the authority to enroll a child in school even if the child resides with the relative full-time. Only about half of the states have laws giving relative caregivers authority to obtain medical treatment for the children in their care; about a fifth of the states provide statutory authority for educational consent. Caregiver relatives with long experience providing full-time care also frequently find themselves left out

of consideration when decisions are made about permanent child placement. In some states grandparents and other relatives may have limited standing to petition a court for visitation, even though it may be in the child’s best interest to have a continuing relationship with these relatives.

State statutes can specify limited circumstances in which a grandparent or other relative may file a petition for visitation, such as divorce, custody proceedings, or a parent’s incarceration or death. The constitutionality of visitation statutes has been challenged in numerous state courts. The US Supreme Court has ruled that very broad visitation laws are unconstitutional but left open whether more narrowly drawn statutes might meet constitutional requirements.

LEGAL RIGHTS OF GRANDPARENTS: Policy		
Legal rights of grandparents	STATE	<p>States should adopt legislation that:</p> <ul style="list-style-type: none"> • provides a range of alternatives by which grandparents and other relatives may obtain and exercise the legal authority to make decisions for the children in their care; and • allows grandparents to petition courts for visitation with grandchildren in cases of divorce, separation of parents, parental incapacity, long-term incarceration, or the death of one or both parents, particularly where the two generations have formed deep bonds critical to the children’s well-being.