No resolution presented herein represents the policy of the association until it shall have been approved by the House of Delegates. Informational reports, comments and supporting data are not approved by the House in its voting and represent only the views of the Section or Committee submitting them.

**AMERICAN BAR ASSOCIATION**

**COMMISSION ON LAW AND AGING**

**SENIOR LAWYERS DIVISION**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

RESOLVED, That the American Bar Association urges Congress and the Administration to reauthorize and implement the Older Americans Act of 1965, as amended ("the Act"), giving increased priority to the delivery of legal services and elder justice.

FURTHER RESOLVED, That the legal services delivery system under the Older Americans Act be structured to:

1. Achieve the goal of creating a high quality, coordinated legal services delivery system in each state that prioritizes advocacy for individuals with the greatest social and economic need as well as those at risk of institutional placement.

2. Fund legal services under the Act directly through a state entity designated by the Administration on Aging, rather than through Area Agencies on Aging.

3. Ensure that the state entity is qualified to plan and support a high quality, coordinated, legal services delivery system and has the capacity to allocate, monitor, and evaluate the use of funds.

4. Ensure adequate funding for legal services in each state, but in an amount not less than the state’s Area Agencies on Aging had spent in the aggregate.

5. Fund national support centers composed of national organizations with expertise in law and aging to provide substantive expertise, materials development and dissemination, technical support, capacity building and training.

6. Utilize a national legal advisory committee including representatives of legal support centers to assist the Administration on Aging in the development of standards and procedures for both state entities that distribute or utilize funds and legal services providers who seek to be recipients of funding.

7. Utilize uniform standards and procedures that build upon the ABA Standards for the Provision of Civil Legal Aid.

8. Refrain from imposing Legal Services Corporation Act advocacy restrictions on providers that are not LSC funded.

9. Strengthen State Legal Assistance Developers by ensuring that they have the qualifications, authority and resources to exercise leadership in developing and supporting a high quality, coordinated legal services delivery system.
REPORT

This Recommendation urges Congress to move forward with reauthorization of the Older Americans Act of 1965 as amended in 2006. Reauthorization is required in 2011. This Recommendation reaffirms the ABA’s 1981 policy that supported reauthorization with a priority placed on the delivery of legal services to the needy elderly. In addition, the recommendation adds to that earlier policy by specifying nine characteristics that the system for delivering legal services under the Act should possess.

I. Background: Brief History of the Older Americans Act


Legal Services under the Older Americans Act

Elders today increasingly need legal assistance to navigate the gauntlet of complex rules to qualify for essential programs and benefits necessary to maintain a healthy independent life in the community or to maintain their rights in an institutional setting.

Legal assistance and related elder rights advocacy under the Act gives voice and power to elders who face hurdles in securing basic services. Legal services are access services. They ensure, to the full extent legally entitled, the individual’s access to essential public benefits such as Social Security, Medicare, and Medicaid; to housing security; to autonomy and protection under the law in the face of diminished capacity, abuse, or consumer fraud; and to essential services such as transportation, in-home care, nutrition and other key community-based and institutional supports. Legal services under the Act are targeted to individuals with the greatest economic or social needs. Without a strong, independent, high-quality legal assistance component, it is those with the greatest needs who are placed in the greatest jeopardy.

The legal assistance and elder rights advocacy components of the Older Americans Act form what may be thought of as a three-layer protective shield. Each layer builds upon the others and all three layers, woven together, offer the strongest and most effective elder rights protection and advocacy system.

The first layer is made up of the direct providers in the field – providers of Title III-B legal assistance, as well as legal “helplines” and pension counseling, plus long-term care ombudsman programs whose job it is safeguard the rights and advocate for the needs of elders in community-based and residential settings. Funding for legal services comes from Title III-B of the Act, which flows through the State Unit on Aging to the Area Agencies on Aging, of which there are approximately 660 nationwide. The decisions to fund and how much to fund legal services are made at the local Area Agency on Aging level.
The second layer is the state’s legal assistance developer, mandated in Title III and Title VII. A highly qualified, full-time legal services developer is important to the functioning and improvement of a statewide, efficient, well-trained, well-supported network. The legal assistance developer is expected to provide the coordination and resources to galvanize the Title VII mandate that the State Unit on Aging take the lead in protecting elder rights. Without an effective Developer, legal assistance can stray into a scattershot array of providers lacking consistency and strength.

Finally, behind the legal assistance developer and the State Unit on Aging are the national support services and other resource centers mandated under the Act. Title IV provides currently funds for five national legal assistance support projects that are currently partnering in the National Legal Resource Center (the ABA Commission on Law and Aging, the National Senior Citizens Law Center, the National Consumer Law Center, the Center for Elder Rights Advocacy, and The Center for Social Gerontology). The NLRC provides much needed substantive expertise, technical assistance and training to advocates at all levels. The National Center on Elder Abuse, the Long-Term Care Ombudsman Resource Center, and the National Pension Assistance Resource Center) all funded under Title II, also provide substantive expertise, technical assistance and training on elder rights to lawyers, prosecutors, judges and court staff, other advocates including ombudsmen, adult protective services staff, law enforcement officers, researchers, and others.

II. Shortcomings of the Current Legal Assistance and Elder Rights Framework

The ABA Commission on Law and Aging has served as a national legal assistance support program with Older Americans Act funding for nearly 30 years. Based on that experience, the Commission has been able to observe the strengths and weaknesses of the system in great detail. While approximately 1000 legal assistance providers and other elder rights advocates throughout the country have steadfastly labored to protect the rights of elders, there are both funding and structural limitations in the system that deserve attention and creative thinking to overcome:

1. The locus of funding decisions for legal assistance are made at the local area agency on aging (AAA) level with the result that legal assistance funding is extremely variable and fragmented, both within states and from state to state. Legal assistance funded at the local level ranges from the funding of full-time attorneys working in public interest law offices to part-time paralegals to the funding of an occasional community education program, to virtually no funding whatsoever. Statewide coordination and strategic planning are generally lacking.

2. The funding for legal assistance flows through Title IIIB and competes for funding with the full panoply of elder service needs. Having legal services in Title III-B with other supportive services means it will often lose when AAAs have to choose between cuts in legal services versus cuts in concrete nutrition and social services provided to elders. The impact of legal assistance is typically less immediately visible to AAAs, although it often has profound lasting effects benefiting elder clients, often giving greater “bang for the buck” of funds allotted.
3. AAAs vary tremendously in the nature and extent of data they collect on the value of legal services they fund. There is no consistent, meaningful, national data collection about the nature, type, and most importantly, outcomes of cases handled by III-B legal services providers.

4. In funding legal assistance, AAAs often have an inherent conflict of interest arising from their direct provision or funding of services in which access issues may arise. Legal assistance providers may have to advocate on behalf of clients against a position taken by a provider or the AAA or a government entity. Zealous advocacy for elders is chilled when one’s funding may be at stake.

5. Aging network/AAAs are often limited in their ability to evaluate quality legal work or select providers who are both particularly appropriate and skilled and connected to legal and advocacy networks capable of examining patterns of legal problems statewide. Systemic legal advocacy is often much more cost effective, yet the current system tends to subordinate it to one-on-one legal problem solving.

6. The Administration on Aging has funded some important and exciting efforts to bridge fragmentation, such as Model Approaches to Statewide Legal Assistance Systems” under its discretionary grant program. This program is intended to help states develop and implement cost-effective, replicable approaches creating comprehensive, statewide, quality legal services and maximum impact from legal resources. It also seeks to develop service delivery and to integrate senior legal “helplines” into the broader array of state legal service delivery networks. Twenty-four states have received funding since 2006. Unfortunately, these programs are time-limited grants, and in the end, do not change the underlying structural barriers to creating a comprehensive and integrated legal service delivery system.

7. At the state level, the role of the legal assistance developer has been underutilized, underfunded, and unempowered in many states. Sec. 731 sets out the functions of the developer, including leadership and coordination in the provision of legal assistance; technical assistance and training to AAAs, legal assistance providers, ombudsmen and others; ensuring the state’s capacity to aid older individuals in understanding and exercising their rights; and more. The role is demanding and requires a great deal of skill and knowledge of legal services and institutions of law. Yet currently, many state developers have little or no legal training, have little authority to initiate advocacy initiatives, and cannot devote full time to these critical tasks, as they have many other unrelated duties as part of their job. Unlike the ombudsman program, the developer program has no dedicated funding under appropriations for the Act.

8. At the state level, the Act’s Title VII elder justice provisions are sometimes implemented without adequate collaboration with legal assistance developers and legal assistance providers. Their lack of involvement weakens efforts to develop, strengthen, and carry out the array of programs for prevention of elder abuse, neglect, and exploitation that are authorized in Sections 721(b) and 752 of the Act.
9. At the national level, the Administration on Aging has made significant strides in enabling coordination among the partner organizations that make up the National Legal Resource Center under Title IV. Yet, there is relatively little structural or operational integration across other national support components that exist in Title II (legal assistance/development, long-term care ombudsman support, Title II (ombudsman national support, elder abuse national support, and pension assistance national support), and Title VII (legal assistance development and vulnerable elder rights protection activities) and elsewhere (e.g. senior health insurance counseling and assistance programs under CMS).

III. Content of the Recommendation

This recommendation urges Congress to reauthorize the Older Americans Act with priority on the delivery of legal services and elder justice in conformance with nine principles or characteristics intended to improve the structure of legal services delivery under the Act. These principles should be incorporated into the act and also guide implementation of the Act.

**Principle 1:** The goal is to “Achieve the goal of creating a high quality, coordinated legal services delivery system in each state that prioritizes advocacy for individuals with the greatest social and economic need and those at risk of institutional placement.”

The Act currently includes as a priority service the provision of legal assistance to those with the greatest social and economic need. The current system of delivering legal assistance under the Act involves over 1,000 separate provider contracts with no system in place to assure quality or coordination of legal assistance. This Recommendation would urge the creation of systems and programs to provide a system of coordinated legal assistance delivery designed to provide high quality legal assistance to elders at the greatest risk.

**Principle 2:** Congress should “Fund legal services under the Act directly through a state entity designated by the Administration on Aging, rather than through Area Agencies on Aging.”

The existing system delegates funding decisions to the local level, generally through a local or regional Area Agency on Aging. This results in over 1,000 separate provider agreements. Many legal aid programs have multiple contracts with different local agencies within their service area. Legal aid program directors report having to separately negotiate agreements at the local level with each Area Agency on Aging. The agreements lack uniform standards, contracts, reporting or accounting standards. This results in undue administrative and reporting burden for the legal services providers. The aim of this Recommendation is to urge moving the funding decision to the state level. This would allow for uniform standards for selection of the best qualified provider, uniform service agreements, reporting and accounting standards to be applied.
**Principle 3:** Congress and the Administration should “Ensure that the state entity is qualified to plan and support a high quality, coordinated, legal services delivery system and has the capacity to allocate, monitor, and evaluate the use of funds.”

The recommendation does not specify which state entity should be the conduit for funding and developing legal services. It could be the state unit on aging, or another entity with knowledge and experience in funding and overseeing legal services delivery. The key variable is that the entity have the qualifications and resources to accomplish the task in a high quality manner.

**Principle 4:** Congress and the Administration should “Ensure adequate funding for legal services in each state, but in an amount not less than the state’s Area Agencies on Aging had spent in the aggregate.”

Since this recommendation seeks to move contracting and funding authority for legal services from the local Area Agency on Aging level to the state level, there is a danger of a net loss in funding if there is no maintenance of effort requirement imposed. The State Units on Aging know the aggregate amount that Area Agencies on Aging within the State spend each year. Therefore, this maintenance of effort principle requires the State to spend at least as much as had been spent in the aggregate by the Agencies on Aging. This will provide a more effective and efficient use of resources, since the state entity is in a position to develop a comprehensive and coordinated plan statewide, rather than relying on piecemeal and fragmented local funding decisions.

**Principle 5:** Congress and the Administration should “Fund national support centers composed of national organizations with expertise in law and aging to provide substantive expertise, materials development and dissemination, technical support, capacity building and training.”

The Act has provided for and funded national support programs to provide substantive expertise, materials development and dissemination, technical support and training for many years. This function is currently provided by an innovative partnership of national centers of expertise, including the ABA Commission on Law and Aging, in a collaboration known as the National Legal Resource Center. National support, as describe earlier, is the essential third layer of the system and should remain a vital part of it.

**Principle 6:** Congress and the Administration should ensure that the system “Utilize a national legal advisory committee including representatives of legal support centers to assist the Administration on Aging in the development of standards and procedures for both state entities that distribute or utilize funds and legal services providers who seek to be recipients of funding.”

Although legal services have been mandated under the Older Americans Act since 1973, the Administration on Aging has never set standards or procedures for the system of delivery. One reason is the absence of in-house expertise in legal services delivery.
This principle, if implemented, would help fill that void by utilizing a national legal advisory committee in developing appropriate standards.

**Principle 7:** Congress and the Administration should “Utilize uniform standards and procedures that build upon the ABA Standards for the Provision of Civil Legal Aid.”

In establishing standards for the delivery of high quality legal services the Administration is urged to use the ABA Standard for the Provision of Civil Legal Aid as a benchmark. These standards are designed to assure that the quality and ethical standards for Civil Legal aid programs conform to the highest standards of the profession while taking into account the limited resources of legal aid programming. Presently, the reporting system used by the Administration collects only the funding level and “units of service.” Not every agency on aging defines units of service in the same way. Moreover, no national data is available to evaluate the types of legal issues or level of service provided under the Act. A recent study reveals that about 86% of all providers under the Act are existing civil legal aid providers, the majority of whom collect data using standards developed over many years by Legal Service Corporation. Utilizing these same data collection standards for services under the Act will result in two major improvements. First the majority of providers will be able to use the case management and reporting system that they already use for the majority of their funding to consistently report data on services provided under the Act. Second, the quality of the data will improve dramatically including at a minimum the LSC problem code (legal issue code) and case closing code (level of service) data.

All of this data is to be reported in aggregate numbers protecting the confidentiality of all client information. The improved data collection will reduce the reporting burden for the vast majority of service providers while providing highly improved data on the services funded under the act.

**Principle 8:** Congress and the Administration should “Refrain from imposing Legal Services Corporation Act advocacy restrictions on providers that are not LSC funded.”

The principle addresses advocacy limitations currently imposed on the activities of participating providers under the Act. The restrictions limit the types of cases that can be handled, legislative advocacy, and representation of certain populations. The LSC regulations are incorporated in their entirety by reference in the Act resulting in conflicts between services mandated under the act and LSC limitations. LSC providers who also provide services under the Older Americans Act must abide by those limitations in order to receive LSC funds. But many providers are not funded at all through the Legal Services Corporation. Applying these restrictions on such providers unduly limits the access of elders to the full range of advocacy resources.

**Principle 9:** Congress and the Administration should “Strengthen State Legal Assistance Developers by ensuring that they have the qualifications, authority and resources to exercise leadership in developing and supporting a high quality, coordinated legal services delivery system.”
Pursuant to Title VII of the Act, states must designate a Legal Assistance Developer or Legal Services Developer to coordinate efforts at the state level to develop capacity, coordination, technical assistance, training and resources to attorneys, other advocates and consumers to protect the legal rights of at risk seniors. There are no standards for the qualifications of the legal services developer and no accountability of their work. States that have excellent legal assistance developers report better access to high quality legal assistance developers. But, most states do not even have anyone serving in the position full time or with prior experience in delivering legal services. The position tends to be one of several duties of a mid-level staff person.

IV. Need for ABA Action

The Older Americans Act, originally enacted in 1965, was last reauthorized in 2006 for five years. Thus, the current Act expires September 30, 2011. However, much of the work to shape reauthorization by the Administration will have already been completed during 2010. For example, the Administration on Aging conducted a series of “listening sessions” around the country in early spring of 2010 to solicit input from the public on changes needed in the Act. The ABA has been involved in some of those discussions but unable to make definitive recommendations due to the lack of ABA policy other than a general policy in favor of reauthorization with a priority given to legal services.

V. Related ABA Policy

The American Bar Association has supported authorization of the OAA since 1981, when the House of Delegates adopted the following policy statement:

Be it resolved, that the American Bar Association urges that the Older Americans Act of 1965, as amended, be reauthorized and that it continue to place a high priority on the delivery of legal services to the needy elderly.

While this policy is still effective, it does not provide any guidance in how to achieve the goal of giving a high priority to the delivery of legal services to the needy elderly. Based upon the decades of experience the ABA Commission on Law and Aging has had in providing support to legal services programs under the Act, the current recommendation will build upon existing policy by articulating the goal in greater detail and delineating the principal elements needed to accomplish that goal.

Submitted By:
Jeffery Snell Chair
ABA Commission on Law and Aging
August 2010
1. **Summary of Recommendation(s).**
   The Recommendation urges Congress and the Federal Agencies to reauthorize the Older Americans Act of 1965 with legal assistance as a continuing priority and further recommends the following nine principals:
   - Legal services under the Older Americans Act focus on creating and maintaining a high quality coordinated legal service delivery system with a priority on serving those with the greatest economic and social need, and those at risk of institutional placement
   - Selection of funded providers to be made at the state level
   - In each state a state level entity should be responsible for planning, supporting, coordinating, monitoring and evaluating legal service delivery
   - Adequate funding at a level not less then current local, state and federal funding level
   - Continue support for national support centers
   - Utilize national advisory committee composed of experts in law and aging to make recommendations on standards and practices in legal service delivery under the Act
   - Utilize uniform standards and procedures based on the ABA Standards for the Provision of Legal Service Delivery
   - Not impose Legal Service Corporation advocacy restrictions on providers who are not LSC funded
   - Strengthen State Legal Assistance Developers assuring that they have the ability and resources to be leaders in developing systems for legal service delivery under the Act.

2. **Approval by Submitting Entity.**
The ABA Commission on Law and Aging met on April 23, 2010 and voted unanimously to submit this proposal as edited.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**
   No.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**
   In 1981 the ABA adopted the following policy:
   “Be it resolved, that the American Bar Association urges that the Older Americans Act of 1965, as amended, be reauthorized and that it continue to place a high priority on the delivery of legal services to the needy elderly.”
The proposed Recommendation is consistent with policy and expands on prior policy with additional and more specific recommendations.

5. What urgency exists which requires action at this meeting of the House?
Development of legislative recommendations are underway at the Cabinet level, with current opportunities for input in that process. Final planning at the Cabinet level will take place by the end of August 2010.

6. Status of Legislation. (If applicable.)
No legislation has been introduced at this time. It is expected that legislation reauthorizing the Older Americans Act will be introduced in early 2011.

7. Cost to the Association. (Both direct and indirect costs.)
None

8. Disclosure of Interest. (If applicable.)
The American Bar Association Commission on Law and Aging receives approximately $185,000 per year in Older Americans Act funding for its work on the Administration on Aging - National Legal Resource Center. No Commissioners are funded directly under the Act and no one abstained from voting on the proposal.

9. Referrals.

Standing Committee on the Delivery of Legal Services
Standing Committee on Legal Aid and Indigent Defendants
Standing Committee on Pro Bono and Public Services
Commission on Domestic Violence
Commission on Homelessness and Poverty
Commission on Mental and Physical Disability Law
Center for Human Rights
Government and Public Sector Lawyers Division
Judicial Division
Young Lawyers Division
Section of Administrative Law and Regulatory Practice
Section of Family Law
Division of General Practice, Solo and Small Firm
Section of Individual Rights and Responsibilities
Section of Litigation
Section of Real Property, Probate, and Trust Law
Section of State and Local Government Law
10. **Contact Person.** (Prior to the meeting.)
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11. **Contact Person.** (Who will present the report to the House.)
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EXECUTIVE SUMMARY
Commission on Law and Aging
Senior Lawyers Division
Older Americans Act Reauthorization

1. Summary of the Recommendation

The Recommendation urges Congress and the Administration Agencies to reauthorize the Older Americans Act of 1965 with legal assistance as a continuing priority and further recommends nine principals to be incorporated into the Act:

- Creating and maintaining a high quality coordinated legal service delivery system with a priority on serving those with the greatest economic and social need, and those at risk of institutional placement;
- Making funding decisions at the state rather than local level;
- Ensuring state level capability in planning, supporting, coordinating, monitoring and evaluating legal service delivery;
- Ensure adequate funding for legal assistance based on current funding as a minimum;
- Continuing support for national support centers
- Utilizing a national advisory committee composed of experts in law and aging;
- Building upon the ABA Standards for the Provision of Legal Service Delivery;
- Refraining from imposing Legal Service Corporation advocacy restrictions on non-LSC providers; and
- Strengthening State Legal Assistance Developers to ensure that they have the ability and resources to develop high quality systems for legal service delivery under the Act.

2. Summary of the issue which the Recommendation addresses;

Without reauthorization services essential to the safety and security of many older Americans could be discontinued. This Recommendation reaffirms and expands the ABA’s 1981 policy that supported reauthorization and recommends needed improvements to the Act. The existing system of funding legal assistance under the Act has resulted in inadequate and inconsistent funding. Funding for legal assistance comes out of a pool of money under Title III of the Act that also provides funding for home delivered meals, home care assistance, transportation services and a long list of other human services programs. The decision of how much to spend on legal assistance is currently made by each of the more than 600 individual Area Agencies on Aging (AAA). Some AAAs adequately fund legal assistance while many others spend little or nothing. Because the funding decisions are made at the local level, the Administration on Aging has a limited ability to enforce the mandate that legal assistance as a core priority service under the act that must be adequately funded.

The Act funds a spectrum of national support centers. The support centers provide essential expertise, substantive knowledge, technical assistance and training. The Act also incorporates by reference advocacy restrictions imposed on Legal Service Corporation funded entities. If the decision is made to fund a non-LSC entity, this incorporation by reference has a chilling effect on scope of advocacy that the attorneys can provide.
The Act requires each state to name an individual to act as legal assistance developer (LAD.) The LAD is responsible for assuring the creation of a legal service delivery system that provides high quality legal assistance to seniors. In many states the legal assistance developer lack knowledge and experience in legal service delivery, lack the capacity to effective create a plan for an effective legal service delivery system and funding to carry out the mandate in the Act.

3. An explanation of how the proposed policy position will address the issue;

The proposed Recommendation will:

- Urge reauthorization of the Older Americans Act.
- Move the decision on funding to a single statewide entity with capacity to coordinate, select, monitor and evaluate services.
- Assure continued efforts to address issues of adequate funding for legal assistance.
- Continue support for national support centers.
- Encourage creation of an advisory group consisting of volunteer national experts.
- Establish uniform standards based on existing ABA standards.
- Allow states to select providers who are not subject to LSC limitations on advocacy.
- Empower the state legal assistance developers to improve legal services delivery.

4. A summary of any minority views or opposition which have been identified.

None have been identified.