

# Civil Legal Strategies: Using Demand Letters and Bench Memos in Elder Abuse Cases

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# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the American Bar Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

# Key Lessons

- We will discuss:
  - How to address ageism and perceived diminished capability in the course of representation
  - Which cases can benefit from the use of bench memos and demand letters
  - What to consider when crafting a demand letter

# Ageism and Diminished Capability

# Ageism

- What is ageism?
  - “Ageism refers to the stereotypes (how we think), prejudice (how we feel) and discrimination (how we act) towards others or oneself based on age.” –World Health Organization
- Ageism affects everyone.
  - She’s too young to understand.
  - He’s too old to do that.
- Ageism magnifies other prejudices.

# The Cost of Ageism - Globally

- From the World Health Organization:
  - ½ of the world's population is ageist against older people
  - Leads to earlier death (by 7.5 years)
  - Poorer mental and physical health
  - Slower recovery from ailment in older age
  - In the United States, 1 in every 7 dollars spent on health care for the top 8 most expensive conditions was due to ageism (\$63 billion total)



# The Cost of Ageism - Locally

- Policy and law
  - Discrimination and inequity on the basis of age
  - Improper allocation of resources on the basis of age
- Relationships
  - Failure to bring together people of different generations
  - Devaluing others
- Decision making
  - Exclusion from participation in health care and other decisions
  - Assumption of cognitive decline with age

# Combatting Ageism (1 of 2)

- Use neutral terms
  - Older adults, people over age X
  - Try using “we” instead of “them” – we are all aging after all...
- Highlight diversity
  - Everyone ages, so older people are not all alike.
  - Be specific about the population being described
- Emphasize community
  - Focus on interconnectedness and collective responsibility for one another

# Combatting Ageism (2 of 2)

- Law and policy
  - Address discrimination and inequality on the basis of age
  - Education of government leadership, courts, and other decision makers
- Education
  - Awareness of ageism increases empathy and dispels misconceptions
  - Helps to reduce prejudice
- Relationships
  - Bring people together of various generations

# Diminished Capability

- Definition: the ability to make an informed decision or choice
- While state statutes may make use of the term “diminished capacity” or “incapacitated,” consider trying to use “diminished capability” when talking about our ability to make informed choices.

# Diminished Capability: Terminology

## Capacity

- Implies a maximum level that's fixed and frozen.
- Implies a binary choice – on/off, yes/no, capacity/incapacity.
- Divorced from context – capacity to do what?

## Decisional Capability

- The quality of being “capable” and able to do something.
- Implies potential that can be developed and improved under the right conditions and with the right supports.
- Wedded to context – the ability to do something specific (make a decision).

# Decisional Capability is...

- A spectrum
  - Comatose to genius – not all or nothing, not on/off.
- Not static
  - It can vary and change day to day, become stronger or weaker, return, and be developed.
  - It can be adversely affected by medications, illness, pain, stress, diet, dehydration, lack of sleep, substance abuse, time of day, grief, mental health, hearing, or vision loss.
- Domain specific
  - The capability to do what?

# Decisional Capability to Do What?

Money  
Management?

Medical  
Decisions?

Selling  
Property?

Choosing  
Visitors?

Intimate  
Relationships?

Signing  
Contracts?

Executing a  
Will?

Smoking?

Executing  
Powers of  
Attorney?

Living  
Arrangements?

Signing a  
Retainer?

Settling  
Litigation?

# Decisional Capability is NOT:

- Synonymous with or proven by:
  - Memory loss or medical diagnosis
    - Remember – it’s a spectrum, not static, and domain specific.
  - Bad decisions, refusal to follow advice, refusal to act in one’s “best interest”
    - “Dignity of risk”
  - Appointment of a fiduciary
    - #FreeBritney
  - A checklist or a test
    - A useful tool does not take the place of reason, insight, and judgment.
  - Old age
- Learn More: [Representing Clients with a Range of Decisional Capabilities](#)



# Bench Memos: An Educational Tool

# Bench Memos as Educational Tools (1 of 3)

- Be creative
- Be kind
- Put your client's situation in context
- Consider filing them with the Complaint or Answer
- Some benefits:
  - Presents the lived experience of the client
  - Educates the judiciary in this case and others – systemic advocacy
  - Preserves issues on appeal

# Bench Memos as Educational Tools (2 of 3)

- Possible bench memo topics to have in your pocket
  - Ageism
  - Diminished Capability
  - Racism
  - Ableism
  - Poverty
  - Lack of Access to Resources
- Use the pleading to apply the issues to the facts. Bench memos can be one size fits all – just about the issue.

# Bench Memos as Educational Tools (3 of 3)

- Possible case types
  - Guardianship/Conservatorship
  - Power of Attorney
  - Trust
  - Divorce
  - Orders of Protection
  - Eviction
  - Consumer
- Also consider filing a resource as an exhibit

# Demand Letters

# Demand Letters: Case Types

Note: a demand letter may be a statutory prerequisite to litigation

- Fiduciary abuse
- Conversion/financial exploitation
  - demand for an accounting by a fiduciary or return of assets
- Consumer cases
  - notice of consumer violation and desired outcome
- Squatting
  - notice of trespass
- Abuse in a shared residence
  - request to leave
  - notice of eviction

# Considerations When Sending a Demand Letter

- Who is the intended recipient?
- Will this impact the client's personal safety?
- Will this impact the safety of the client's property?
- What is the likelihood of a response? Of recovery?
- Does a statute require written notice?
- LSC – Do you have a signed Statement of Facts?

# Example: Accounting Demand Letter

- Account of money that has been misappropriated and available legal remedies
- Statutory demand for an accounting
  - Client requests a written account of all transactions you entered into as his attorney-in-fact. As you know, the Power of Attorney in question was revoked on XXX....Client requests that your accounting be annotated and exhibited with complete records for all the transactions in your accounting. You are required by Antarcctica law to provide your written accounting within sixty (60) days of receiving this notice....



# Example: Consumer Demand Letter

- Generally, statute dictates timing and content of the letter
- Example outline:
  - **Heading identifying the transaction in question**
    - Re: Consumer Transaction Commencing on May 1, 2022
    - Notice pursuant to [statute]
    - Consumer: [name]
    - Vehicle: 2017 Honda Civic
    - VIN: xxxxx
  - **Body**
    - Facts that identify the statutory violation and why it is a violation
    - Cite the statute
    - Say what the client wants

# Example: Consumer Demand Letter (cont.)

- Your actions described above constitute an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction, pursuant to the Indiana Deceptive Consumer Sales Act Ind. Code §24-5-0.5-3. You should also know that if you fail to cure the above deceptive act, Client may bring an action pursuant to Ind. Code §24-5-0.5-4(a) to recover damages suffered as a result of the deceptive act, which may be increased up to three times the actual damages if the court finds there was a willful deceptive act, and reasonable attorney's fees. Additionally, in that Client is a senior consumer over the age of sixty, she may be entitled to recover treble damages, pursuant to Ind. Code §24-5-0.5-4(i). Further, under Ind. Code §24-5-0.5-4(d), the court may void or limit the application of contracts or clauses resulting from deceptive acts and order restitution to be paid to aggrieved consumers.
- Client, pursuant to the Deceptive Consumer Sales Act, now gives notice of the deceptive act and damages suffered, and hereby requests you offer to cure the act within thirty (30) days of this notice, and to cure the deceptive act within a reasonable time. Ind. Code §24-5-0.5-5. An acceptable cure would be ...

# Example: Unwanted Houseguests (1 of 2)

- Letter for trespass and return of converted property
  - Announces they are trespassers and must vacate by a date certain
  - Need to check with state landlord-tenant law to ensure a landlord-tenant relationship does not exist by law
  - Demands return of any converted property, if applicable
- Typically, the opportunity to avoid law enforcement involvement is persuasive in these cases.

# Example: Unwanted Houseguests (2 of 2)

## TRESPASSING - NOTICE TO VACATE

Mr. Trespasser:

You are an unwanted and unauthorized occupant of 123 Sesame Street, Town, State 12345. You must vacate the property no later than 3:00 p.m. on August 28, 2019. Mr. and Mrs. Client, owners of the property, did not give you permission to stay in their home, and you have already been removed from their residence multiple times, including at least once by Adult Protective Services. You have not paid any rent or otherwise contributed to the finances of the household, and no lease agreement has ever been contemplated or entered into between you and the Clients. You were only given permission to store some personal property in their basement. You were never given permission to move in. At this time, you must leave, and you are no longer permitted to store any of your personal property at their residence. Any items you fail to take with you will be considered abandoned by you and may be disposed of.

You are financially exploiting the Clients by using their home and utilities and eating their food without permission and without compensation...

# Demand Letters: Ethical Considerations (1 of 2)

- Rules of Professional Conduct govern what we say
- Refer to Model Rules 3.1, 4.1, 4.4, and 8.4 and corresponding case law
  - 3.1: All claims must be meritorious.
  - 4.1: A lawyer cannot knowingly make a false statement of material fact or law to a third person.
  - 4.4: Lawyers are prohibited from using threats of criminal penalties to gain advantage in a civil proceeding.
  - 8.4: A letter that constitutes civil extortion would open an attorney to discipline.

# Demand Letters: Ethical Considerations (2 of 2)

- All claims must be meritorious
- Never make threats of reporting a defendant to authorities
- Never make statements about criminal liability or criminal charges
- Never threaten civil litigation the client doesn't intend to pursue and that wouldn't be meritorious
- Any wrongdoing mentioned must be related directly to the client's claim

# Resources

- [ABA Commission on Law and Aging](#)
- [National Center on Law and Elder Rights](#)
- [World Health Organization: Ageism](#)
- [Frameworks Institute: Aging](#)
- [National Center to Reframe Aging](#)

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# Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).