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Foreword

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Foreword

I am extremely pleased to have this opportunity to prepare a Foreword to the *Hastings Law Journal* symposium on age discrimination. Realization of a viable social role for our elderly population is becoming an increasingly significant social concern. This concern is demonstrated by the emerging acceptance of the important contributions that can be made by older persons in business, industry, and government. With the passage of some much needed legislation in the mid-1960's, such as the Age Discrimination in Employment Act¹ and the Older Americans Act,² our society took notice of the inadequate treatment theretofore accorded its senior citizens. Since that time, we have learned to view the older American as a whole person whose worth and whose needs are not unlike those of any other segment of society except as they may be emphasized by the social and economic conditions of later life. The congressional attention emanating from our increased awareness has since resulted in more than 130 federal programs, which, by legislative mandate, provide direct benefits to the elderly.

Despite the extent of these services, the elderly continue to face unique difficulties. What is needed is a commitment by each of us to do our part in helping to lessen their hardships. The legal community in particular must join in this commitment as the profession is in a unique position to make important contributions to an improved lifestyle for the elderly.

This Foreword begins with a brief discussion of several areas of major concern to the United States House Select Committee on Aging, noting both the current state of the law and possible new measures that the Committee has suggested to alleviate problems that have arisen. The remainder of this Foreword offers some preliminary suggestions to the members of the legal profession of ways they can translate their increasing understanding of the needs of the elderly into increased involvement in issues that affect them.

1. 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979).

2. 42 U.S.C. §§ 3000-3056f (1976 & Supp. III 1979).

Retirement Income

Persons over age sixty-five constitute eleven percent of this country's population.³ Many of these individuals live at or close to poverty levels and the great majority depend on social security, SSI, and public assistance as their only sources of income. Of the income they do receive, elderly persons in general spend relatively larger amounts of money on the bare essentials of life than do younger consumers. Latest figures available show the largest consumption item for senior citizens is housing (32%), followed by food (25%), transportation (15%), and medical care (10%).⁴ These statistics are in reality low because they fail to take into account the enormous increases in the costs of goods and services that have taken place in the last several years. Inflation is especially harsh on the elderly because so many of them must live on fixed incomes, which do not always provide cost of living adjustments. Consequently, providing adequate income levels for retired individuals is an issue of high priority with the House Select Committee on Aging.

Social Security

Social security constitutes the principal source of retirement income for the majority of the American public. Despite continuous concerns regarding the social security system, it remains the single most successful American social program. The report of the 1979 Social Security Advisory Council⁵ echoed this sentiment with its conclusion that all current and future social security beneficiaries will be able to rely on receiving the benefits to which they are entitled. To encourage the system's stability, however, the report recommended integrating designated portions of personal and corporate income taxes into the system instead of requiring the system to depend upon continually increasing payroll taxes. It also endorsed a proposal that would allow payments to be made to the

3. Census Bureau Population Survey, National Estimate Branch Series P-25, No. 870 (1979).

4. Facts About Older Americans 1979, Pub. No. 80-20006 (1980) (publication of the U.S. Dep't of Health & Human Services).

5. REPORT OF THE SOCIAL SECURITY ADVISORY COUNCIL, EXECUTIVE SUMMARY (1979), reprinted in *Oversight on Recommendations of 1979 Social Security Council, Hearings before the Subcomm. on Retirement Income and Employment of the Select House Comm. on Aging*, 96th Cong., 2d Sess. 103 (1980).

system's various trust funds from general revenues or borrowing among funds as ways of increasing the flexibility of the system and thus protecting it against economic fluctuations.

Debate over amendments of this type has generated considerable disagreement and has left the future of the system open to conjecture. Recommendations to tax social security benefits and to raise the eligibility age levels are seen by some as the salvation of the system and by others as the occasion of its demise. Moreover, some analysts have claimed that the cost of financing the social security system will rise sharply in the twenty-first century, necessitating adjustments in benefit levels and eligibility ages.

Private Pensions

The deficiencies in private (and even state and local government) pension plans and the inadequacy of private savings are the most important reasons for the reliance on the social security system as the primary source of funds for the retirement population. Private pension plans cover only about half of the workforce, and because the formation and maintenance of such programs by employers or through collective bargaining remain strictly voluntary, the specific funding levels are not regulated or adjusted by government control. Indeed, to encourage continued employer and union sponsorship of plans, the government has conspicuously avoided any interference in the actual funding determinations and has refrained from the imposition of strict regulations that might discourage employers from continuing their plans. Thus, although comprehensive regulation of the pension system was effected through the Employee Retirement Income Security Act of 1974⁶ (ERISA), certain compromises were made to achieve the needed reform without discouraging plan sponsorship. One of the most significant concessions made on behalf of pension plan sponsors was to allow disparate treatment of younger and older employees in the establishment of plan rules determining eligibility for participation. Under current regulations, employers or labor organizations maintaining either of the two most common types of pension plans (the defined benefit plan and the defined contribution plan) may, under certain circumstances, take age into account when setting requirements for plan participation. The result is that significant

6. 29 U.S.C. §§ 1001-1381 (1976 & Supp. III 1979).

numbers of workers covered by pension plans will not receive a pension upon retirement. This is especially true for employees who begin working or change jobs late in life. Pension plans typically require workers to meet age, years of covered service, and other eligibility requirements before they acquire a vested right in the plan benefits. Most plan participants are in plans that require as much as ten years of participation before a worker is vested. Moreover, a worker leaving employment prior to meeting vesting requirements forfeits any employer pension benefits accrued.

Thus, the private pension system offers adequate retirement income protection only to those individuals with a long attachment to a specific plan. Even then, pension benefits are most often inadequate because of integration with social security and increases in the cost of living. While the improvements made by ERISA were important ones, standards for pension plans under that Act fell short of creating a system under which a majority of workers could earn a nonforfeitable right to earned benefits. Thus, even with the enactment of ERISA, major deficiencies in the private pension system remain. The complete lack of pension coverage for many workers, forfeitures of nonvested benefits, and the serious impact of inflation on this type of fixed income are severe impediments to a confident reliance on the pension system as a source of retirement income.

Employment of Older Workers

A related issue and one of great concern to the House Select Committee on Aging is the increasing incidence of age discrimination in employment. Many retirees with insufficient funds generated by pensions, social security, or savings supplement their incomes by either continuing to work past retirement age or seeking new employment. About three million or thirteen percent of older persons were in the labor force—either working or actively seeking work—in 1978.⁷

Because of the quite prevalent cultural bias that prevents the recognition of the usefulness and abilities of older workers, many aged workers experience frustration and disappointment as they

7. *Oversight on Recommendations of 1979 Social Security Council, Hearings before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging, 96th Cong., 2d Sess. (1980).*

attempt to reenter the workforce. Recognition of their plight prompted the enactment of the Age Discrimination in Employment Act of 1967 as an expression of legislative intent to promote employment opportunities for older workers based on ability rather than age. Despite the Act's very laudable goals, it engendered substantial litigation, focusing primarily on the mandatory retirement provision, which outlawed involuntary retirement between the ages of forty and sixty-five unless pursuant to a bona fide seniority or pension plan. The 1978 amendments to the Act⁸ extended the upper age limit to seventy, emphasizing that involuntary retirement of workers in the protected age group was impermissible regardless of whether it was conducted pursuant to specific plan terms. This later change was of vital importance in the effectuation of the Act's purpose. Extension of the age limit would have been of little practical significance to those employees covered by plans that condition receipt of benefits upon mandatory retirement at a specified age other than that established by the Act.

The changes instituted by the 1978 amendments initially prompted considerable criticism from various employers and labor organizations. However, as evidenced by numerous studies commissioned to examine the effects of the amendments, most employers have succeeded in complying with the Act without substantially changing their retirement and benefit programs. The Committee on Aging nonetheless continues to push for a complete removal of the upper age limit to ensure true freedom of choice for older workers. Some progress may be indicated by the fact that, after years of debate, the American Bar Association has changed its policy of refusing to recommend a person to a federal judgeship because of age. It is to be hoped that this salutary move will be echoed by other organizations as well.

Health Care for the Elderly

Current debate over health care issues such as national health insurance, Medicare, and Medicaid is important in focusing attention on the deficiencies in our health care system. However, unless this debate is soon translated into action, the result may be an impasse that would deny essential health care to the one class of citi-

8. Pub. L. No. 95-256, 92 Stat. 189 (amending various sections of 5, 29 U.S.C.).

zens who need immediate relief—senior citizens. In 1977, the nation spent \$143,000,000,000 for personal health care. About twenty-nine percent of that amount (\$41,000,000,000) was spent for persons age sixty-five and over, making the per capita health care cost for an older person \$1,745, over two and one-half times that of younger adults. Benefits from government programs, including Medicare (\$183,000,000,000) and Medicaid (\$6,900,000,000), accounted for about two-thirds of the health expenditures of older persons, compared with only three-tenths of the health expenditures for adults under age sixty-five.⁹ The heavy reliance by the elderly on publicly funded programs is apparent. Consequently, the necessity of providing uninterrupted delivery of services to the elderly through those programs should be similarly apparent. Unfortunately, however, the converse is often the case. The elderly are often the first to suffer when cutbacks or reorganization of government funding is attempted.

The Medicare program is an example of how the deficiencies in our national health care system are especially onerous for senior citizens. When Medicare was first enacted in 1965, it was intended to cover most of the health care costs of recipients. Presently, Medicare covers only about thirty-eight percent of these costs while insurance premiums continue to rise.¹⁰ Hearings held by the Committee on Aging have revealed severe gaps in the health care coverage of senior citizens. To complicate the situation further, widespread fraud and misuse of funds by health care providers—physicians, hospitals, and so forth—drain away millions of dollars that are desperately needed to bring about improvement in services and reform of the system.

Because of widespread abuse of the system, along with its many inefficiencies, support for increasing Medicare coverage is not pronounced. However, current coverage is severely lacking in at least one crucial aspect—that of preventive care. Although Medicare does cover many important services, it offers no reimbursement for preventive health care services, such as regular visits to physicians, or for prescription drugs, dentures, hearing aids, or eyeglasses. If Medicare were extended to include such expendi-

9. *Oversight on Recommendations of 1979 Social Security Advisory Council, Hearings before the Subcomm. on Retirement Income and Employment of the Select House Comm. on Aging, 96th Cong., 2d Sess. (1980).*

10. *See Medicare Reform: Hearings Before the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging, 96th Cong., 2d Sess. (1980).*

tures, the system could be greatly benefited in the long run. Availability of these items to the elderly as well as coverage of regular office visits could help to avoid the necessity of long-term care or extended hospitalization. Legislation sponsored by the Committee that would extend the Medicare program to cover these and other services is now being considered.¹¹

The quality of care provided for the elderly in nursing homes and similar institutional settings is another facet of the current problem in providing the elderly with health care. Questions involving improper or inadequate medical care, drug abuse, and even physical mistreatment have beset the nursing home industry and have created an air of mistrust and suspicion. Many improprieties have been exposed, but it must also be noted that many nursing homes do provide valuable professional service to many individuals unable to care for themselves. The focus thus should be on closer regulation of the services that are now available, augmented by improvements in the health care industry as a whole.

The Select Committee on Aging has been very active in suggesting reforms by encouraging education and hiring of more nurses and other skilled health care personnel and, increasing the amount of Medicare funds available for the use of nursing homes and noninstitutional care facilities. The latter proposal is for alternative methods of caring for the elderly, including in-home care, cooperative living arrangements, and a new program sponsored by the Department of Health and Human Services known as the Long-Term Care Channeling Demonstration Program. The goal of this program is to coordinate the various services already available to the elderly in the hope that they can be cared for in their homes rather than needlessly ending up in nursing homes. It is estimated that twenty-five percent of the persons in nursing homes could be cared for in home care programs. This new program¹² would act to reduce costs for care of the elderly by limiting unnecessary institutionalization. The costs are not strictly financial; in human terms, the cost of putting one who does not need institutional care in a nursing home can be diminished physical and mental health, disruption of family life, and more. Innovations such as the Long-

11. Supply pending legislation.

12. See *Long-Term Care for the 80's: Channeling Demonstrations and Other Initiatives: Hearings Before the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 96th Cong., 2d Sess. (1980).

Term Care Channeling Demonstration Program, however, help to provide care under conditions that enhance rather than impair the morale of the individual. It thus is extremely important to continue the fight for expanded Medicare and Medicaid coverage for home-based services.

The problems discussed thus far are only a few of the host of concerns facing the elderly every day. Because inflation is most difficult for those living on fixed incomes, the elderly as consumers are especially vulnerable to cost increases. Housing costs devour a huge percentage of an already limited income, and the growing incidence of apartment and condominium conversions is forcing many elderly people into substandard living accommodations. Soaring food and medical expenses jeopardize the elderly's ability to maintain proper diet and nutrition.

The financial hardships, however, are not the only issue. In part because of their declining health and mobility, the elderly are extremely susceptible to fraud, crime, and victimization. They are thus often the target of insurance schemes, real estate swindles, and countless other scandals perpetrated by those who prey upon their vulnerability. Exposure of this type of inhumanity always evokes feelings of anger and outrage. Sadly, though, the one response most needed is rarely elicited: action. Those with the ability to influence present conditions must channel that ability into effective techniques for improving life for the elderly.

Although numerous aging programs have been established, the government cannot begin to meet all the needs of the elderly. Especially in the current atmosphere of budget cutting and program elimination, private commitments from the community must be relied upon to make up the balance. The legal profession's involvement in such a movement is vitally important. The elderly are in need of many legal services and are often unaware of ways to obtain them. Programs to inform and instruct thus are needed to reach out to these people and let them know that their well-being and security are of paramount social concern. The following discussion sets forth some suggestions by which members of the legal profession can make uniquely fulfilling contributions towards this goal.

The basic problem facing the elderly in the area of legal services is inadequate knowledge and information. The organized bar needs to combat this problem by sponsoring informational campaigns in each community. These campaigns could include the set-

ting up of informal forums in areas easily accessible to the elderly, where they could go for basic information as well as for referrals to participating attorneys who would provide services at reduced fees. Programs whereby senior citizens would be visited directly by attorneys could be extremely effective. Highly publicized appearances by attorneys in condominiums, nursing homes, and other residences and recreational centers for the elderly could be set up to create an awareness of potential legal problems and could point out ways to avoid them. These initial meetings could then be followed up by regular visits at which individual problems are discussed.

The complexity of standardized forms for governmental benefits and the highly technical language used in legal contracts and agreements is more than just confusing to older people. Inadequate understanding of the ramifications and liabilities flowing from the signing of legal instruments has resulted in countless instances of needless loss and suffering. Local bar associations could provide an invaluable service by setting up clinical operations where individuals could bring their leases, insurance policies, investment and banking papers, and medicare and social security forms for help in understanding and completing them. An important element in the success of these proposed programs is visibility. An accompanying advertising campaign including posters, magazine and newspaper exposure, as well as radio and television public service announcements, can provide the publicity necessary to assure that the older audience is reached. The American Bar Association and many local groups already have several very effective programs for the elderly,¹³ but these need to be greatly expanded.

Private attorneys similarly make important contributions by accepting elderly clients by referral or on a pro bono or reduced fee basis. Representation of individuals subjected to age discrimination in job hiring and firing and in employee benefits and pensions is also needed. These emerging areas will assume greater importance in the near future.

When an attorney accepts an elderly client for whatever reason, he or she can help prevent other problems by counseling the client on any related matter. By inquiring whether the client has a

13. The American Bar Association has a special Commission on the Elderly. Ms. Nancy Coleman, Staff Director of the Commission, provided helpful suggestions for this Foreword.

will, whether he or she has made an adequate provision for survivors and dependents, or whether the client has any problems or questions with insurance or other contracts, the attorney can help avoid later complications. A checklist of problem areas and questions regarding them could easily be compiled by every law firm to be used when interviewing elderly clients. Through this method, the attorney would be able to elicit valuable information that the client might overlook or deem unimportant.

Public law positions also afford opportunities for effectuating reforms in favor of the elderly. A recent report by the Broward County Victim's Advocate Unit found that people fifty-eight or older were the victims of forty-six percent of the strong-arm robberies in the Fort Lauderdale, Florida area last year.¹⁴ Figures are similar for other violent crimes such as assault and burglary and figures are the same for many other metropolitan areas. The report further states that offenses against the elderly are definitely on the rise, especially as perpetrated by juveniles. In addition, the victims of these crimes suffer much more trauma than other age groups. Judges and prosecutors should therefore be urged to consider mandatory sentences with limited or no chances for parole for multiple violations of this type. For juveniles and first-time offenders, alternative sentencing should be explored, including programs whereby the offenders would be ordered to make restitution to their victims as part of the sentence.

On the preventive side, state attorneys and law enforcement agencies should encourage the establishment of neighborhood crime watch programs to help curb such crimes. Most local police departments offer safety checks of homes and apartments, lock installations, and engravings of valuables as free prevention measures. These services should be made better known through increased publicity and promotional campaigns.

The suggestions offered here are only a starting point. The problems are real and immediate, the solutions difficult and elusive. This symposium on age discrimination can serve to inform the legal community of the challenge ahead. We must confront the

14. St. Petersburg Times, Dec. 15, 1980, §B, at 2, col. 1.

situation with a fresh attitude and a determination that we will not rest until substantial progress has been made.

Congressman Claude Pepper*

* Chairperson, United States House of Representatives Select Committee on Aging. The author would like to acknowledge gratefully the assistance of Patricia Martin in the preparation of this Foreword.

