

# THE VOICE OF EXPERIENCE

A Publication of the American Bar Association Senior Lawyers Division

## Memorializing the Work and Lives of Women Trailblazers in the Law

*By Brooksley Born and Linda Ferren*

Senior women lawyers today have not forgotten the challenges they faced in law schools, law firms, corporate America, and academia decades ago. Some women who graduated at the top of their classes from the nation's premier law schools were offered positions in some of the country's preeminent law firms—not as associates but as legal librarians or legal secretaries. Others were never granted an interview. Still others were harassed in their law school classes and on the job for taking positions that were thought rightfully to belong to men. Others were barred by institutional policies from even applying to some of the nation's top law schools or from seeking prestigious clerkships because of their gender.

Stories like these appear in many of the oral histories recorded for the Women Trailblazers Project (WTP), a unique initiative that is designed to make the life stories of outstanding women in the legal profession readily available to lawyers and nonlawyers alike. The heroes of these tales are women, now in their 60s, 70s, 80s, and 90s, who not only persevered against great odds in law school classes and legal posi-

tions in all parts of the country, but who succeeded in a profession that was often hostile and rejecting.

The stories of this generation of women who entered the profession at a time when only 3 percent of lawyers were female are important and compelling. These women met unique challenges and overt discrimination, and not only succeeded, but also opened the doors to younger generations of women in the profession. Many of them were also instrumental in developing and implementing legal strategies that were an essential part of the social revolution of the last forty years, opening economic opportunities to women in our society.

The WTP is designed to memorialize the stories of these women, as recounted in their own voices, to ensure that they are not lost to history. The goal of the effort has been to record the stories the women tell about what they experienced and how they saw the world as young children, adolescents, young adults, and mature members of society; what people and forces impacted them as they grew; how and why they chose to enter the legal profession; how they developed the determination to try to break into,



and then succeed in, a profession that for many years shut many more doors than it opened; and what they have accomplished. Their words will remind future generations of their courage and the many contributions they have made.

The project, which we conceived and developed in 2003, actually began in earnest in late 2004 when the ABA Commission on Women in the Profession agreed to sponsor the effort. The WTP was the first, and remains the only, nationwide program to take the complete oral histories of out-

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By Charles A. Collier Jr.

## State and Local Senior Lawyers Bar Outreach

**T**he Senior Lawyers Division (SLD) has reestablished its State and Local Bar Outreach Committee to encourage the development of state and local bar senior lawyers committees, sections, or divisions (“sections”) and to provide a forum for an exchange of information among such senior lawyer groups.

There has been a noticeable increase in the number of state and local bar senior lawyers organizations in the last several years. For example, the New York State Bar undertook a survey in 2008 of some 16,000 of its members age fifty and up to determine whether they were interested in the establishment of a New York State Bar senior lawyers section. More than 50 percent of those who responded supported the creation of such a section. Based on projections from the survey, it is anticipated that perhaps 3,400 New York State Bar members would join a new senior lawyers section of the state bar. The formal announcement of the creation of that section was made on November 1, 2008. Membership will be free for the first year, and dues thereafter are expected to be the same as for members of the Young Lawyers Section. The New York State Bar Survey of Senior Lawyers can be accessed at [www.nysba.org/slsr](http://www.nysba.org/slsr).

At the local bar association level, in 2007, the Los Angeles County Bar Association organized a senior lawyers section and offered free membership for one year to all who were interested. Some 6,000 lawyers in the L.A. County Bar signed up. Past SLD chair, Harry Hathaway, is currently vice-chair of this senior law-



Charles A. Collier Jr.

yers section. In the second year, dues will be charged for membership. This section has been very active in its first year in providing monthly programs and publishing an electronic guide for senior lawyers with more than fifteen articles on continuing your practice, changing your focus, leaving the practice, and enjoying retirement. This guide is online at [www.lacba.org/seniorguide](http://www.lacba.org/seniorguide).

The New York City Bar has had a senior lawyers committee for many years. Several representatives of this organization attended the SLD meetings at the ABA Annual Meeting in New York in August 2008 and are participating in the committee’s work.

The Chicago Bar Association has had a long-standing senior lawyers committee with a variety of programs. The Michigan Bar Association has a senior lawyers section, as does the Virginia Bar Association. In New Mexico, the state bar senior lawyers section is concentrating its efforts on providing pro bono services to returning veterans. Senior lawyer sections are found in many other state and local bar associations.

If you are a member of a state or local bar senior lawyers section, the SLD State and Local Bar Outreach Committee would be delighted to hear about its activities. It would be appreciated if you would send that information to our committee chair, Anthony Palermo, whose e-mail address is [apalermo@woodsoviatt.com](mailto:apalermo@woodsoviatt.com).

The committee is creating a blog whereby members of the state and local senior lawyers’ sections can exchange information about their programs, recruitment efforts, and various services to senior lawyers.

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# Protecting Against Power of Attorney Abuse: A Comparison of Current State Laws With the New Uniform Power of Attorney Act

By Naomi Karp, Lori A. Stiegel, and Ellen M. VanCleave Klem

**A**ARP recently released a report exploring the growing problem of power of attorney (POA) abuse and how state legislatures can protect vulnerable adults against it. The report, written by Lori A. Stiegel and Ellen M. VanCleave Klem of the ABA Commission on Law and Aging, explains how provisions of the new Uniform Power of Attorney Act (UPOAA) help prevent, detect, and redress abuse, and provides resources to promote enactment of this model law.

## What Is Power of Attorney Abuse?

A POA is a legal document used by an individual to allow someone else to act on their behalf. It is commonly recommended by lawyers to clients as a tool for planning for incapacity because it enables a trusted person to act for an individual who can no longer make or communicate financial decisions. When used for planning, the POA generally is “durable,” meaning it continues if incapacity occurs.

While POAs enhance autonomy by authorizing a trusted person to act and avoiding court appointment of a guardian, they also confer a great deal of authority without regular oversight or clear standards for agent conduct. Advocates for older people consider a POA, in the wrong hands, a “license to steal.” In 2002, the Uniform Law Commission Joint Editorial Board for Uniform Trust and Estate Acts conducted a national survey of probate and elder law practitioners, adult protective services staff, law enforcement officers, prosecutors, and others. Sixty-four percent of the 371 respondents stated that they had encountered POA abuse in their own work, and 78 percent indicated awareness of such abuse outside their work. Since that time, adult protective services and criminal justice professionals report an explosion of financial exploitation cases of this type.

POA abuse takes many forms. An agent may spend the principal’s money for self-dealing purposes, such as buying him- or herself a car rather than paying for the principal’s health care. The agent may exceed the intended scope of authority by, i.e., making gifts of the principal’s property when that power hasn’t been granted. The principal’s estate plan may be undermined when assets are given to unintended recipients. The POA itself may be a forgery.

## State Regulation and the New Uniform Power of Attorney Act

POAs are regulated by state law, and these laws vary substantially. In 2006, the Uniform Law Commissioners (ULC) approved the Uniform Power of Attorney Act



(UPOAA or Act). Among other goals, the UPOAA aims to promote autonomy and prevent, detect, and redress POA abuse. You can read the Act and a summary of the Act at <http://nccusl.org/update>.

Some of the key provisions of the UPOAA that benefit and protect people who execute POAs include:

- The clear statement of an agent’s duties, including the agent’s responsibility to act in good faith, within the scope of authority granted, and according to the principal’s known expectations or best interest—as well as more specific duties, such as preserving estate plans and cooperating with health care proxies;
- Stringent requirements for exercising “hot powers”—those with a high propensity for dissipating property or altering an estate plan;
- The provision that a third party may refuse to honor a POA under limited circumstances, including when the third party makes, or knows that another person has made, a report to adult protective services when abuse appears to be present;

- Liability of malfeasant agents for damages, attorney's fees, and costs.

### How Do the States Measure Up?

Based on a careful comparison of state POA statutes with the UPOAA, the research report shows that a large majority of state laws lack most of the UPOAA's protections for individuals creating POAs. For example, as of December 31, 2007:

- Only four states had provisions regarding an agent's mandatory duties that are identical, equivalent, or substantially similar to Section 114(b) of the UPOAA.
- Only eight states had provisions requiring specific grant of the hot powers that are identical, equivalent, or substantially similar to Sections 201(a) and 301 of the UPOAA.
- Only four states had provisions on agent liability that are identical or equivalent to UPOAA Section 117.

### What States Can Do

State legislatures should consider adopting the UPOAA to protect against POA abuse and promote autonomy. Two states—New Mexico and Idaho—have already enacted the UPOAA, in 2007 and 2008, respectively. The UPOAA can be adopted, either in its entirety or with modifications appropriate to their states (i.e., to maintain a provision that may be more protective than the Act). Tips for enacting the UPOAA provisions that protect against POA abuse or promote autonomy can be found in the report. The text includes a list of stakeholders who may want to collaborate in the study and recommendation process.

A free copy of the report may be downloaded from [www.aarp.org/research/legal/legalrights/2008\\_17\\_poa.html](http://www.aarp.org/research/legal/legalrights/2008_17_poa.html).

To obtain the ABA Commission on Law and Aging's free fact sheets for consumers and for criminal jus-

## Hot Powers

The new Uniform Act recognizes the following powers of an agent *only* if expressly granted. The power to: (1) create, amend, revoke, or terminate an inter-vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; (5) delegate the agent's authority; (6) waive the principal's right to be a beneficiary of a joint and survivor annuity; (7) exercise fiduciary powers that the principal has authority to delegate; or (8) (at state option) disclaim property, including a power of appointment. The Act also has a default rule that a nonrelative agent cannot give an interest in the principal's property to the agent or to a dependent of the agent.

tice professionals on POA abuse, visit the commission's elder abuse Web page at [www.abanet.org/aging/elderabuse.shtml](http://www.abanet.org/aging/elderabuse.shtml). [VOE](#)

*Naomi Karp, a senior policy advisor for the Public Policy Institute of AARP, contributed to this article and the AARP Public Policy Institute In Brief, Power of Attorney Abuse: What States Can Do About It, on which this article is based. The In Brief is a synopsis of the AARP Public Policy Institute Research Report, Power of Attorney Abuse: What States Can Do About It.*

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# SENIOR LAWYER | READER SURVEY

**A**s a member of the Senior Lawyers Division, you receive two publications: *Experience*, our magazine, and *The Voice of Experience*, our newsletter. We are looking for ways to make certain that both publications are relevant to your needs, and thus we are asking you to complete this survey about *The Voice of Experience*.

**We want, need, and encourage your input. Please submit your responses by:**

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# A Summary of the New York State Senior Lawyers Survey

By Anthony R. Palermo

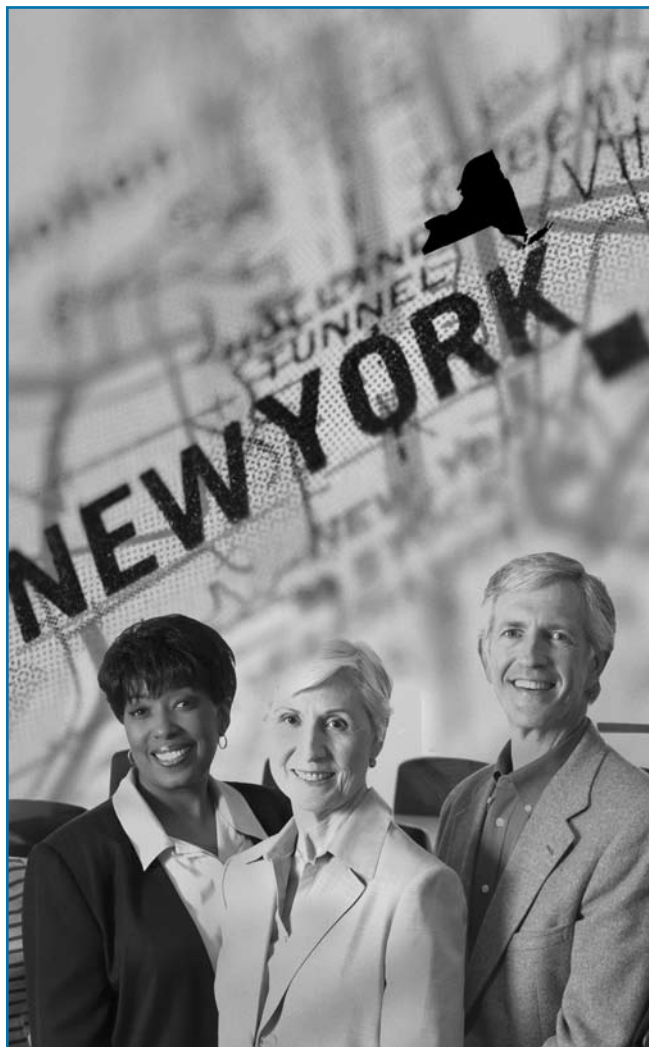
State and local bar associations are increasingly recognizing the importance of addressing matters of interest and concern to their experienced members by establishing committees or sections to serve and utilize senior lawyers. The Los Angeles County Bar Association (LACBA) and the New York State Bar Association (NYSBA) are two recent illustrations of this trend.

Before establishing a Senior Lawyers Section on November 1, 2008, the NYSBA appointed a special committee to investigate and report with recommendations the views of senior lawyers regarding retirement planning, community and pro bono service, the needs of retiring and retired lawyers, and the possible creation of a section. An invaluable research tool that was part of this evaluation process was a detailed survey distributed to a randomly selected study group of 16,000 lawyers, age fifty and older. The survey was sent to 8,000 NYSBA members (5,600 with e-mail addresses and 2,400 without e-mail addresses) and to 8,000 non-NYSBA members (4,000 with e-mail addresses and 4,000 without e-mail addresses). Survey responses from 2,270 were received by the March 5, 2008, deadline, with 1,612 submitted online and 658 mailed hardcopy. The return rate of 14.2 percent is considered excellent by knowledgeable professionals.

Part I of the survey sought generic background information, such as age, gender, location, practice setting, and firm size. Part II of the survey sought the views of lawyers not yet retired regarding future retirement concerns relating to personal, financial, and professional matters. Part III of the survey sought views on similar topics from lawyers already retired from their primary careers. The complete 2008 Senior Lawyer Survey (267 pages, including tables and full text of open-ended responses) is available online at [www.nysba.org/slsr](http://www.nysba.org/slsr). Key findings of the survey are briefly described below.

Seventy-four percent of retired attorneys retired between the ages of 55 and 69. Of those not yet retired, 19.6 percent plan on retiring before age 65, 22.6 percent expect to retire between ages 65 and 69, and 23.8 percent do not plan to retire until after age 70. Twelve percent say they will never retire, while 21.9 percent are uncertain when they will retire.

In general, pre- and postretirement lawyers equally share concerns about a list of personal retirement matters, such as loss of professional identity, camaraderie, and affiliations; health; and independence. Retired lawyers expressed less financial concern, with the exception of stock market performance, than preretirement respondents. For example, 22 percent of retired lawyers



indicated no financial concern, compared to 12 percent of preretirement attorneys. (In light of the current worldwide financial crisis, these expectations may have significantly changed.) Eighty-eight percent of retired lawyers expressed significant, partial, or complete satisfaction with their financial retirement planning, versus 66 percent of preretirement lawyers, while 28 percent of non-retired lawyers were not very or at all satisfied with their planning. Only 39 percent of non-retired lawyers had discussed financial aspects of retirement with family, friends, and colleagues, and 22 percent have done none of the listed common advance financial planning activities. It is interesting to note that 25 percent of preretirement lawyers have retained the services of a financial planner.

With regard to future Social Security payments, 93 percent of retired respondents expressed confidence in

the present system, while only 82 percent of preretirement lawyers have faith in the program.

Responses to the survey suggest that retired attorneys, as a group, may be less active in community and pro bono service than their working colleagues. For example, 44 percent of preretirement lawyers volunteer from one to ten hours per month for pro bono service, compared to 23 percent of retired lawyers. However, 28 percent of postretirement lawyers volunteer eleven or more hours per month, compared to only 18 percent of attorneys not yet retired. While 36 percent of preretirement lawyers expressed interest in doing pro bono work when they retire, 28 percent of the same group said they had no interest, and another 36 percent were undecided. Both groups indicate a desire for supplemental professional training in specific practice areas where their pro bono services are needed.

With respect to advance planning for law practice continuity, 48 percent of non-retired lawyers responded that they had made no arrangements, while 21 percent said that they had. Among non-retired lawyers, 11 percent indicated that they had established a relationship with another lawyer to assist clients in transition, in the event the original lawyer was unable to serve, but 77 percent of this group stated that they had not informed their clients of such arrangements. Fifteen percent indicated that they had advised their clients, and another 8 percent

responded that they were in the process of doing so.

The survey demonstrated substantial support for the creation of a formal section dealing with issues of concern to senior lawyers. Fifty-one percent, or 1,140 respondents, said they thought it would be beneficial if the NYSBA established a senior lawyers section; another 32 percent said they were uncertain; and only 17 percent were not interested in such a section. When asked whether they would join such a section if created, 19 percent (428 respondents) said "yes," 37 percent (831) said "possibly," 20 percent were uncertain, and 23 percent said "no." With a current membership of 17,900 lawyers age fifty-six and higher, the survey responses project to an estimated 3,400 senior lawyers who might be expected to join the new section, with an upward potential for 6,623 members.

Based on the results of this survey and the favorable recommendation of the special committee, the NYSBA House of Delegates approved the establishment of a new Senior Lawyers Section. For those who enroll prior to March 31, 2009, membership for the year is free, and annual dues thereafter will be \$20. [VOE](#)

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All rates are subject to change/availability. (Travel programs pending approval.)

CST #1007734-10

# Think Twice Before Signing

By Eric M. Carlson



**W**hat do you know about nursing homes? For the typical consumer, the answer is “nothing,” or, more accurately, “nothing, and I don’t particularly want to think about it either.”

This lack of knowledge and interest is understandable but carries with it consequences. An entering resident likely knows next to nothing about life in a nursing home. The resident and the resident’s family commonly will defer to the nursing home’s policies and practices, trusting that the nursing home and its staff will follow laws and perform professionally.

Unfortunately, this trust can be abused. One example is nursing homes’ frequent use of improper and unfair admission agreements. Studies consistently find that these admission agreements misrepresent the law and take advantage of consumers.

The most recent study was conducted in Missouri by the National Senior Citizens Law Center, based on a review of 175 admission agreements from nursing homes across the state. Many of the admission agreements contained provisions that conflicted with federal or Missouri law. Other provisions, although arguably compliant with the law, could be used to insulate nursing homes from responsibility for their actions.

Based on the author’s experience, the Missouri nursing

home admission agreements are representative of the admission agreements in use across the country. This article’s analysis and advice are relevant to a reader from any state.

## Federal Law

The federal nursing home law—entitled the Nursing Home Reform Law—applies to every resident of any nursing home that is certified to accept payment from Medicare or Medicaid. Since over 97 percent of nursing homes are certified for either one or the other, or both, the Reform Law almost always will apply. The Nursing Home Reform Law focuses on residents’ individual needs. For example, the Reform Law requires that a resident’s care be based on an individualized assessment and care plan, and that a nursing home make reasonable accommodations for an individual resident’s preferences.

Under the Nursing Home Reform Law, a nursing home must provide the care that a resident needs to reach the highest practicable level of functioning. The Reform Law was written to counteract the warehousing mentality that too frequently characterized nursing homes prior to the Reform Law’s enactment in 1987. Although certain conditions are associated with aging, the Reform Law counsels that they not be considered inevitable. Care should be provided to prevent undesirable conditions such as incontinence or pressure ulcers. If such a condi-

tion nonetheless develops, then the nursing home must provide necessary treatment.

### Admission Agreement Problems

**Altering the Standard of Care.** Contrary to the Reform Law's philosophy, a significant number of the Missouri admission agreements focused excessively on the risks of aging and had the resident acknowledge certain injuries as essentially inevitable. Specifically, 25 percent of the admission agreements contained a provision that attempted to lower the expectations of nursing home residents and their families. For example, one admission agreement had the resident agree that the nursing home's services were "not designed to somehow protect the Resident from everyday, normal risks and responsibilities of living, including, but not limited to, such general accidents and situations such as falling, choking and weight loss and/or dehydration resulting from a Resident's failure to partake of food and drink." Many agreements similarly had the resident or resident's representative agree that the nursing home was not responsible for providing anything more than "general duty" nursing care, and it would be the responsibility of the resident or the resident's representative to obtain additional care if the resident's needs were more extensive.

Consumers (and nursing home operators) should recognize that all such provisions are inappropriate and counterproductive. The lowering of expectations carries with it the danger of self-fulfilling prophecy. These admission agreement provisions clearly are written to influence the expectations of residents and their family members, but undoubtedly also have an impact on nursing home employees. Better nursing homes today emphasize a "culture change" in which the nursing homes move toward care that is "resident-centered," i.e., based on a resident's individual needs. A culture of lowered expectations is a significant step in the opposite—and wrong—direction.

This is not to say that aging does not bring with it increased risk. But the risks should be discussed in care plan meetings, where the resident, resident's family, and nursing home staff can decide jointly on the best possible plan of care. In other words, risk should be discussed in order to prevent bad outcomes to the extent possible, not to excuse a nursing home in advance for inadequate care.

**Waiving the Nursing Home's Responsibilities.** In the study, the examined admission agreements contained a wide variety of liability waivers. These waivers claimed to eliminate or reduce a nursing home's legal responsibility for a resident's injuries in situations in which the nursing home otherwise would have been financially liable.

One noteworthy admission agreement claimed that the nursing home would "not be held responsible for accidents or injuries sustained by the Resident during residence in the Facility." Another admission agreement broadly waived the liability of the nursing home and its employees.

One admission agreement eliminated the nursing home's liability for noneconomic damages. As a practical matter, this would almost entirely insulate the nursing home from responsibility for its own negligence. Because nursing home residents do not hold jobs and thus do not lose wages when injured, recoveries by nursing home residents consist almost entirely of noneconomic damages, such as damages for pain and suffering.

A common provision, found in 74 percent of the admission agreements, waived the nursing home's responsibility for a resident's personal property. Many agreements rejected liability unless the object in question had been specifically given to the nursing home for safekeeping, ignoring the fact that a resident's personal property is useful only if the resident has easy access to it. Going further, some admission agreements broadly declared that the nursing home would not be liable for a resident's lost or stolen property even if the nursing home were at fault.

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*Better nursing homes today emphasize a "culture change" in which the nursing homes move toward care that is "resident-centered," i.e., based on a resident's individual needs.*

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In most states, such waivers of liability are likely to be unenforceable for violating public policy. Although waivers of liability may be acceptable when businesses engage in arm's-length bargaining, they generally are not allowed in business-prepared consumer contracts.

**Mandatory Arbitration.** Arbitration is an important issue in a multitude of consumer settings, including but certainly not limited to nursing homes. Arbitration often is considered disadvantageous for consumers who prefer trial by jury or, at a minimum, deserve having the right to choose a jury trial.

In looking at arbitration agreements, it is important to note whether the agreement was entered into before or after the dispute arose. There is nothing wrong with arbitration when represented parties have chosen it as the best way of resolving an identified dispute. On the other hand, pre-dispute arbitration agreements are generally objectionable in consumer transactions since they do not really reflect a consumer's choice. The pre-dispute agreements generally are part of an initial contract package prepared by a business for signature by a consumer, broadly referring future disputes to arbitration. The consumer likely signs the various documents while paying little or no attention to the arbitration provisions.

Indeed, during the nursing home admission process, neither residents nor their families are thinking of how to resolve future disputes. Their focus is on more immediate and tangible concerns—the physical and emotional aftermath of an unexpected stroke, for example, or a family's

grief over a mother's need for nursing home care.

Health care often is recognized as an inappropriate setting for pre-dispute arbitration agreements. Both the American Health Lawyers Association and (with specified exceptions) the American Arbitration Association do not provide arbitrators under pre-dispute arbitration agreements for health care disputes.

In Missouri, 18 percent of the examined admission agreements required arbitration as a condition of admission. Another 4 percent of the agreements offered arbitration as a purportedly voluntary option. These numbers likely understate the prevalence of arbitration agreements since an arbitration agreement could be a document separate from the admission agreement itself, and such a separate document would not have been among the documents reviewed.

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*In other words, risk should be discussed in order to prevent bad outcomes to the extent possible, not to excuse a nursing home in advance for inadequate care.*

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Currently, pre-dispute arbitration agreements are not considered per se illegal, although they are unconscionable and thus unenforceable if the terms are unfair and the circumstances of the contracting process had not given the resident (or the resident's agent) a legitimate choice. Pending federal legislation—the Fairness in Nursing Home Arbitration Act—would prohibit pre-dispute arbitration agreements in nursing home admission agreements.

**Authorization of Improper Evictions.** Under the Nursing Home Reform Law, involuntary transfer or discharge is allowed only for one of six reasons. Non-payment is one reason. A second reason is the nursing home going out of business. The other four reasons all are based on the resident's health or behavior. Involuntary transfer/discharge is allowed if the resident no longer requires nursing home care (reason #3) or requires a level of care that cannot be provided in a nursing home (#4). The final two reasons are based on the protection of others in the nursing home—a resident can be transferred or discharged involuntarily if his presence endangers others' health (#5) or safety (#6).

In the examined admission agreements, however, 17 percent of the nursing homes claimed the right to terminate a resident's stay without a reason. Furthermore, of the nursing homes that listed reasons for an involuntary transfer/discharge, 46 percent included at least one reason not allowed by the Reform Law.

One admission agreement authorized transfer/discharge of a resident for being “unduly disturbing, unduly noisy, objectionably untidy, noncooperative or destructive in behavior and action.” In a similar vein, another

admission agreement authorized transfer/discharge for a resident being “uncooperative or destructive to people or facility.” A third admission agreement broadly authorized involuntary transfer for any resident “becom[ing] uncooperative or unmanageable.”

Such justifications—common in admission agreements across the country—are objectionable both because they go far beyond the justifications allowed by the Reform Law and also because they are inconsistent with nursing home reality. In fact, nursing home residents often are disturbing, untidy, uncooperative, and destructive. They can't help it—this type of behavior frequently results from Alzheimer's disease and other dementias, which are common among nursing home residents. When presented with such behavior, a nursing home should not transfer or discharge the resident; instead, the nursing home should assess the resident's condition and develop a care plan that addresses the resident's needs as best as possible.

**Financial Guarantees.** Under the Nursing Home Reform Law, a nursing home cannot require a resident's family member or friend to become financially liable for nursing home expenses. A no-guarantee rule makes sense in nursing home admissions because nursing home expenses are not limited to any particular amount, and because the Medicaid program steps in when a resident has inadequate financial resources.

In the study, 19 percent of the admission agreements required a financial guarantee, in direct violation of the Nursing Home Reform Law; 30 percent of the agreements solicited, but did not require, a financial guarantee. The guarantor was commonly termed the “responsible party.”

For at least three reasons, such “voluntary” guarantees are improper. First, the admission agreement and the term “responsible party” are deceptive because they often give the family member or friend the impression that a “responsible party” is only a representative or contact person. As a result, a family member or friend might sign as “responsible party” without understanding that she purportedly is becoming financially liable for all nursing home bills.

Second, admission agreements with supposedly “voluntary” guarantees can be used to require guarantors. It is easy for a nursing home staff member to tell a family member or friend that she must sign as “responsible party,” even if the guarantee provision is written as being voluntary.

Third and finally, a supposedly “voluntary” guarantee is unenforceable because it provides no benefit to either a resident or a “responsible party.” A “responsible party” signature has no effect on a resident's admission; as explained above, the Nursing Home Reform Law prohibits a nursing home from requiring a guarantee as a condition of admission. Such a gratuitous promise, benefiting neither the resident nor the “responsible party,” is not enforceable under the laws of most states.

This result—that a “voluntary” guarantee agreement is unenforceable and improper—comports with com-

mon sense. It is difficult to imagine a more one-sided agreement. It would be unfair to make a family member or friend liable based on an admission agreement provision that gave no benefit to the resident or to the resident's family member or friend.

### What to Do

Consumers should not take anything for granted. A nursing home admission agreement may or may not be consistent with relevant law, and frequently will contain provisions that disadvantage residents and their families.

During admission, a resident or family member should speak up when seeing an objectionable provision. Speaking up is particularly advisable if the resident already has moved into her room in the nursing home. As discussed earlier, once the resident has moved in, there are only six limited reasons for eviction. Objecting to inappropriate admission agreement provisions certainly is not one of these reasons.

If the resident has not yet moved into the nursing home, the negotiating situation is a little more difficult, but the basic strategy remains the same: Speak up! It is recommended that the resident or agent sign an admission agreement only after deleting or appropriately modifying offending provisions.

The nursing home staff member probably will be too embarrassed or confused to object and will continue with the resident's admission. Of course, there is the risk that the nursing home will refuse admission, but avoiding that risk generally is not worth the signing of an illegal or unfair admission agreement. Most nursing homes cannot afford to turn away potential customers. Also, refusing to sign is an important step in educating nursing homes and their staff on the illegal or inappropriate provisions in many admission agreements.

Remember that arbitration and financial guarantees often are claimed to be "voluntary." This should be pointed out to any staff member who is demanding a signature.

If an improper admission agreement already has been signed, all is not lost. As discussed above, certain provisions are unenforceable.

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*Once the resident has moved in, there are only six limited reasons for eviction. Objecting to inappropriate admission agreement provisions certainly is not one of these reasons.*

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Ultimately, it is counterproductive for nursing homes to ignore, misrepresent, or disclaim relevant standards. Better nursing homes today pursue "culture change" in which resident needs and preferences are given high priority. An improved culture will require honest, cooperative relationships among nursing homes, residents, and family members. An important step in developing such a culture would be for nursing homes to acknowledge and follow relevant provisions of the Nursing Home Reform Law. **VOE**

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*Eric M. Carlson is the director of the Long-Term Care Project for the National Senior Citizens Law Center. He is the author of Long-Term Care Advocacy and The Baby Boomer's Guide to Nursing Home Care. This article is adapted from a recent report from the National Senior Citizens Law Center, Think Twice Before Signing: Improper and Unfair Provisions in Nursing Home Admission Agreements, available at [www.nslc.org](http://www.nslc.org).*

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## From the Top

*continued from page 2*

With the baby boomer generation reaching senior lawyer age, such sections are likely to expand throughout the organized bar. For example, in New York, 35 percent of the state bar's members are age fifty-five or above. This percentage is probably

fairly representative of membership in bar associations throughout the country. There is a great potential for senior lawyers sections to assist in the many areas of interest to senior lawyers, such as pro bono services, mentoring, mediation, arbitration,

transition planning from full-time practice to part-time, of-counsel status, alternative careers, retirement, and so forth.

The SLD is excited about this new service that it can render to senior lawyers throughout the country. **VOE**

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## Submit Articles to *The Elder Law E-News List Serve*

*The Elder Law E-News* list serve is transmitted electronically to SLD members every two weeks. Members are asked to submit newsworthy articles that are of interest to lawyers. Topics should be relevant to the practice of elder law, possibly including court cases and opinions, Medicare, and health law issues.

Articles should be faxed or sent by e-mail with a direct link to the article to Angela Boykin (fax: 312/988-6033, e-mail: [boykinaa@staff.abanet.org](mailto:boykinaa@staff.abanet.org)). Each article should note the article title, source, date, and issue.

## Memorializing Women Trailblazers

continued from page 1

standing women in the law, selected for their accomplishments and contributions to the law, highlighting the role of women in the profession. The interviewees, who thus far number eighty-nine from twenty-four states and the District of Columbia, are from all areas of the legal profession: the judiciary, academia, government, law firms, corporations, and public interest organizations.

The WTP has selected as interviewees a number of the Commission on Women's Margaret Brent honorees and nominees, federal and state court judges, and attorneys recommended by ABA members and others involved or interested in the project. Whenever possible, older women have been selected with diversity of race, ethnicity, geography, and professional backgrounds being key considerations.

All project interviewers are women volunteers who are practicing lawyers. Interviewers are teamed up with interviewees who, in almost every case, live in the same or neighboring communities. Each interviewer is instructed in the art of taking an oral history. At the beginning of the project, we looked to Donald A. Ritchie, associate historian of the U.S. Senate, author of *Doing Oral History: A Practical Guide*, and a highly skilled and experienced trainer of oral historians to run the WTP's first four training sessions. The sessions were held at ABA meetings over a two-year period when large numbers of women from different parts of the country were gathered together. Trainees were provided with a training manual that includes detailed program procedures on preinterview preparation; a practical article on how to schedule, conduct, audio-tape, transcribe, and edit oral history interviews; information about donation instruments; and sample questions relating to gender, among other things. More recently, when on-site training for large numbers of women has not been feasible, we have con-

### Completed Oral Histories

Barbara Allen Babcock—Stanford, CA  
Barbara Aronstein Black—New York, NY  
Ruth C. Burg—Washington, DC  
Mary B. Cranston—San Francisco, CA  
Carol E. Dinkins—Houston, TX  
Sara-Ann Determan—Washington, DC  
Betty Weinberg Ellerin—New York, NY  
Betty Binns Fletcher—Seattle, WA  
Maryann Saccomando Freedman—Buffalo, NY  
Jamie Gorelick—Washington, DC  
Antonia Hernandez—Los Angeles, CA  
Irma Herrera—San Francisco, CA  
Zona Hostetler—Washington, DC  
Petra Maes—Sante Fe, NM (under seal)  
Barbara Mendel Mayden—Nashville, TN  
Marygold Shire Melli—Madison, WI  
Dorothy W. Nelson—Pasadena, CA  
Bettina B. Plevan—New York, NY  
Betty Roberts—Portland, OR  
Barbara Paul Robinson—New York, NY  
Lynn Hecht Schafran—New York, NY  
Grace Berg Schaible—Fairbanks, AK  
Mary Murphy Schroeder—Phoenix, AZ  
Shirley Adelson Siegel—New York, NY  
Dolores Korman Sloviter—Philadelphia, PA  
Fern M. Smith—San Francisco, CA  
Judith P. Vladeck—New York, NY  
Rosalie E. Wahl—Lake Elmo, MN  
Patricia M. Wald—Washington, DC  
Judith A. Winston—Washington, DC  
Miriam E. Wolff—Los Altos Hills, CA  
Rya Zobel—Boston, MA

ducted telephonic training sessions for new project interviewers, who also were provided with copies of the project's training manual and other background materials.

Preparatory to conducting an oral history, each interviewer is asked to engage in extensive preinterview research on her interviewee. Then follows a series of interviews that are audiotaped and transcribed. Each interview session is typically 1½-2 hours, and while there is not a "typical" oral history, many of the histories are taken in five, six, seven, or more sessions. A supplemental videotaped interview has been conducted with seventeen of the WTP's interviewees thus far; additional interviewees will be videotaped as resources permit.

In September 2008, the WTP was transferred from the Commission on Women in the Profession to the Senior Lawyers Division (SLD) of the ABA, which, unlike the commission, sponsors long-term projects. A committee was appointed to oversee the project and includes Carol Dinkins, Elizabeth A. Moody, Bettina Plevan, and Estelle Rogers. Brooksley Born serves as committee chair. Most committee members have been involved with the WTP either as interviewees or interviewers.

Linda Ferren has served as the project director of the WTP since the project's inception, handling day-to-day activities, which include program planning, arranging training sessions, developing program reports and materials, assisting interviewers and interviewees, tracking the progress of each oral history, researching potential interviewees and interviewers, reviewing oral histories, and communicating with repositories.

In addition to chairing the SLD Committee, Born has served as a key adviser to the project, a role she has played since the project began. Born has helped to plan and develop the project and has been solely responsible for all of its fundraising to date.

The historical importance of the WTP was underscored when the Library of Congress agreed to become a repository for the WTP collection. The Schlesinger Library at the Radcliffe Institute at Harvard University, which specializes in American women's lives and issues, has also expressed a strong interest in housing the WTP collection, and the project is currently involved in negotiations with the Schlesinger Library to make this a reality.

At the time of this writing, thirty-two oral histories have been com-

pleted. A list of these oral histories appears on page 12. Most have been sent to the Library of Congress where they are available to the public. Many of them are posted in their entirety on the SLD Web site at [www.abanet.org/srlawyers/oralhistory/](http://www.abanet.org/srlawyers/oralhistory/). Fifty-seven additional oral histories are on-going, and we are planning to initiate additional oral histories in the coming year. **VOE**

*Brooksley Born is a retired partner of Arnold & Porter LLP in Washington, DC, where she practiced for over thirty years. She chairs the SLD's WTP Committee and is a member of the SLD Council. She chaired the U.S. Commodity Futures Trading Commission from 1996-1999 and currently chairs the Board of Directors of the National Women's Law Center.*

*Linda Ferren currently serves as project director of the SLD's WTP and as the executive director of the Historical Society of the DC Circuit. Previously, Linda served as circuit executive of the DC Circuit, as executive director of the Commodity Futures Trading Commission, and as director of research, Evaluation and Special Projects of the Superior Court of the District of Columbia.*

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# Should You Invest in Exchange Traded Funds?

By the Investment Strategies Committee

**E**xchange Traded Funds (ETFs) have become a popular investment vehicle. Whether you should include them in your investment portfolio was discussed by Edward J. Finley II, a managing director of JP Morgan Private Bank, during a CLE program presented by the SLD Investment Strategies Committee at the 2008 ABA Annual Meeting. The following interview by Bruce Alan Mann, chair of the committee, reflects the views expressed by Mr. Finley during that program.

**BAM:** Ed, we've heard a lot about investing in ETFs recently, but I'm not sure we all understand what an ETF is.

**EJF:** An ETF is a passive vehicle that seeks to track an asset class benchmark, for example, the S&P 500. By using an ETF, you will add the "beta" (or market return) of an asset class to your portfolio without the manager risk (or return) inherent in an actively managed portfolio.

**BAM:** So, if I want to invest in emerging market securities but don't know which ones to invest in, I can buy an ETF?

**EJF:** Exactly. Although you cannot directly invest in an index, there are ETFs that aim to mirror the performance of emerging markets indices. There are also ETFs that track the S&P 500 index, Russell 2000 index (Small Cap Index), and MSCI Europe, to mention a few. Also, you might use an ETF as a hedging vehicle or to enhance returns, as there are ETFs that follow short strategies (will increase when its relevant index decreases), and some that use leverage (will deliver enhanced returns when its relevant index increases).

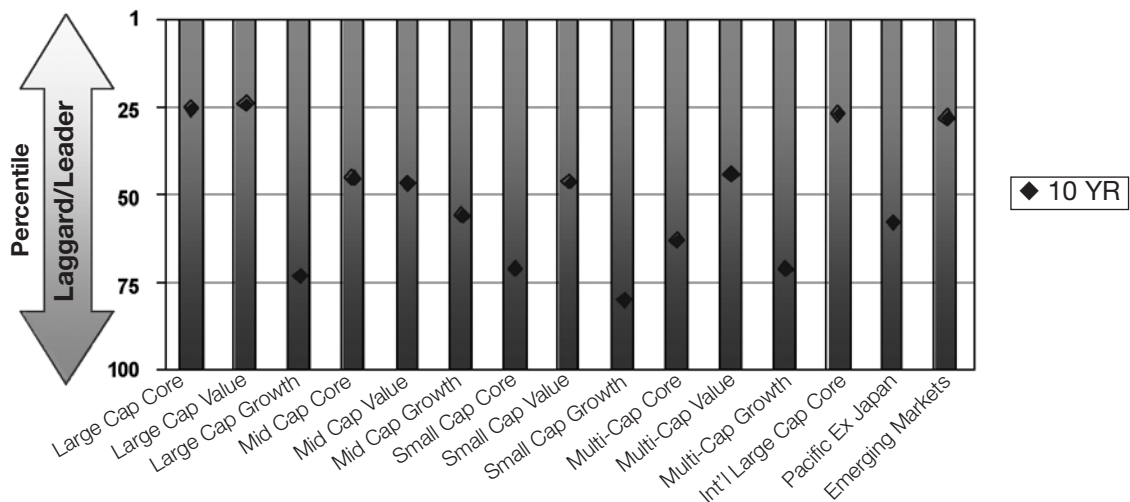
**BAM:** That sounds good for those of us who don't have the time to manage our own investments. But do ETFs have expensive management fees?

**EJF:** ETFs have minimal fees, usually 0.10 percent–0.70 percent, compared to over 1 percent for the typical actively managed mutual fund. Personal money managers will cost even more when you consider their fees (brokers will charge a fee per transaction, while discretionary money managers will charge an annual fee based on assets under management) in addition to investment vehicle fees. Not surprisingly, ETFs have attracted a large following among attorneys. The argument usually goes something like this: "I've read that over the long run it's not worth paying for active management in equities; besides which, I have no time to figure this all out. I'm just as well using ETFs."

**BAM:** That sounds good to me. Is there any reason not to rely on ETFs as an exclusive investment vehicle?

**EJF:** For all their benefits, there can also be a cost to using passive investment vehicles exclusively: performance. And the differences can sometimes more than justify paying someone to actively manage an equity portfolio. By choosing best-in-class managers, you should expect to pay them fees for the additional performance they should provide relative to their benchmark, therefore enhancing your portfolio returns. Also, in the same way that you should diversify among asset classes,

## Index Performance Percentile Rankings: 10 Year



### Lipper Mutual Fund Categories

The above data has been hypothetically ranked using Lipper percentile ranking methodology. Percentiles are based on a scale of 1 to 100 where 1 is the best and 100 is the worst category performer. Past performance is not indicative of future results.

Indices ranked within their respective Lipper categories; Large Cap Core: Russell 1000; Large Cap Value: Russell 100 Value; Large Cap Growth: Russell 1000 Growth; Mid Cap Core: Russell Mid Cap Core; Mid Cap Value: Russell Mid Cap Value; Mid Cap Growth: Russell Mid Cap Growth; Small Cap Core: Russell 2000 Growth; Small Cap Value: Russell 2000 Value; Small Cap Growth: Russell 2000 Growth; Multi-Cap Core: Russell 3000; Multi-Cap Value: Russell 3000 Value; Multi-Cap Growth: Russell 3000 Growth; International Large Cap Core: MSCI EAFE Net; Pacific Ex Japan: MSCI All Country Asia ex Japan Gross; Emerging Markets: MSCI Emerging Markets Gross.

Source: Lipper 4.1

you should also diversify among investment vehicles within those asset classes. Simply relying on one kind of investment vehicle, like an ETF, risks achieving the optimal risk-adjusted returns over time. Like all unprotected equity exposure, there can be a serious downside. Finally, “tracking error” would be another reason to avoid relying on ETFs as a sole investment vehicle. Tracking error is the difference in return between an ETF and its relevant index. So, just because you invest in an ETF, you shouldn’t necessarily expect to experience the same return as its index. Tracking error can be the result of not being able to fully replicate an index, expense ratios, or market participant behavior, for example.

**BAM:** You mean the fees payable to actively managed mutual funds and investment managers can be offset by their better performance? How do you know?

**EJF:** You can do it by comparing the indices that the ETFs mimic to the performance of active managers that invest in the same types of securities. Lipper, a division of Reuters, ranks the performance of mutual funds. If you were to plot the performance of an index among the mutual funds in that class, you could evaluate an ETF against managers. We’ve conducted this exercise among fifteen sub-asset classes (see graphic: Index Performance Percentile Rankings: 10 year) for the past ten

years (1998–2007), and only four indices would have ranked among the top quartile of active managers. The rest would be roughly among the bottom half of active managers. Not surprisingly, the four outperforming indices would have been U.S. Large Cap Core, U.S. Large Cap Value, International Large Cap Core, and Emerging Markets. These are large, rather efficient markets where the dispersion of returns among top and bottom quartile managers is historically small. In other words, active management isn’t as important in such asset classes. It is far more important in asset classes where returns are largely a result of the skill of the individual managers, risk management, and style diversification.

**BAM:** So, when is it good to consider using ETFs?

**EJF:** I would look to use ETFs in those asset classes where the dispersion of manager performance is low. An ETF might also be useful if your allocation to an asset class is too small to get adequate manager coverage or style diversification. Likewise, if you are seeking a tactical allocation to an asset class, it might make more sense to use an ETF, getting only market exposure, since manager alpha would likely take longer to materialize. You might also use an ETF if you don’t have access to a manager with a sufficient track record or robust performance in down markets. [VOE](#)

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## A Legacy of Liberty— Celebrating Lincoln’s Bicentennial

**2009** marks the bicentennial of the birth of Abraham Lincoln, regarded by many as our nation’s greatest and most eloquent president. Lincoln, who devoted much of his adult life to the practice of law, was the quintessential American lawyer-president. His background in law informed both his actions and his oratory.

The Senior Lawyers Division wants to encourage all experienced lawyers to share in this year’s Law Day activities. We encourage you to commemorate Abraham Lincoln, our sixteenth president, by exploring this rich and resonant theme—A Legacy of Liberty. Check out the ABA Law Day Web site, [www.abanet.org/publiced/lawday/2009/home.shtml](http://www.abanet.org/publiced/lawday/2009/home.shtml), for materials.

The Illinois State Bar Association (ISBA), in recognition of February 12, 2009—President Lincoln’s bicentennial birthday—has commissioned and given the Illinois Supreme Court a bust of Abraham Lincoln. It is titled “Prairie Lawyer—Master of Us All,” after a line in the Vachel Lindsay poem “Abraham Lincoln Walks at Midnight (in Springfield, Illinois).” It was sculpted by the internationally acclaimed sculptor John W. McClarey of Decatur, Illinois, who is well-known for his work involving the sixteenth president. The bust depicts a beardless Lincoln as he appeared during his time as an attorney when he lived

in Springfield and rode the old eighth judicial circuit.

Additionally, the court unanimously approved and signed the following resolution:

Whereas, A grateful nation observes the 200th Anniversary of the birth of Abraham Lincoln, and

Whereas, The lawyers of Illinois reaffirm their commitment to Lincoln’s struggle to preserve the Rule of Law and provide equal justice for all Americans, and

Whereas, Lincoln’s lasting influence on the cause of justice continues to inspire the People of Illinois to be touched by “the better angels of our nature.”

Therefore, The Supreme Court of Illinois, on behalf of the People of Illinois, accepts with deep and abiding gratitude the bust of Abraham Lincoln by the distinguished American sculptor, John McClarey, commissioned by the Illinois State Bar Association upon the occasion of the Lincoln Bicentennial in lasting tribute to Abraham Lincoln—“Prairie Lawyer—Master of Us All.”

To commemorate this important event, the ISBA has produced a printable 2009 calendar featuring the “Prairie Lawyer—Master of Us All” sculpture. The calendar is available for download for free at the ISBA Web site: [www.isba.org/teachers/lincoln/calendar](http://www.isba.org/teachers/lincoln/calendar). [VOE](#)

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## U.S. Supreme Court Trip Sunday, May 31 – Monday, June 1, 2009

**B**ecome part of history when you take your oath before the United States Supreme Court Justices as a new admittee to the bar of the Supreme Court of the United States on June 1, 2009. Enjoy social events, including a reception at the Supreme Court, after the bar admissions ceremony. Bar admission is open to 50 applicants.

The Senior Lawyers Division will pay the bar application fee of \$200 per applicant provided that they meet the bar application and U.S. Supreme Court Trip registration requirements.

Registration is open to ABA members, their families and friends who pay the \$800 nonrefundable registration fee.

Visit the 2009 U.S. Supreme Court Trip web page at [http://www.abanet.org/srlawyers/sct\\_web\\_page](http://www.abanet.org/srlawyers/sct_web_page) for more information, or to register and download bar admissions instructions and application.