

# Vulnerable Adults Act

## Statute Reform Group Meeting

Kelley Board Room, William Mitchell College of Law

Friday, November 2, 2007

### Introductions

- Jennifer Kirchen (DHS – AP Consultant), Arnie Rosenthal (OHFC), Kris Lohrke (OHFC), Cheryl Hennen (Ombudsman – Long Term Care (sitting in for Maria Michlin)), Deb Peterson (MN Attorney General office), Carmen Castaneda (APS in Hennepin County), Barb Doherty (Contractor with MNALL), Marsha Berry (Alzheimer's Association), Deb Siebenaler (DHS – AP Program Administrator), Jane Ochrymonycz (Alzheimer's Association, standing in for Iris Freeman), Todd Monson (Hennepin County Public Health), Jennifer Wright (St. Thomas Law School), Pam Zimmerman (Director of Information – Metro Area Agency on Aging), Maura McNellis-Kubat (DHS – Licensing, Investigations), Jerry Kerber (Director of Licensing Division DHS – Maltreatment Determinations), Roberta Opheim (Ombudsman – Mental Health & DD)
- Mark Wandersee and Harbir Kaur (ElderCare Rights Alliance)
- Kevin Hansen (Wm. Mitchell College of Law, standing in for Kim Dayton and ElderCare Rights Alliance)

- handing out the review document from the last meeting (prepared by Tom)
- breaking down the VAA reform needs (committees)
  - penal code
  - criminal aspect
  - protections

### What's In Progress Now

- DHS Update
  - a group has been established to work on CMS' (Center for Medicaid Services – Federal Auditors of the OHFC) requirements relating to waivers (elder waiver, DD waiver, live in the home and receive services)
  - outcomes of services and client satisfaction level
  - investigating the system of investigations (quality of that process)
  - examining the incident reporting system (VA reports, quality assurance)
  - implementing SSI's project (Common Entry Point information being entered into a database for ease of access)
    - piloting in Carver and Washington counties, then Hennepin
    - SSI system capturing all calls that are a CEP report
    - should be able to connect the quantity of the reports with the disposition of the investigations subsequently conducted
  - quality assurance and maltreatment reporting (children and adults)
  - CMS in Chicago concerned about the CEP system in place
    - timing of the reports from facility and how long it takes to get to the office of OHFC

- hope new system will take care of some of that
- waiting for written information
- counties are not accepting reports from facilities (whether or not it's reportable or being passed on to a lead agency)
  - maintaining a record by each county of calls that are not prosecuted/investigated/followed-up on
  - the data is relevant to our conversations
- on-going discussions with health plans about what a Vulnerable Adult is
  - how to address someone that's in a "gray" area of definition
  - going to the issue of maltreatment (or is the case-worker having a disagreement over a certain issue)
  - eclectic choice vs. a "substituted-judgment/undue influence" choice
- mandatory reporters vs. volunteer reporters
- separate out Elder Abuse (someone victimized) and making sure that person is not characterized as a Vulnerable Adult
  - making a clear distinction through the process
  - definitions of Elder Abuse and Vulnerable Adult (other states' definitions)
- more people in assisted living rather than nursing homes
  - the bulk of investigations from CEP are going to the counties (equal distribution of 1/3 each to OHFC, DHS, and the County...now in Hennepin, 50% are going to the county itself (resource allocation))
- APS: County Elderly Waiver Program
  - tool that the county could use
  - HMO's coming in (using care systems rather than county workers)
    - rural system
- Child Protection model
  - "structured decision making": process for handling phone calls
  - similar process used out in California (Riverside)
  - version of it being used in Wisconsin, as well
- identified client not becoming the "child" in the system
  - where does the adult client fall (take a lead in their own decision-making)
  - who makes the decision if you have an adult?
- the number of people with mental impairment
  - right now, 5.1 million people in the U.S. with Alzheimer's
  - 60-70% of those with dementia have Alzheimer's
  - by 2050, there will be 11-16 million people in the U.S. with Alzheimer's
    - CDC Alzheimer's predictions (it's a disease of aging)
  - care for family members at home: huge backdrop of our focus
  - numbers that represent the population, but the population diagnosed with dementia or Alzheimer's is only a third of the people who actually have the disease/impairment
  - informing physicians they can diagnose early (instead of waiting for autopsy) and know there's something that can be done
    - reducing the negative stigma
    - improving quality of life
    - giving opportunities for life planning documents (conservatorship)

- safety of people
  - wandering about or driving around
  - individual vs. the population at large
- funding for Vulnerable Adults
  - Federal Law that didn't pass
  - Elder Justice Act (someone who was working on it recently left)
    - been trying to pass for years, hasn't yet
- disqualified transfer
  - giving a "gift" away vs. being a victim
  - VA not able to get services as needed
- definition of a lead agency and the duties implied with that designation
  - inter-agency agreements

### Suggestions and Needed Revisions

- neglect resulting in death is a gross misdemeanor in MN
  - killing an animal can be a felony
  - why shouldn't this be a felony too?
  - city and county attorneys and AG want neglect resulting in death to be a felony level offense and proper punishment for the offender
  - having to double up two crimes to get it to felony level
- financial exploitation of VA
  - theft under or over \$2500
  - statute of limitations is at 3 years
  - another division needed
    - over \$35K having an expanded statute of limitations to 5 years (similar to theft by false representation or swindle)
    - the more taken requires more time to take that larger amount
    - won't be discovered until that large amount is gone (and then the statute of limitations has expired)
    - POA: money starts being taken after a few days
      - improper transfers discovered faster
    - having a look back period on funds
- categorical (living) vs. functional (diagnosis) vulnerable adult
  - designation at 62 or 65 years of age
  - "early onset" diagnoses available (switching of assets after a diagnosis)
  - adding another category for age
- education of mandated reporters
- counties maintaining detailed records
  - cases they investigate and cases they don't pursue
- city and county attorneys and the AG wanting to see the crime of neglect raised to a felony level (AMA is against this)
- consumer fraud statutes vs. VA statutes
  - coordinated together, instead
  - create provisions for recovery of the funds
- if a facility terminates an offense-committing individual, their investigation may end (so there is a need for follow-up by OHFC or DHS or APS)

- differentiate between employer and employee responsibility
  - consequences for all levels within the chain of authority, not just punishing the PCA or worker that may have committed the offense (administration can be equally responsible through policies, procedures)
- coordination of domestic violence statutes with Elder Abuse
  - looking to see what other states may have done in that regard
- dementia: those who wander
  - amber alert (however, no need for criminal involvement)
  - currently, it's 24-48 hours be declared a "missing person"
- training for individuals and the VA law (scope)
- safety
  - training for workers dealing with a VA (dementia or not)
  - Alzheimer training
  - statute service
  - resident
  - nursing home, assisted living facility, community member...
- lots of agencies can potentially become involved: care coordination
  - who does what?
  - is there a lead agency appointed?
  - addressing alternate forms of care ("ALF Light")
- allocation of funding
  - child protection vs. adult protection
  - county under stress (50% of need vs. previous 33.3% of need)
- VA: categorical definition
  - someone potentially misusing VA "protection" to veto an individual's choices/rights (abuse of the system?)
- recovery of stolen funds
  - consumer fraud protection (special damages)
  - penalty and private right of action
  - consumer protection statute
  - currently there are different age definitions (62 vs. 65)
  - public system and a private right of action (recover money)
  - criminal vs. civil
  - but is it possible to support ageism by doing this?
  - criminal law requires person to be age 62
  - to get the enhanced penalties
- look at Minn. Stat. § 609.2336 and Minn. Stat. § 325(f)
- need for a strong PREVENTION rather than a strong RESPONSE
  - education
  - under-funded mandates
- problems presented by forms of electronic communication
  - caregivers need to know legal forms of communication for care recipient
  - new ways to exploit the elderly (fraud scams → email/phone)
  - easier access to elderly by perpetrators
    - victims of sexual assault or domestic violence (or pornography) have their perpetrators facilitated by technology

- review maltreatment
  - disqualification of an individual from providing care
  - language of “serious or recurring”
  - consequences for perpetrators
  - licensed person (nurse, social worker, PCA, mental health professional)
- Common Entry Point (CEP)
  - clarity of what’s investigated and what isn’t
- mental inquiry
  - quality of life
  - constant abuse
- failure to report
  - called a “so what” law by some
  - city attorney determining whether or not to prosecute a misdemeanor
    - inconsistent levels of prosecution across the board?
- confidentiality of info
  - restricted access makes it harder to help individuals
  - need to know more of the professional licensing board’s workings
- when the individual is a PCA and committing offenses
  - terminating the PCA’s number immediately (can’t be in the program)
  - DHS pursuing the offender for alleged offenses
- CDCS program
- facility-based vs. community-based
  - background checks on PCA’s
  - qualifying criteria to receive waiver money for giving/receiving care
  - what happens when you have an “informal caregiver”
- “if worker is terminated, there is not an investigation”
  - steel workers scenario
  - internal investigation → possible failure to report?
  - then, after internal investigation, need a further investigation by an agency such as OHFC or DHS
  - go after the person doing maltreatment (but need resources for it, too)
- reporting vs. investigating
  - distinguish between the two
- “failure to report” language
  - need a re-examination of the wording
  - concerns for an appeal
- consequences for board members (all levels of the care facility when an alleged incident occurs...not just the perpetrator, but the administration too)
  - consequences for all levels of involvement
- California: banks as mandated reporters
  - financial exploitation
  - if not mandated reporters, some way to have access to bank records
    - allow them to report
    - educational component
    - pairing with law enforcement
    - law enforcement working together with APS

- background checks
  - statute
  - money
  - okay money transactions
  - how are they written?
- POA Documents
  - criminal background checks for attorneys-in-fact
  - more careful monitoring of attorneys-in-fact
  - sexual assault aspect
  - database of information and potential ways to access the information
- PCA's
  - training
  - consequences for their actions
- "Date of Destruction"
  - unsubstantiated information is gone (that would help an investigation)
  - tracking of people is limited only to substantiated information
  - hindrance
- emotional and verbal abuse
  - "malicious"
  - definitions of each form of abuse and "malicious" so courts have to operate within those set definitions
- abuse vs. neglect
  - outcomes could potentially be different
  - denying abuse: not admitting it
    - different to substantiate it
    - change in standards is needed
- assisted living facility
- how many ALF's are there?
  - marketing restrictions (lots of clever ways these places advertise)
  - 1400 or so out there, but more with different classes of licenses
  - education of rules and regulations pertinent to those providing care (increase the knowledge the staff members have for their job)
- CMS
  - accountability and compliance with their requirements/standards
  - not hearing about things: missing reports out there somewhere
  - what is required to happen before something can be reported?
- accountability: facility too
- training/educated
  - who's a mandated reporter?
  - what's REQUIRED to be reported?
  - home/community-based services
  - what are the responsibilities of a mandated reporter?
  - what needs to be recorded?
- elderly with no support systems
  - no family, friends, or caregivers
  - "unbefriended"

- potentially an increased target
- protection and identification needed for these individuals
- emergency guardianships
- eliminate the VA review panel OR beef up the current system (more power)
  - Minn. Stat. § 626.557 (?)
- duties vs. tools
  - OFP (person or their guardian can only apply for it, right now)
  - APS wants the opportunity to be the petitioner for an OFP on behalf of the vulnerable adult
- guardian/conservator
  - data for the individual representing the ward
  - release of information when the individual is incapacitated
    - they can't do so if incapacitated, so how do you get that info?
  - public guardian or conservator (subdivision)
  - data practices act (civil)
- what happens when the guardian is the perpetrator
  - compelling court proceedings? clarify?
  - case management/accountability
  - government workers violating government laws (tracking/prosecution)
- whistleblowers
  - no retaliatory firing or practices
  - same for the vulnerable adult still within the facility
- facility discharges to an unsafe situation (when information of such is available)
- limited by money
  - prioritizing what can be done
  - definitional revisions will help, as will assisting in the allocation of funds more evenly throughout
- defining a facility and the complaint process a facility must follow
- conservatorships and POA
  - make it more clear/easy on how to compel an accounting?
    - who can compel the accounting
    - advocates? attorneys? non-family members?
    - specific statute section to address this?
  - prevent financial abuse more easily this way

#### Potential Categories (for Suggestions/Revisions)

- Education/Training
- Protection from Injury
- Criteria for Reporters
  - Definitions
  - Data Collection Issues (uses, methods, databases)
- Penalty Codes
  - Criminal Aspects
- Funding (Budget Neutral)
- Short Term Solutions vs. Long Term Solutions
- Protections for Autonomy in Individuals

Who Else Should Be Included

- MN Medical Association (MMA)
- CarePro
- MHHA
- MN Nurses Association Board
- Hospital Association
- County Directors (greater MN and Metro areas)
- Home Services
- Home Care
- Unions
- County Attorneys
- DHS policy (PCA – continual care)
- Law Enforcement (Police Chiefs)
- ARRM