

Vulnerable Adult Justice Project

Friday, December 10, 2010 from 2-4pm

William Mitchell College of Law, Room 123

Attending: Jane Ochrymowycz (CEJP Advisory Board WMCL), Gary Smith (WMCL), William Brown (WL Brown Law Office), Iris Freeman (WMCL), Doug Beardsley (Care Providers of Minnesota), Suzanne Elwell (MN Dept of Public Safety, Office of Justice Programs), J.J. Hasbargen (MN Attorney General's Office), Amy Sweasy (Hennepin County Attorney's Office), Jenna Bowman (Alzheimer's Association), Tara Patet (St Paul City Attorney's Office), Phil Carruthers and Ben Rosene (Ramsey County Attorney's Office), Sheri Hansen (Lac Qui Parle County Adult Protective Services), Kevin Hansen (Ombudsman for MH/DD), Lynda Olson, Kimberly Ziegler and Steve Dopson (Ramsey County Adult Protection), Jerry Kerber and Maura McNellis-Kubat (DHS-Licensing), Sue Voigt and Nate Swanson (Voigt, Klegon, and Rode, LLC), Carmen Castaneda (Hennepin County Adult Protection), Lisa Godon (Minneapolis City Attorney's Office), Darrell Shreve (Aging Services of MN), Janet Golden and Ellen Longfellow (ElderCare Rights Alliance), Kris Maser (Maser and Amundson), Barb Doherty (Little Brothers of MN), Greg Marita (Minneapolis Legal Aid Society), Jim Arlt (MN Dept of Public Safety, Interim Director of Alcohol and Gambling Enforcement Division) Deb Tulloch (Washington County Adult Protection), Larry Houk, member, and John Selstad, staff (Minnesota Board on Aging), Nick Halbur (Attorney in St. Paul), Stephanie Zugschwert (Minnesota Alliance on Crime)

2:00 Welcome, Introductions & Updates

The Forensic Nursing Home, after many delays, has opened for 15 residents in St. Peter. The state facility is meant to house residents ranging from committed mentally ill and dangerous to convicted sex offenders.

Updating the VAJP Roster: We have a longer list of participating stakeholders and involved public agencies than we did when the roster was last updated in 2009.

2:15 Vulnerable Adult Justice Project Legislative Initiative for 2011

- Criminal neglect of a vulnerable adult - Darrell Shreve presented and conducted discussion about the following proposal on behalf of Aging Services of MN, Care Providers of MN, MN Home Care Assn, MN Medical Assn, and MN Hospital Assn.
- **Providers' Proposed language for 609.233.** This would be a new subdivision 2, and the current subd. 2 would become subd. 3. We also propose a revised penalty subdivision that removes a penalty proposed for "substantial" bodily harm.

Sub. 2. A caregiver is guilty of a felony and may be sentenced as provided in subdivision 2a if the caregiver, with intent to cause great bodily harm, intentionally fails to perform an act that the caregiver knows is necessary to maintain or preserve the life or health of the vulnerable adult and the caregiver's failure causes great bodily harm unless the act is an accident or therapeutic conduct as defined under 626.5572, subd. 3 and 20 or the caregiver acted reasonably and in good faith.

Subd. 2a. Penalties for Felony Violation. (a) A person who violates subdivision 2 and causes great bodily harm may be sentenced to imprisonment of not more than five years or to a payment of a fine not more than \$10,000.00, or both.

For reference and comparison, the following is the proposal made in September by the VAJP Criminal Code Committee:

609.233 CRIMINAL NEGLECT.

Subdivision 1. **Crime Gross Misdemeanor.** A caregiver or operator who intentionally neglects a vulnerable adult or knowingly permits conditions to exist that result in the abuse or neglect of a vulnerable adult is guilty of a gross misdemeanor. For purposes of this section, "abuse" has the meaning given in section 626.5572, subdivision 2, and "neglect" means a failure to provide a vulnerable adult with necessary food, clothing, shelter, health care, or supervision.

Subd. 2. Felony. A caregiver or operator who intentionally deprives a vulnerable adult of necessary food, clothing, shelter, health care, or supervision, or intentionally forsakes a duty to provide food, clothing, shelter, health care, or supervision when the caregiver or operator is reasonably able to make the necessary provisions and causes substantial or great bodily harm is guilty of a felony and may be sentenced as provided in subdivision 2a.

Subd. 2a. Penalties for Felony Violation. (a) A person who violates subdivision 2 and causes substantial bodily harm may be sentenced to imprisonment of not more than two years or to payment of a fine of not more than \$5,000.00, or both. (b) A person who violates subdivision 2 and causes great bodily harm may be sentenced to imprisonment of not more than five years or to a payment of a fine not more than \$10,000.00, or both.

Subd. 2 3. **Exemptions.** A vulnerable adult is not neglected or deprived, and a caregiver has not forsaken a duty, under subdivisions 1 or 2 above for the sole reason that:

(1) the vulnerable adult or a person with authority to make health care decisions for the vulnerable adult under sections 144.651, 144A.44, 253B.03, or 524.5-101 to 524.5-502, or chapter 145B, 145C, or 252A, refuses consent or withdraws consent, consistent with that authority and within the boundary of reasonable medical practice, to any therapeutic conduct, including any care, service, or procedure to diagnose, maintain, or treat the physical or mental condition of the vulnerable adult or, where permitted under law, to provide nutrition and hydration parenterally or through intubation; this paragraph does not enlarge or diminish rights otherwise held under law by:

(i) a vulnerable adult or a person acting on behalf of a vulnerable adult, including an involved family member, to consent to or refuse consent for therapeutic conduct; or

(ii) a caregiver to offer or provide or refuse to offer or provide therapeutic conduct;

(2) the vulnerable adult, a person with authority to make health care decisions for the vulnerable adult, or a caregiver in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the vulnerable adult in lieu of medical care, provided that this is consistent with the prior practice or belief of the vulnerable adult or with the expressed intentions of the vulnerable adult; or

(3) the vulnerable adult, who is not impaired in judgment or capacity by mental or emotional dysfunction or undue influence, engages in consensual sexual contact with:

(i) a person including a facility staff person when a consensual sexual personal relationship existed prior to the caregiving relationship; or

(ii) a personal care attendant, regardless of whether the consensual sexual personal relationship existed prior to the caregiving relationship.

History: 1995 c 229 art 2 s 4; 2004 c 146 art 3 s 44

No in-person meetings have yet been held between the providers' group and the VAJP criminal code subcommittee.

Providers had four goals in writing new language:

1. Deal with the caregivers split-second decisions
2. Remove the duty requirement
3. Limit to cases involving "great bodily harm"
4. Make the affirmative defenses explicit

Issues raised about the providers' proposal:

1. Operator was left out (current language = "caregiver or operator")
 - Providers did not want to expose corporate offices to liability
 - Note in definition: "caregiver" includes the facility, but not the management, head nurses, who are not within the definition of caregiver—just the person committing the offense and the facility itself
2. Intent to cause great bodily harm
 - Concern: If accused intended neglect but did not intend to cause the victim great bodily harm, the neglect cannot be proved

-Concern: including the intent to cause the specific great bodily harm makes this provision an anomaly in the MN criminal code

-Recommendation: take out “great bodily harm” and re-insert “substantial”.

-Recommendation: simply remove the “intent to cause great bodily harm” element.

3. Concern: Providers intentionally added “health” and removed “health care” and other specific acts of neglect, such as supervision.

4. Concern about “accident” as a concept that exists nowhere in the MN criminal code. If a prosecutor fails to prove the element of intent, then it IS an accident.

5. Concern: including the language, “...the caregiver knows is necessary to maintain or preserve the life or health...” because that adds the element of proving what the accused did or did not know at that moment, as opposed to what they should have known or what a reasonable caregiver would have known.

Darrell will work further with the providers to set up an in-person meeting with the VAJP Criminal Code Committee to consider further alternative language in the goal of reaching a compromise. That meeting will occur ASAP in January. Legislative work on the eight VAJP proposals approved earlier this year will go forward immediately, as there is no reason to delay. Amendments to the VAJP initiative can be made later if appropriate.

3:00 Break

3:10 Discussion of Possible Legislative Proposal on investigative findings – Jerry Kerber, DHS

-In the earlier version of the VA law, there were no evidentiary standards (“substantial evidence”)

-Currently, the three findings for a completed investigative finding are “substantiated”, “false”, and “inconclusive”. Kerber suggests a new standard so we don’t have so many “inconclusive” responses. Oftentimes, the investigators don’t want to label a complaint false and the reporter a “liar”, so they will instead write “inconclusive” rather than “false” more than they probably should.

-Possibility he offers: “Maltreatment not determined”, and “Substantiated” depending on whether or not there is a preponderance of the evidence that an act that meets the definition of maltreatment occurred.

-Concern: Any change in the language of findings should apply to all Lead (Investigative) Agencies: MDH, DHS, and counties.

-Concern: “no determination” may not be a terrific wording choice—it sounds as if the investigators did not want to make an investigation or a determination.

3:25 Legislative Proposal to combat scams against the elderly – Jim Arlt, DPS

-Jim Arlt has worked on the anti-fraud unit; complaints have grown exponentially—over 90,000 since the fall of 2007(?), 30 million or more is lost; organized criminal games

-Working more closely with adult protection; a lot of victims are vulnerable adults who continue to fall victim to a scam until they are out of money

-Program has charged a number of people. They have been able to return money to people.

-Rep. Atkins introduced HF 3850 in May 2010 to begin discussion on the topic. Jim wants VAJP to be aware of the proposal and support it if possible. Link to bill text:

<https://www.revisor.mn.gov/bin/bldbill.php?bill=H3850.0.html&session=1s86>

-Summary points of bill: Expand their ability to look into fraud in the area (Craig's List, etc.); require a solution for telephone books on caller ID spoofing; requiring telephone companies to block incoming international calls if the consumer requests it; telephone companies respond to an administrative subpoena; turn off telephone service on notification; bill would be delivered to the properly ID'd person; requires money transfer company to notify sender and to have written release from sender when money is picked up or transferred where it should not be; must blacklist persons from using service; money transfer companies would have to report fraud and reply to subpoena; this is a well under-reported crime; money transfer companies would be required to pay a fee for funds transferred to/from MN.

-Prosecution is done where crime is occurring; easier to charge in Canada than to extradite and charge here.

-Question of leadership on bill as Rep. Atkins won't be chairing the Commerce Committee in 2011. Will there be bipartisan support for the bill? All the original provisions may not be in there, and there will be some opposition. AARP is meeting with DPS and Rep. Atkins next week to discuss the bill.

-Credit unions and banks aren't current included; banks currently already work with this type of investigation on a regular basis and can report already

3:40 Center for Elder Justice & Policy Updates

- Keystone class, internships and externships

-Keystone class starts January 11.

-Kevin (Ombudsman MH/DD) and Greg (Minneapolis Legal Aid) each will have keystone students

-VAJP participants should note opportunities to propose internships or externships to the Center. Christine Bjorkman is currently one of Professor Dayton's Research Assistants and will continue with the VAJP next semester.

- Grant activities

-The Center has sent Letters of Inquiry to four local foundations to request permission to submit a full proposal for funding to support the VAJP.

-Iris begins a grant project in January— to develop a model FAST (financial abuse specialist team). The grant, from the Stevens Square Foundation, goes through October 2011. Questions about advisory committees and scope? Contact Iris.

3:45 Wrap Up and Schedule small group meetings

- Legislative Track Team

-Iris, Kevin, Jane, Deb Holtz, Carmen (when and if available), Larry Johnson, Stephanie Zugschwert and interested others. You don't have to be, in the vernacular, a "Capitol Rat" to participate. Deb Tulloch and Steve Dopson will attend some meetings. Tara Patet will receive all LTT communications.

-First meeting: Friday, January 7, 2011 at the State Office Building Lower Level Cafeteria at 2:00 p.m. These meetings are primarily to share updates and divvy up the coming week's assignments...and so they are as brief as we can make them.

- Public Awareness Working Group

-Lynda Olson and Kimberly Ziegler, Jenna Bowman, Jan Golden, William Brown, David Joyslin, Deb Tulloch

-What we hope to do over the course of the year: develop a plan for kinds of awareness activities we can do, given limited resources and time

-Carmen's notes from the November 12, 2010, meeting were duplicated and shared with the Working Group.

-The Public Awareness Working Group will meet at the ElderCare Rights Alliance on Wednesday, January 26 at 3:00 p.m. Jan Golden will send details about the meeting and Bloomington location beforehand.

2011 Meeting Dates and Times – Second Fridays of the month at WMCL. We'll send information about room assignment as soon as we are notified.

Thank you, VAJP stakeholders, for a full year of work in 2010!