The Minnesota Vulnerable Adults Protection Act: Analysis[1]

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I. INTRODUCTION

The Vulnerable Adults Protection Act (Act), Minn. Stat. sec. 626.557, has as its purpose the protection of adults, who, because of a variety of circumstances, are vulnerable to abuse and neglect. Enacted in 1980 (Laws 1980, ch. 542), the Act takes a multifold approach to the problem of protection. They key operative features of the Act are the following:

- A definition of the class of persons to be protected by the Act, vulnerable adults. The definition rests on alternate talismans of vulnerability: dependency on institutional services, and physical, mental or emotional disability which makes self-reporting of abuse or neglect unlikely.
- Definitions of abuse and neglect.
- A requirement that certain persons report suspected abuse or neglect of vulnerable persons.
- Requirements that local and state governmental agencies investigate reported abuse and neglect.
- A requirement that local social service agencies proved protective and ongoing social services to victims of abuse and neglect.
- Protections for reporters and victims of abuse and neglect against retaliation.
- Provisions for the enforcement of the law by both public and private action.
- A requirement that governmental agencies coordinate their activities under the Act.
- Provisions to prevent or lessen the risk of abuse and neglect of vulnerable adults.
- A requirement for public education and out reach concerning the Act.

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[1] I am grateful for the assistance of Luther Granquist, Advocacy for Developmentally Disabled Persons in Minnesota, and Thomas Campbell, Minnesota Department of Human Services.

The Act is supplemented by Rules promulgated by the Minnesota Department of Human Services. Minnesota Rules Parts 9555.7100 to 9555.7700, titled Protective Services to Vulnerable Adults, deals with the investigation and protective service provisions of the Act. Minnesota Rules Parts 9555.8000 to 9555.8500, titled Reporting Maltreatment of Vulnerable Adults in Licensed Facilities, applies to all facilities required to be licensed to serve adults by the Human Services Licensing Act, Minn. Stat. secs 245A.01-.16. As of this time, the Minnesota Department of Health, which also has investigation and enforcement responsibility under the Act, has promulgated no rule regarding these activities. However, the Office of Health Facility Complaints has guidelines it follows in making investigations under the Act.

II. GENERAL FUNCTIONING AND POLICY OF THE ACT

The central theme of the Act is the provision of protection to adults who are particularly unable to protect themselves against abuse and neglect. The Act keys in on two proxies for vulnerability: First, a person is considered to be vulnerable if he or she is unable or unlikely to report abuse or neglect him or herself. A person who can easily call for help, it is reasoned, is less vulnerable to harm than one who cannot ask for outside assistance. Second, the Act identifies institutionalization as a proxy for vulnerability. Institutionalization generally suggests impaired functioning and relative isolation from the outside world, a combination which is likely to increase one's vulnerability to harm.

Having identified a group in need of added protection, the Act sets out three broad approaches: First, vulnerable adults are to be protected directly against identified abuse and neglect through the provision of protective social services. Second, circumstances producing identified abuse and neglect are to be corrected and/or punished. Third, caretakers of vulnerable adults are expected to develop plans identifying and minimizing risks of abuse and neglect.

Other sections of the Act serve to support this central scheme by encouraging and protecting compliance with the act, punishing non-compliance, and increasing public awareness.

III. DETAILED ANALYSIS OF THE ACT

A. Definition of "Vulnerable Adult"

Central to the operation of the Act is the definition of the term "vulnerable adults." The definition is central because it identifies the outer boundaries of the reporting, investigation and protective services requirements of the Act.[2] Limiting its reach to persons 18 years of age or older[3], the Act provides two alternate and parallel tests of vulnerability. In this paper, these tests, or components, are identified respectively as the categorical component and the functional component. A person who fits either one of these components is considered a "vulnerable adult" for purposes of the Act.

1. Categorical Component

The purpose of the categorical definition of vulnerability is to provide a ready and easily applicable definition which will include within its sweep most of the individuals who are in need of the Act's protection. The categorical definition keys on a person's dependency on institutional services as a proxy for vulnerability. Dependency on such services is a useful proxy because it is objectively and unambiguously determinable, thus facilitating a clear categorization of individuals. Also, use of such services generally accompanies some impairment in independence, and often entails some isolation from the general society and dependence on professional caretakers.

Key to the definition is the term "facility," which includes, roughly speaking, hospitals, nursing homes, and other agencies licensed by the departments of health or human services to serve adults. Adults are vulnerable if they are residents or inpatients of facilities, or if they receive outpatient services from a facility licensed to serve adults by the department of human services. However, people receiving outpatient services for chemical dependency or mental

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[2] Individuals who are not "vulnerable" as defined by the Act may nonetheless be entitled to receive social services. Thus, the definition is not co-extensive with entitlement to social services.

[3] Persons under 18 are protected by the Reporting of Maltreatment of Minors Act, Minn. Stat. sec. 626.556.

health are not, for that reason, considered vulnerable. Finally, any one who receives services from a "home care provider" licensed under section 144A.46 satisfies the categorical definition.

The rationale for the apparent complexity of this definition is this: Residents and inpatients are thought to be at greatest risk to abuse or neglect since they are isolated from the outside world, dependent on the staff, and sufficiently impaired to need residential services. People receiving outpatient services for chemical dependency and mental illness are clearly less isolated and less impaired. People receiving home-based services, however, may be both isolated from the outside world and correspondingly dependent on service providers, both conditions suggesting increased vulnerability.

The categorical arm of the definition was placed in the law in order to provide some certainty as to the membership in the class of vulnerable adults. The incidence of vulnerability among those falling within the definition was thought to be high. Residency in a facility and the receipt of services from a facility, are objective facts. Hence, this section of the definition requires no exercise of judgment or discretion, and is likely to encompass within its scope a large number of persons who need the Act's protection. Of course, this section is somewhat overbroad, in the sense that not all those included would be considered "vulnerable" in the general sense of that term. Nonetheless, it was though that the certainty achieved through the use of this categorical definition outweighed the overbreadth of the definition.

No doubt, some questions will arise in the application of this definition. One which comes immediately to mind is this: Is a person who falls within the definition of "vulnerable adult" because of the receipt of services from a day facility considered to be vulnerable at other times during the day? At other locations? For example, suppose a person attends (receives services from) a Developmental Achievement Center (DAC) but lives at home with his/her parents. Since the DAC is licensed under the public welfare licensing act, the person would be a vulnerable adult. Clearly, staff at the DAC would be subject to the reporting requirements of the Act (see below). Would the person, however, be considered vulnerable under the first prong of

the definition during the evening? Or, if the person left the DAC during the day for a trial work period at a sheltered workshop, would he/she be considered vulnerable under this portion of the definition while at the workshop?

The answers to these questions are not spelled out in the Act. In this author's opinion, however, categorical vulnerability (that is, qualifying as a "vulnerable adult" under the first prong of the definition) should carry over beyond the facility from which the person receives services, and should apply at least in those situations in which it is known that the person is "categorically vulnerable."

The second alternative prong of the definition is as follows:

A person is a "vulnerable adult" who

> regardless of residence or type of services received, is unable or unlikely to report abuse or neglect without assistance because of impairment of mental or physical function or emotional status.

This is referred to as the "functional" prong of the definition because it depends upon an analysis of the person's functioning because it depends upon an analysis of the person's functioning for its application. This prong of the definition is intended to pick up those persons whom we would consider vulnerable in the general sense of that term, but who are not included in the categorical prong. It is the more difficult prong to apply. Unlike the categorical prong, its application depends upon the exercise of a certain amount of judgment.

The introductory clause, "regardless of residence or type of services received," emphasizes that the two prongs of the definition are disjunctive, satisfaction of either being sufficient to trigger the protection of the Act. In particular, the clause should make clear that even those persons who are excluded from the categorical prong (e.g., because the services they are receiving are outpatient chemical dependency or mental health services) can be considered vulnerable if they satisfy the functional prong.

2. Functional Component

The functional prong focuses, as directly as possible, on the likelihood that a person will report abuse and neglect. Although there is more to vulnerability than the unlikelihood that a person will report abuse or neglect, such unlikelihood is evidence of the most severe vulnerability. The Act has prevention of abuse and neglect as a goal. Its most direct thrust is to intervene in those circumstances where the person's vulnerability itself is an impediment to intervention.

Keeping this purpose in mind, the functional prong of the definition should not pose overwhelming difficulties of application. Let us explore the implications of this part of the definition. There are four components of this definition: To be considered vulnerable, a person must be (1) unable or unlikely to (2) report abuse or neglect (3) without assistance (4) because of impairment of mental or physical function or emotional status.

First, we note that the inability or unlikelihood of reporting must be caused by the impairment. In many cases, such causation will be clear and objectively determinable. Persons without the ability to communicate at all clearly fall within the definition. In other cases, causation may be more subtle. For example, a mentally retarded person may be able to communicate, but may not, because of the mental retardation, know how to describe the abusive or neglectful behavior. Or, the person's social retardation may make it unlikely that he/she would assert him/herself to make a report.

Note that the definition is triggered by either an inability or an unlikelihood of reporting abuse or neglect. The purpose of this disjunctive is to avoid metaphysical questions about the meaning and nature of "ability." The triggering factor is the likelihood of the absence of a report, it being less important whether the person could not, or simply would not, make the report. The definition is intended to include not only those who lack the physical or behavioral competencies to report (no or inadequate communication skills, lack of mobility), but also those whose emotional status makes it unlikely that they will exercise the skills they otherwise have.

Next, note that the inability or unlikelihood of reporting must be caused by an impairment. The key idea here is that there be some nexus between the unlikelihood of a report and some lack of free informed choice. This represents a dual policy choice: First, it limits the intrusive protections of the Act to those persons who have not in some sense voluntarily decided not to protect themselves. Second, it aims the limited resources of the state at those who are more in need of them. Note that the class of persons who meet this criterion is not co-extensive with the class who need social services. Rather, this is the group that needs the extra protections of mandatory reporting and abuse prevention planning.

In many situations, the existence of an impairment, and its connection to the person's ability or likelihood of reporting, will be quite clear. Persons without the ability to communicate, for example, clearly fall within the definition. In other cases, either the existence of the impairment, or its connection to reporting, will be more subtle. For example, a mentally retarded person may be able to communicate, but may not, because of the mental retardation, now how to describe the abuse or neglectful behavior. Or, the person's social retardation may make it unlikely that he/she would assert him/herself to make a report.

Perhaps the most difficult determinations will involve "impairment of emotional status." If a person, for example, expresses reluctance to report abuse because of fear of retaliation, does that fear constitute "impairment of emotional status?" If a person refuses to report neglect by his/her caretaker because he/she prefers to die, is that indicative of emotional impairment?

In this author's opinion, determining whether a person is "vulnerable" based upon the unlikelihood of a report should depend upon whether the person has made an informed and voluntary choice not to report. In other words, does the person know the consequences of not reporting? Is he/she capable of weighing the consequences of not reporting against the consequences of reporting? Has he/she, in fact, balanced those alternatives and come up with a choice based on that balance? Does that choice represent a rational balancing of consequences? Is the person under duress not to report?

Minnesota Rules, part 9555.7000, subpart 8 contains a fairly extensive definition of the term "impairment of mental or physical function or emotional status" is "substantial difficulty in engaging in the rational decision-making process and inability to weigh the possible benefits and risks of seeking assistance;" and "a condition in which an individual is so fearful, so ashamed, so abused, or so anxious about the consequences of reporting that that individual would be unable or unlikely to make a responsible decision regarding whether or not to report abuse or neglect."

Continuing with our analysis of the definition, note that it speaks of an inability or unlikelihood of "report[ing] abuse or neglect." What is meant by "reporting" in this context? If an immobile person is able to "report" abuse to his/her caretaker, but cannot, because of immobility, make a telephone call to the police or the welfare department, is that person vulnerable under the functional definition? The answer appears clear from the Act itself. The term "report" is defined to mean a report "received by the local welfare agency, police department," etc. (Subd. 2(f).) Thus, unless the impaired person can and is likely to make a report to an outside agency, he/she is considered vulnerable.

Lastly, note that the definition specifies that the person vulnerable unless he/she can and is likely to make a report "without assistance." Thus, an immobile person who could make a report if he/she could reach a telephone, is considered vulnerable unless there is a telephone within reach which the person can use without assistance. There will be some close questions on this subject as well. For example, if a hearing-impaired person cannot make a report except with an interpreter, is he/she vulnerable? Or, if a mentally retarded person needs the assistance of a person specially trained in interviewing mentally retarded persons concerning sexual assault, is he/she vulnerable? The likely answer seems to be this: If the assistance needed can and will be provided by the agency to which the report is being made, then the victim is not vulnerable by reason of needing that assistance to make a report. If, on the other hand, the alleged victim would need assistance even to contact the appropriate agency, then that need for assistance would satisfy the definition.

In discussing the definition of the term "vulnerable adult," it is important to keep in mind the function played by the definition within the Act, and the limitations this ought to place on the concept outside of the context of the Act. The key defining characteristic of the term is the absence of the call for help, the report of abuse or neglect. Satisfaction of the definition indicates the need for additional vigilance in watching for abuse or neglect. Clearly, however, persons who do not meet the definition might still be abused or neglected, and might still need protective or supportive services. Thus, the definition ought not to be used as an eligibility condition for social services in general, and ought to be used with caution outside of the context of this mandatory reporting act.[4]

B. Definition of Abuse

The definition of abuse contains 5 parts. The first incorporates the definitions of a number of criminal acts:

- Sections 609.221-609.223 define assault in the first, second and third degrees.
- Sections 609.23-609.231 define crimes involving mistreatment of confined or institutionalized persons. They required a showing of intentional "abuse," "ill-treatment," or "culpabl[e] neglect."
- Sections 609.235 involves the administration of drugs to others with intent to injure or facilitate the commission of a crime.
- Section 609.332 prohibits the solicitation, inducement and promotion of prostitution.
- Sections 609.342-609.345 define criminal sexual conduct in the first, second, third and fourth degree. These all involve some form of sexual contact in a variety of circumstances. Of particular importance here, the provisions prohibit sexual contact where (1) the perpetrator knows or has reason to know that the victim was "mentally impaired, mentally incapacitated, or physically helpless;" (2) with certain age limitations, the perpetrator had a "significant

[4] An example of a questionable, albeit benign, use of the Act and the term "vulnerable adult" occurs in State v. Bergstrom, 413 N.W.2d 206 (Minn. App. 1987) in which the court reversed and remanded a conviction for arson of a state hospital patient who had tried to commit suicide by burning herself. The court criticized the prosecutor for pursuing criminal sanctions in this case, reasoning as follows: "Bergstrom was a 'vulnerable adult' under the Vulnerable Adult Act, . . , which places responsibility for the care and supervision of mental patients, and the reporting of any abuse of them, on the hospital and its staff. . . . The statute is intended to protect vulnerable adults from the inability to protect themselves." The Act does not, itself, impose the obligation for the "care and supervision" of the patient, but rather the obligation to report a failure to provide care. The distinction is important because there may well be obligations to provide care and supervision which reach beyond the scope of the Act.

relationship" with the vulnerable adult; or (3) with certain age limitations, the perpetrator was in a position of authority over the vulnerable adult.

These statutory incorporations need to be read and understood in connection with the other parts of the definition of "abuse." It is to those other sections which the paper now turns.

The second clause of the definition is this:

> (2) nontherapeutic conduct which produces or could be expected to produce pain or injury and is not accidental, or any repeated conduct which produces or could reasonably be expected to produce mental or emotional distress;

This definition has two sub-clauses. Note that the first includes within the term "abuse" conduct which is "nontherapeutic" and "not accidental." Thus, conduct which is either therapeutic or "accidental" would not qualify as abuse under this phrase.

1. "Nontherapeutic"

Clearly, the "nontherapeutic" qualification is intended to exclude standard medical procedures from the definition, even if they cause pain or injury. The application of the definition to "aversive" or "deprivation" procedures which cause pain or emotional distress will be much more difficult.[5] Clearly, such procedures are intentionally administered, therefore they are not "accidental;" they may even be intended to cause pain and some form of emotional distress. Under this definition, aversive and deprivation procedures could therefore be classified as "abuse" unless they are "therapeutic." There may be disagreement among professionals about the therapeutic value of various procedures. This disagreement may be at its height in connection with procedures which cause pain or emotional distress. The statute is silent as to how this disagreement is to be dealt with. It may make a difference, in assessing whether aversive or deprivation procedures constitute abuse, whether the term "nontherapeutic" refers to subjective intent or objective effect. If it is the first, then procedures which are administered with a proper, i.e., therapeutic, intent will not be counted as abuse, even if the assessment of the therapeutic

[5] Aversive and deprivation procedures which "have not been authorized under section 245.825" are explicitly made "abuse" by subdivision 2(d)(5). It is arguable that (d)(5) governs only aversive and deprivation procedures in facilities serving persons with mental retardation. If so, then the catchall "nontherapeutic conduct" clause under discussion in the text would control whether the use of aversive procedures in other settings constitutes abuse.

value of the procedures are thought to be wrong. Under the objective effect standard, the therapeutic intent of the administrator of the procedure would be irrelevant. Whether the procedure was therapeutic or not, and hence whether it constituted abuse or not, would be judged solely by whether its effect was, in fact, therapeutic.

Both approaches have shortcomings. The subjective intent approach ignores the fact that procedures which are non-therapeutic hurt the vulnerable adult whether or not the administrator acted with a pure intent. The objective effect test ignores the fact that therapy is not an exact science.

Alternately, a "procedural" definition might be appropriate: conduct, even if it causes pain, would not be "nontherapeutic" so long as the facility had in place and used a procedure for planning, approving and reviewing the conduct that insured that independent experts found it to be "therapeutic."[6]

2. "Active" abuse versus abuse by omission

It is of interest to consider whether, in order to count as abuse, there must be affirmative, active conduct. Put another way, is it abuse if pain or injury is caused by acts of omission rather than commission? Section 609.231, defining the crime of mistreatment of residents or patients, includes the "culpable neglect" of a patient or resident which results in the "physical detriment" of the patient or resident. Thus, since violation of this section is part of the definition of "abuse," failure to take care of a patient or resident, an act of omission, may qualify as abuse if it is "culpable." Presumably, acts are culpable if they are intentionally and knowingly done, or if they are recklessly done, or if the actor "should have known" of their consequences.

The general language of the abuse definition might support a even broader inclusion of omissions. Note that there is no foreseeability requirement in the abuse definition. That is, there is no requirement that conduct, to count as abuse, be undertaken with knowledge, or reason to

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[6] See Minn. Rules Parts 9525.2700-.2810 for DHS rules governing the administration of aversive and deprivation procedures in licensed facilities serving persons with mental retardation and related conditions.

know, that pain or injury might occur. Thus, any infliction of pain or injury, is "abuse," provided only that it not be "accidental." If this principle is extended to omissions, the definition of "abuse" would become very broad. Understood in this way, any omission which results in pain or injury and which is not accidental is abuse. If this construction is adopted, then some conduct which might normally be thought of a "neglect" would be classified as abuse. For example, if a resident of a facility suffered frostbite because the facility failed to provide close enough supervision, the facility's action could be counted as abuse since an injury resulted from its action.

Such a construction of the general term in the abuse definition is probably too broad. As indicated, the broad construction would tend to collapse the definitions of abuse and neglect. In any event, most acts of omission which produce pain or injury would probably count as "neglect;" thus the precise location of the boundary of the term "abuse" is of limited significance.

3. "Not accidental"

To count as "abuse," the conduct must be "not accidental." The provision used to read: "The intentional and nontherapeutic infliction of physical pain or injury." Thus, the term "intentional infliction" has been replaced by "conduct which . . . is not accidental." To understand the significance of the change, one must ask whether there is a difference between "not accidental" and "intentional." Note that the term "not accidental," in its literal reading, appears to modify "conduct" and not "pain or injury." Thus, if this clause is read literally, non-accidental conduct which accidentally causes pain or injury would count as abuse. This is a significant change from the prior language of the definition, which required that the infliction of pain or injury be intentional. Under that definition, it was necessary that the perpetrator intended to cause pain or injury. Under the new definition, it appears sufficient if the perpetrator does, in fact, cause pain or injury. Note that there is no foreseeability requirement for the pain or injury if the conduct actually produces pain or injury.

4. "Reasonably be expected to produce pain or injury"

It is also noteworthy that conduct can count as abuse even if it does not actually cause pain or injury, so long as it "could reasonably be expected to produce pain or injury." There are two possible interpretations of this phrase. First, interpreted narrowly, this may be a device to allow pain or injury to be inferred from the circumstances of the conduct. This would be of particular importance where the vulnerable adult is unable to communicate. Understood in this way, the reasonable expectation of pain or injury does not replace the requirement that there be pain or injury, but merely provides a means for proving its existence.

In its broader interpretation, this phrase would allow for a finding of abuse even if it were proved that particular conduct did not produce pain or injury. Under this construction, conduct would be abuse if it was of the sort that in general would produce pain or injury, but, due to a lucky fluke, did not in a particular instance.

5. Mental or emotional distress

The second subclause of this clause is "any repeated conduct which produces or could reasonably be expected to produce mental or emotional distress." Prior to amendment this read "any persistent course of conduct intended to produce mental or emotional distress." The changes are significant. The new language omits any requirement of intention to cause mental or emotional distress. Read literally, the new definition counts conduct as abuse so long as it is "repeated" and causes emotional or mental distress. Note that there is no exception for therapeutic or accidental conduct in this subclause. Thus, to the extent that this subclause and the first subclause are read separately, repeated conduct which causes mental or emotional distress is abuse even if it is therapeutic or accidental.

The literal language of this clause produces two relatively extreme aspects to the definition of the term abuse. Conduct which is itself non-accidental, but which accidently causes pain or injury, is abuse. And therapeutic or accidental repeated conduct which causes emotional or mental distress is abuse. Under these definitions, abuse would arguably be present

if an orderly was intentionally shaving a patient (non-accidental conduct) when the patient moved abruptly causing the razor to cut him (physical injury). Similarly, a nurse's conduct could be counted as abuse if his repeated checking of the patient's chart made the patient emotionally upset.

The definition of abuse should be more narrowly construed. In the first subclause, the term "non-accidental" should be read as modifying pain or injury, rather than conduct. The second subclause should be read as being subjected to the same modifiers as the first; i.e., to the requirement that the conduct be nontherapeutic and non-accidental.

6. Sexual contact

The next clause reads:

> any sexual contact between a facility staff person and a resident or client of that facility

This language and its implications are clear: sexual contact between staff and clients is never appropriate. Consent is never a justification for that contact. Even if it is the resident or client who "initiates" the contact, or who consents to the contact, the contact remains abuse if it is sexual.

For sexual contact involving facility staff, this definition covers everything that is covered by the criminal sexual conduct statutes incorporated in the first clause of the abuse definition. Where the sexual contact does not involve a facility staff person, however, the criminal provisions may be of independent significance. For purposes of the vulnerable adults act analysis, it is sufficient to note that conduct that constitutes criminal sexual conduct falls into two major categories: that which involves physical force and is nonconsensual, and that which involves, roughly speaking, unequal power but no use of physical force. In the latter category, the consent of the victim is not a defense.

The examples of unequal power which are of particular relevance here are those in which the victim is mentally impaired or physically helpless and the perpetrator either knows or should know this. The terms "mentally impaired" and "physically helpless" are defined as follows:

> "Mentally impaired" means that a person, as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration. Minn. Stat. sec. 609.341, subd. 6.
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> "Physically helpless" means that a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw because of a physical condition, or (c) unable to communicate non-consent and the condition is known or reasonable should have been know to the actor. Minn. Stat. sec. 609.341, subd. 9.

The definition of mentally impaired is clearly designed to refer to individuals who are mentally ill or who have impairments of their intelligence because of mental retardation, trauma or other conditions. In order for this definition to apply, the victim must "lack the judgment to give a reasoned consent" to sexual contact or penetration. The determination of whether a person had the judgment to give a reasoned consent should include inquiry into both the person's knowledge of the consequences of sexual activity, the person's ability to assess those consequences, and the person's ability to communicate a withholding of consent. When the label "mentally impaired" applies to a person, then it will be immaterial, in determining whether abuse exists, that the person assented or acquiesced (or appeared to give consent) to the sexual contact. It may also be immaterial that the person initiated or voluntarily participated in the sexual contact.

The term "mentally impaired" suggests a condition which is a relatively immutable characteristic of the person, or, at least, a characteristic which does not depend radically on context. However, the ability of a person to make judgments about sex (or about other things) may depend a great deal on the context. The judgment of a person with mental impairments, like that of any other person, may, under certain circumstances, be clouded by fear, confusion or just plain passion.

The statute does not make clear whether the lack of judgment required for the definition must be present at all times, or whether its absence in the particular situation leading to the charge of abuse is sufficient.

Note that the second, situational construction of the term makes the determination turn, in part, on the action and station of the perpetrator, whereas the non-situational construction is entirely independent of the perpetrator.

This provision will cause potentially serious questions about sexual contact between residents of facilities. The problems will be exacerbated if the non-situational construction of the definition is adopted, for that construction entails that people who meet the definition of "mentally impaired" in one context meet it in all. Thus, if two mentally retarded residents of a home engage in sexual contact, that contact may be "abuse" if it is determined that at least one of them is "mentally impaired." This would be true even if the contact were mutually voluntary and desired, and, in fact, non-harmful and non-abusive.

7. Exploitation

The fourth clause in the definition of "abuse" reads as follows:

> (4) the illegal use of a vulnerable adult's person's profit or advantage, or the breach of a fiduciary relationship through the use of a person or a person's property for any purpose not in the proper and lawful execution of a trust including but not limited to situations where a person obtains money, property, or services from a vulnerable adult through the use of undue influence, harassment, duress, deception, or fraud.

This is a complex definition.[7] It has three clauses. The first refers to the "illegal" use of a vulnerable adult's person or property for another person's "profit or advantage." The term "illegal" might mean constituting a crime, or it might be satisfied by actions which are merely civil wrongs. For example, if A deposited money in N Bank, and N took some of that money to offset another debt, that might be contrary to statute, hence unlawful, but it might not be criminal. Criminal wrongs are usually intentional wrongs; that is, they generally (but not always)

[7] The application of this definition is affected by the reporting requirements. See discussion of subdivision 3a, at page **Error! Bookmark not defined.**

require a showing of intention to do wrong. Civil wrongs sometimes do not have such an element. Thus, interpreting "illegally" as requiring a crime would generally confine reportable abuse to the most serious kinds of exploitation. On the other hand, the harm to the vulnerable adult is measured by his or her loss, rather than by the intention of the perpetrator. The civil wrong interpretation would recognize this principle.

The second clause refers to the breach of a "fiduciary relationship" by the use of a person or the person's property "for any purpose not in the proper and lawful execution of a trust." This clause appears to have two elements. One, there must exist a fiduciary relationship and a breach of it. Second, the breach must consist of the use of person or property "not in the proper and lawful execution of a trust." Since it is always property and not "persons" which is held in trust, it is not clear how a person could ever be used properly and lawfully in execution of a trust. That difficulty aside, this clause apparently boils down to this: "abuse" occurs whenever a person in a special relationship of trust with a vulnerable adult (a fiduciary) uses that person or his/her property improperly. The meaning and import of the last phrase are difficult to ascertain. It is not clear whether this phrase means the misused property must, in order for the conduct to count as abuse, be part of a trust. Alternately, this phrase might mean that it counts as abuse if the fiduciary uses the vulnerable adult's property that is not part of a trust.

The third clause begins with the word "including." It is not clear whether this clause is meant to refer to both of the two preceding clauses, or only to the immediately preceding "fiduciary" clause. If it is meant to refer to both, then it is a strong indication that the first clause is not intended to be limited to criminal conduct, since the actions enumerated in the "including" clause are not necessarily criminal. Under this construction, the term "illegal" in the first clause would include both civil and criminal wrongs.

8. Aversive and Deprivation Procedures

The Act defines as "abuse" any "aversive or deprivation procedures that have not been authorized under section 245.825. That section governs the use of aversive and deprivation

procedures in facilities and services serving persons with mental retardation or related conditions. It requires the commissioner of human services to promulgate a rule governing the use of such procedures. It absolutely prohibits certain types of procedures, and prohibits others unless they are appropriately authorized and monitored.

The rules governing aversive and deprivation procedures are found at Minn. Rules parts 9525.2700-9525.2810. An aversive procedure is a planned application of a stimulus which is typically unpleasant, in an attempt to suppress a target behavior. Id., at 9525.2710, subps. 4, 5. A deprivation procedure is a "planned delay or withdrawal of goods, services, or activities to which the person is otherwise entitled . . . contingent on the occurrence of a behavior that has been identified for reduction or elimination. . ." Id., at subp. 12. Emergency use of aversive and deprivation procedures is governed by part 9525.2770, which allows immediate intervention only in limited circumstances if needed "to protect the person or others from physical injury or to prevent severe property damage which is an immediate threat to the physical safety of the person or others."

Neither section 245.825 nor the implementing rule governs the use of aversive or deprivation procedures in non-mental retardation facilities and services. Literally, then, since such procedures are not "authorized" by 245.825, they would constitute "abuse." This literal reading of the statute is probably not the intended meaning, and the classification of aversive and deprivation procedures in non-MR settings would be governed by the general definition of abuse in the "nontherapeutic conduct" clause. See above.

C. Definition of Neglect

The definition of neglect has three parts to it. The first reads as follows:

Failure by a caretaker to supply a vulnerable adult with necessary food, clothing, shelter, health care or supervision.

This definition involves the failure of a particular class of persons -- defined as the "caretaker" of the vulnerable adult -- to provide certain basics. The term "caretaker is defined as follows:

> "Caretaker" means an individual or facility who has responsibility for the care of a vulnerable adult as a result of a family relationship, or who has assumed responsibility for all or a portion of the care of vulnerable adult voluntarily, by contract, or by agreement.

There are several implications of this definition. First, a person is caretaker even if he/she has assumed responsibility for only a portion of the care of a vulnerable adult. Thus, volunteers who take residents of a group home out of the home area "caretakers." Second, the "caretaker" need not be associated with a facility. Thus, if a person attends a DAC and lives in a private home with family members, the family members are probably "caretakers" and their failure to provide for the person would be "neglect."

Note that a single vulnerable adult can have more than one "caretaker." This raises a question about the duties imposed upon "caretaker" by this section. For example, the statute indicates that a caretaker's failure to provide for "shelter" is neglect. How does this apply to, say, a day care facility from which the person receives services? What about the provision of "health care" by a caretaker" who is a volunteer who has simply taken the person on an afternoon's outing. While the statute would seem to imply that it is "neglect" for any of these "caretakers" to fail to provide shelter or health care, common sense dictates as different reading of the statute. Clearly, neglect must relate to the scope of the responsibility undertaken by the caretaker. While a volunteer who has taken a person on an outing may be responsible for providing (or arranging for) emergency health care for the person, he/she would not be responsible for more. The DAC is responsible for providing supervision while the vulnerable adult is under its care, but not during the rest of the day. The statute should be read to mean that it is "neglect" for a caretaker in which the person is in their <u>physical</u> care. For example, a group home may be responsible for

arranging for the health care of its resident even if the need for the care arose while the resident was at a DAC.

The second part of the definition reads as follows:

> The absence or likelihood of absence of necessary food, clothing, shelter, health care, or supervision for a vulnerable adult.

The definition incorporates what might be called both "self-neglect" and "societal" neglect. Under this prong of the definition, the reasons why the vulnerable adult is not getting appropriate services and care, and the blame for the failure of care, are irrelevant.

The third prong of the definition is as follows:

> the absence or likelihood of absence of necessary financial management to protect a vulnerable adult against abuse as defined in paragraph (d), clause (4). Nothing in this section shall be construed to require a health care facility to provide financial management or supervise financial management for a vulnerable adult except as otherwise required by law.

This clause might refer to two types of services. First, it could refer to the types of informal financial management services offered by social service agencies and residential facilities to assist people to manage their money. Second, it could refer to more formal guardianship and conservatorship arrangements. Under this definition, a vulnerable adult would be "neglected" if he/she needed some form of financial management services in order to resist financial exploitation. It is not clear how real a threat of abuse there must be in order to trigger this form of neglect.

D. Reporting Requirements

The reporting requirements of the Act may be divided into three sections for discussion. First, who must report? Second, what must be reported? Third, to whom must reports be made? These three subjects will be discussed in order.

1. Who must report?

The Act identifies a number of categories of persons who must report under the Act. The first consists of professional or the professional's delegate" involved in the following fields:

care of vulnerable adults
education
social services
law enforcement
any of the occupations regulated pursuant to section 214.01

The occupations referred to in the last item are as follows:

nursing home administrators

teachers

doctors

barbers

nurses

cosmetologists

chiropractors

assessors

optometrists

architects

psychologists

accountants

dentists

private detectives

pharmacists

peace officers

podiatrists

doctors of veterinary medicine

The term "professional or the professional's delegate is not defined. The term probably should be read in connection with the reporting requirement. In other words, where the Act requires a professional to make a report, the report may be made either by the professional or by someone on his/her behalf -- the delegate. It is also possible that the term "delegate" refers to

people who must report in their own right. For example, a teacher might delegate his/her teaching or caretaking responsibilities in part to an aide. It is arguable that this person would then be required to report in his/her own right. A further question arises as to the scope of the term "professional." While it is clear in some circumstances, it is not at all clear what its application is, for example, in connection with the term "engaged in the care of vulnerable adults." Is, for example, a homemaker who works in the home of vulnerable adult a "professional?"

The second category of mandated reporters was added by the 1983 Legislature:

> an employee of a rehabilitation facility certified by the commissioner of jobs and training for vocational rehabilitation."

Vulnerable adults will be involved in vocational rehabilitation. The language of this phrase does not clearly indicate whether it is the employee who need be certified before the obligation to report arises or merely the facility. Arguably it would make more sense, in light of the discussion below, to read it as the certification of the facility that gives rise to the reporting requirement. Receiving services from a certified vocation rehabilitation facility does not, however, make one a categorically vulnerable adult.

The third broad category of persons required to report is defined as follows: "an employee of or person providing services in a facility." This definition, of course, relates back to the definition of "facility" discussed earlier. Here, no distinction is made between professionals and non-professionals. It is clear that everyone employed by a facility, from the administrator to the housekeeping staff, has a responsibility to report. Further, the reporting requirement is not limited to employees. Any person "providing services" at the facility is included. These might include volunteers as well as persons, such as pool nurses, who are actually employees of an independent contractor.

It should be noted that multiple reporting is not required. Subdivision 3, which lists those persons required to report, concludes with the following paragraph:

> Nothing in this subdivision shall be construed to require the reporting or transmittal of information regarding an incident of abuse or neglect or suspected abuse or neglect if the incident has been reported or transmitted to the appropriate person or entity.

Several comments can be made about this paragraph. First, it does not excuse anyone from supplying information about the incident during the investigation of the incident by the proper authorities. It relates only to the initial reporting of the incident. Second, it should be read in conjunction with Subd. 15, which reads as follows:

> Subd. 15. Internal reporting of abuse and neglect. Each facility shall establish and enforce an ongoing written procedure in compliance with the licensing agencies' rules for insuring that all cases of suspected abuse or neglect are for insuring that all cases of suspected abuse or neglect are reported promptly to a person required by this section to report abuse and neglect and are promptly investigated.

Pursuant to this subdivision, each facility should have a procedure for insuring that reports are, in fact, made. Such a procedure can help assure, for the facility, that it is in compliance with the law without the need for duplicative reports.

In addition to the above, the Act contains one other category of persons who must make reports:

> Medical examiners or coroners shall notify the police department or county sheriff and the local welfare department in instances in which they believe that a vulnerable adult has died as a result of abuse or neglect.

Finally, the Act provides for voluntary reporting of suspected abuse and neglect:

> A person not required to report under the provisions of this subdivision may voluntarily report as described above.

2. Privilege and confidentiality

It seems clear that the Act means to abrogate, in two respect, the normal incidents of confidentiality and privilege which characterize many professional relationships. The mandatory reporting required by the Act would violate the expected confidential nature of the physician/therapist-patient relationship. In addition, the Act abrogates evidentiary privileges which would otherwise prohibit a physician or psychologist (or other professionals) from testifying in court. No reported appellate opinions test these conclusions or their

constitutionality. However, a series of cases has confirmed that the Reporting of Maltreatment of Minors Act, Minn. Stat. sec. 626.556 does intend to abrogate the statutory medical privilege, State v. Odenbrett, 349 N.W.2d 265 (Minn. 1984), State v. Andring, 342 N.W.2nd 128 (Minn. 1984), and does not thereby violate the client's right to privacy. Matter of Schroeder, 415 N.W.2d 436 (Minn. Ct. App. 1987).

3. What must be reported?

This topic can be divided into two subparts. First, what circumstances trigger the reporting requirement? Second, what information must the report contain?

Under the Act, a person who is a mandated reporter must report under the following circumstances:

(1) If he/she has knowledge of the abuse or neglect of a vulnerable adult. A person would have such knowledge if he/she actually witnessed the abuse or neglect. A person might be held to have such knowledge, as well, if he/she had been informed of the abuse or neglect by a reliable source.

(2) If he/she has reasonable cause to believe that a vulnerable adult is being or has been abused or neglected. Such reasonable cause could be based upon information provided by other persons who had witnessed the abuse or neglect, or who had heard others talking of it; upon "circumstantial evidence might take a variety of forms. The person may be bruised or otherwise injured. He/she might be obviously malnourished, ill-clad, be exhibiting sudden or significant changes in behavior, or have unattended-to physical symptoms. The term "reasonable cause" is, clearly, somewhat ill-defined. It calls for the exercise of judgment. Mandatory reporters, however, are well-advised to err on the side of reporting because of the possible consequences of negligent failure to report (discussed below).

(3) If he/she has knowledge that a vulnerable adult has sustained a physical injury which is not reasonably explained by the history of injuries provided by the caretaker or caretakers of the vulnerable adult. Thus, if the caretaker's version of how the person became injured is

inconsistent with, or simply does not fully explain, the injuries, a report should be made even if the reporter has no independent information as to how the injury occurred.

The Act details the contents and manner of reporting as follows: First, an oral report must be made, by telephone or otherwise. This report shall be made "immediately." The Act does not specify what "immediately" means. Clearly, obtaining emergency assistance, if needed, for the victim could precede such a report. It is unclear, however, if the abuse or neglect is discovered during hours when governmental offices are not open, whether the report may be delayed until business hours. In this author's opinion, that would depend upon the circumstances. If the abuse is such that prompt investigation is necessary, the report should be made to law enforcement authorities without delay.

A written report must be made thereafter, "as soon as possible." The written report must

> be of sufficient content to identify the vulnerable adult, the caretaker, the nature and extend of the suspected abuse or neglect, any evidence of previous abuse or neglect, name and address of the reporter, and any other information that the reporter believes might be helpful in investigating the suspected abuse or neglect.

Clearly, the requirement that "any other information" be included would indicate that the reporter must state the name of the suspected abuser, or other information which would assist in identifying him/her.

4. To whom must reports be made?

Reports may be made to any of the following agencies: local welfare agency, police or sheriff, or the appropriate licensing or certifying agency. A licensing agency or certifying agency would be appropriate if the suspected abuse or neglect involved a licensed or certified person or agency.

Where a mandated reporter has reasonable cause to believe that the vulnerable adult has died as a direct or indirect result of abuse or neglect, he/she must also report to the local medical examiner or coroner. (Subd. 9.)

5. Exceptions to the Reporting Requirement

Subdivision 3a modifies the general rule of the Act which requires reports of all known or suspected abuse. The first paragraph deals with a conflict between federal law and the general reporting requirement of the Act. Where federal law "specifically prohibits a person from disclosing patient identifying information in connection with a report of suspected abuse or neglect . . . that person need not make a required report unless the vulnerable adult . . . has consented to disclosure . . .." Facilities covered by such a federal confidentiality law are mandated to seek consent for disclosure of suspected abuse or neglect "upon the patient's or resident's admission to the facility." Persons who are prohibited from making reports "shall promptly seek consent to make a report."

This provision of the Act is aimed principally at chemical dependency treatment facilities, which are subject to stringent federal confidentiality requirements.[8] In this paragraph, the Act recognizes the potential conflict caused by such confidentiality mandates and the reporting mandate of the Act. First, the Act creates an exception to the reporting requirement, but only where federal law "specifically" prohibits the disclosure of pertinent information in a report of suspected abuse or neglect. Note that some reports of abuse or neglect, particularly those reporting incidents outside of the facility, might be reportable without violating the federal non-disclosure requirements. Second, the exemption from reporting is withdrawn if the vulnerable adult (or his/her legal representative) gives consent for the disclosure of the required information. Finally, both the facility, and the mandated reporter, are required to seek consent for such reports. The facility must seek the consent at the time of admission. The reporter, at the time the report must be made. Note that the latter requirement poses problems if there are multiple mandated reporters: need each of them seek consent to report? Arguably, since the Act explicitly eschews the need for multiple reports, this provision of the Act will be satisfied if one mandated reporter

[8] 21 U.S.C. sec. 1175, 42 U.S.C. sec. 4582; 42 C.F.R. sec. 2.1-.67. The regulations purport to preempt any state law which may authorize or compel disclosure prohibited by the act and regulations. 42 C.F.R. sec. 2.23.

seeks consent. As with the multiple reporting, facilities ought to establish procedures for seeking consent when a report is mandated.

Some light is shed on the relationship between the federal alcohol act and the Vulnerable Adults Act reporting requirements by a court decision arising in the context of the child abuse reporting act. However, differences in the origins of the adult and child acts may weaken the decision's precedential value in the adult context.

In State v. Andring, 342 N.W.2d 128 (Minn. 1984), the Minnesota Supreme Court held that the federal law and regulations do not prohibit reports mandated under the Reporting of Maltreatment of Minors Act, Minn. Stat. sec. 626.556. However, the Court's reasoning depended heavily on the fact that the federal alcohol treatment act and the Federal Child Abuse Prevention and Treatment Act of 1974 were enacted by the same Congress. Since the latter act mandated the passage of a child abuse reporting law, the Court reasoned that Congress did not intend to preempt, with the alcohol law, state laws reporting laws which it had just mandated with the child abuse act. "Given its awareness of the situation, Congress could not have intended to preempt the very state statutes that it had itself mandated." 342 N.W.2d at 132.

The Vulnerable Adults Act does not have the same federal origins as does the Reporting of Maltreatment of Minors Act. The argument, therefore, against preemption, would have to depend upon other grounds.

The second paragraph of subd. 3a provides an exception for reporting abuse which occurs between two recipients of services from a facility.

> (b) Except as defined in subdivision 2. paragraph (d), clause (1), verbal or physical aggression occurring between patients, residents, or clients of a facility, or self-abusive behavior of these persons does not constitute "abuse" for the purposes of subdivision 3 unless it causes serious harm. The operator of the facility or a designee shall record incidents of aggression and self-abusive behavior in a manner that facilitates periodic review by licensing agencies and county and local welfare agencies.

This paragraph creates exclusions from the term "abuse" "for purposes of subdivision 3." In other words, the types of incidents described need not be reported as "abuse." The careful

wording of the Act, however, preserves resident to resident harm, and self-inflicted harm, as abuse in general. It would thus be a proper subject of abuse prevention plans. In addition, it is clear that a pattern of such harm could be evidence of a failure to provide proper supervision, and thus constitute neglect.

The last paragraph of subdivision 3a is intended to provide clarification on the circumstances which would trigger a report for exploitation abuse under subd. 2(d)(4):

> Nothing in this section shall be construed to require a report of [exploitation] abuse, . . . solely on the basis of the transfer of money or property by gift or as compensation for services rendered.

Note that this paragraph does not purport to modify the definition of exploitation abuse, but rather to clarify when a report of such abuse is required. Most likely, this paragraph is intended to clarify the circumstances under which a person might be said to have "reasonable cause to believe" that exploitation abuse has occurred. It takes more than knowledge of a gift or payment for services to trigger a report. There must, in addition, be knowledge or reason to believe, that some undue influence or other impropriety occurred.

E. Duties of agencies receiving reports.

1. Forwarding of Reports

The agency receiving a report must first insure that the report is forwarded to other appropriate agencies:

Police or sheriff's departments must "immediately notify" the local welfare department upon receiving a report. (Subd. 3.) They must "forward immediately" copies of written reports to the local welfare department. (Subd. 4.) Thus, it is clear that law enforcement agencies receiving oral reports must immediately notify the welfare department of the report (presumably orally).

Local welfare agencies must immediately notify the local law enforcement agency and the appropriate licensing agency or agencies upon receiving a report. (Subd. 3.) Local welfare agencies must "forward immediately" copies of written reports to the local law enforcement

agency and appropriate licensing agencies. (Subd. 4.) Again, it seems clear that the local welfare agency may be required to make two reports to the other agencies. One, it must "notify" the other agencies upon receiving the oral report. Two, it must forward copies of the written report.

The local welfare agency must notify a licensing agency if the report indicates, or the agency finds, that the abuse or neglect occurred at a facility, or while the vulnerable adult was or should have been under the care of or receiving services from a facility, or that the suspected abuse or neglect involved a person licensed by a licensing agency. (Subd. 10(b)) Clearly, in some of these circumstances the report might not be forwarded immediately upon receipt to the licensing agency, but may have to await the local welfare agency's investigation.

Licensing agencies must "immediately notify" local law enforcement and welfare agencies, and other appropriate licensing agencies, upon receiving a report. (Subd. 13(a).) Copies of reports received by licensing agencies must be made available to law enforcement and local welfare agencies. (Subd. 12.)

Persons or agencies receiving reports of the death of a vulnerable adult must report the information and findings to the ombudsman for mental health and mental retardation when the victim was receiving mental health, mental retardation, chemical dependency or emotional disturbance services from a mental health or mental retardation agency or facility.

2. Investigation of reports.

The Act is based upon the premise that abuse and neglect require, in different circumstances, different sorts of responses. For this reason, the Act makes provision for different types of investigations. Investigation by the local welfare agency is mandated in all circumstances. The rationale for this is that abuse or neglect may require immediate protection or services which only the welfare department can provide or arrange for. Investigation by licensing agencies is required only where it appears that a licensed facility or individual is involved. Investigation by law enforcement agencies is left to the discretion of those agencies.

Local welfare agencies must investigate "immediately" upon receiving a report. (Subd. 10(a).) The statute does not specify what "immediately" means. However, Minnesota Rules, part 9555.7300, subpart 2 contains the following guidelines. (A) Where it appears that the vulnerable adult is in a life threatening situation, the local welfare agency must conduct an immediate on site investigation. (B) The agency must begin its investigation within 24 hours where it appears that the vulnerable adult is not in need of immediate care but is allegedly abused. (C) The time limit is 72 hours where there is no indication that immediate care or protection is needed but the adult is allegedly neglected.

The local agencies are given the right to enter facilities and inspect and copy records as part of the investigation. In this author's opinion, the agency need not obtain consent in order to inspect and copy records as part of its investigation. "Investigations shall not be limited to written records, but shall include every other available source of information." At a minimum, this would include interviewing the victim. The local welfare agency must also investigate to determine whether the conditions which resulted in the reported abuse or neglect might place other vulnerable adults in similar jeopardy. Under Minnesota Rules, part 9555.7300 subp. 6, if it is necessary in order to carry out a competent investigation, local welfare agencies are required to consult with persons with appropriate expertise in such areas as physical and mental health, behavior modifications, geriatrics, etc..

Licensing agencies. A Licensing agency must investigate in the following circumstances: (1) If it has received a report or (2) otherwise has information indicating that a vulnerable adult has been abused or neglected either in a facility it has licensed or by a person it has licensed or credentialed; or, (3) if it has information indicating that the facility or person is not in compliance with the Act. Several points should be noted about this provision. First, a licensing agency's investigation need not be triggered by a "report." Information obtained by agency personnel while on site in a facility, for example, may also trigger an investigation. Second, the agency must investigate not only suspected abuse or neglect, but also failure to comply with the Act.

Thus, if it appears that a licensed person or facility has failed to report when it should have, or does not have in place the plans and procedures required by the Act, the licensing agency should investigate.

F. Notification Requirements

Subdivision 10a contains a series of provisions mandating and allowing for third-party notification of reports and findings of abuse and neglect. Common themes run through the notification provisions.

First, persons to be notified are legal representatives (guardians, conservators) of persons under the care of facilities licensed by the department of human services, and, in limited circumstances, nursing homes. Also, if vulnerable adult has no legal representative, notices may/must go to the person designated to be notified in case of emergency, "unless consent is denied by the vulnerable adult." It is not clear whether the agency must seek consent before making the notification. The wording suggests that consent should be sought for notification, otherwise there would be no occasion for the vulnerable adult to "deny" consent. However, the Act does not make the giving of consent a necessary condition to notification. Thus, if for some reason the agency cannot obtain consent (due, for example, to the condition of the vulnerable adult) notification should nonetheless be made in the absence of a denial of consent.

Second, the notification requirements attach only in connection with neglect, physical abuse and sexual abuse. For reasons which are not immediately apparent, mental or emotional distress abuse do not trigger mandatory or discretionary notification.

Paragraph (a) mandates notification whenever a report is received which alleges neglect, "physical abuse, or sexual abuse." It is not clear whether the notification must be in writing, though the language specifying what the notification must "contain" suggests that a written notice was contemplated. The notice must contain the name of the facility, the fact that a report alleging abuse or neglect of "a vulnerable adult in the facility has been received," the nature of the alleged abuse or neglect, the fact that an investigation will be conducted, a description of

protective or corrective measures being taken, and notice that a written memorandum will be provided when the investigation is complete.

Note that the Act does not require that the name of the alleged victim be specified in the notice. Although there is no explicit prohibition in this paragraph on identifying the alleged victim by name in the notification, two factors suggest that the Act intended that the notification not contain such information. First, the language refers to "a vulnerable adult," suggesting that the legislature intentionally omitted reference to the name of the victim. Second, paragraph (c), which describes the "written memorandum" which must follow an investigation, explicitly indicates that the memorandum should be written in such a manner to protect the identity not only of the reporter and the alleged perpetrator, but also of the alleged victim. Providing information in the notice which is prohibited from the memorandum would, of course, defeat the purpose of the limitations on the memorandum.

Paragraph (b) authorizes the local welfare agency to provide notices for non-victim vulnerable adults in DHS-licensed facilities (but not department of health licensed nursing homes). This discretionary notice may be given where the agency "knows or has reason to believe the alleged neglect, physical abuse, or sexual abuse has occurred." Presumably, this provision is directed at notices prior to investigation. Notices after investigation are provided for in paragraphs (c) and (d).

Upon completion of the investigation, paragraph (c) requires the local welfare agency to provide a written memorandum to each person who has been notified under (a) or (b). The memorandum summarizes the agency's findings and actions. It also must protect the identities of reporters, victims and perpetrators.

Paragraph (d) provides additional circumstances in which the agency is permitted to disseminate the written memorandum. Under this paragraph, it may give the memorandum to legal representatives and "persons to notified in emergencies" if the report has been substantiated,

or if the report is inconclusive but is the "second or subsequent report of neglect, physical abuse, or sexual abuse" regarding the facility.

Paragraph (e) provides guidelines to be followed as the agency determines whether to exercise its discretion to notify non-victim representatives. Factors to be considered include the severity of the abuse or neglect and the "impact of the notification on the residents of the facility." The facility is to be notified whenever "this discretion is exercised." Presumably, the discretion is "exercised" when discretionary notices are sent.

G. Provision of Services

Subdivision 10 spells out the services which must be provided by local welfare agencies in connection with reports, investigations and findings of abuse and neglect. The services are of two sorts. Paragraph (a) deals with direct social services to prevent further abuse or neglect. Paragraph (c) details steps the agency must take to invoke judicial intervention.

The duty to provide direct social services may arise immediately upon receiving a report. The agency is mandated to provide "emergency and continuing protective social services." The purpose of the services is "preventing further abuse or neglect and . . . safeguarding and enhancing the welfare" of the vulnerable adult. Services are to be of an "emergency" and "continuing" nature. Thus, provision of services may precede (and need not await) completion of the investigation, and may continue after the completion of the investigation. It follows also that the obligation to provide services is not tied to a substantiation of the report of abuse or neglect. There may be circumstances, for example, where it is clear that services are needed to prevent future harm even though it cannot be proved that a particular individual was responsible for past abuse.

The Act does not generally specify the sort of social services to be made available. However, in the case of suspected sexual abuse, the Act requires that the local welfare agency make available appropriate medical examination and treatment. The purpose of this provision, in

addition to protecting the welfare of the victim, is to increase the likelihood that evidence will be preserved.

In addition to requiring direct protective services, the Act requires the agency to seek additional powers of intervention when necessary to prevent future harm. The Act spells out the following as actions which must be taken if necessary:

> Seeking authority to remove the vulnerable adult from the situation in which the abuse or neglect occurred. Although not specified in the Act, such authority would come from the guardian or conservator, or from an appropriate court.
>
> Seeking a restraining order for the removal of the perpetrator from the residence of the vulnerable adult pursuant to the Order for Protection Proceedings, Minn. Stat. 518B.01.
>
> Seeking the appointment or replacement of a guardian or conservator.
>
> Referring to the prosecuting attorney for possible criminal prosecution of the perpetrator.

Administrative Rules suggest that these interventions are appropriate where the victim refuses an offer of services and "in the judgment of that agency the vulnerable adult's safety or welfare is in jeopardy." Minn. Rules 9555.7600. The rule indicates that the agency itself may seek the intervention, or it may assist the family or the victim in seeking them.

Often, the key problem in seeking intervention involving guardianship or conservatorship is the absence of a suitable and willing person to serve. The Act recognizes that problem, and takes several steps to ameliorate it. The expenses of legal intervention are to paid for by the county if the victim is indigent. The county itself is to prosecute the guardianship or conservatorship petition in the absence of another interested person. The county must "contract with or arrange for" a suitable person or organization to provide ongoing guardianship services. The guardianship law provides for compensation for attorneys, health professionals, and guardians and conservators in circumstances relevant here. Minn. Stat. sec. 525.703 provides that lawyers and health professionals rendering necessary services with regard to the appointment of a guardian or conservator is entitled to reasonable compensation from the estate, or, if the

ward or conservatee is indigent, from the county. Further, the court is directed to order reimbursement or reasonable compensation to the guardian or conservator who was nominated by the court or by the county adult protection unit because no suitable relative or other person was available to provide guardianship or conservatorship services necessary to prevent abuse or neglect of a vulnerable adult, as defined in section 626.557. As a last resort, a county employee may be appointed conservator or guardian. The Act protects such an appointee from retaliation by the county.

Note that the law requires the welfare agency to investigate to determine the conditions which have created the reported abuse or neglect might also place other vulnerable adults in jeopardy. This section does not authorize or require a "fishing expedition" by the agency. Rather, the agency should attempt to determine whether the reported abuse or neglect appears to be an isolated incident, or whether it is likely that others might be similarly affected. Only if there is some suggestion that there may be danger to others is the agency required to take further protective action.

H. Protections against retaliation.

The Act seeks to protect reporters of suspected abuse and neglect, as well as the victims, from retaliation. The object, of course, is to encourage reporting and, hence, the elimination of abuse and neglect. The Act attempts to accomplish this objective in several ways:

Persons who make reports in good faith (including voluntary reporters) are made "immune" from any civil liability for such reports. In other words, such persons simply cannot be successfully sued because of the reports. Such immunity exists even if the report is, eventually, not substantiated, or even false. However, the report must have been made in good faith -- that is, the reporter must have had an honest belief in its truth.

The Act does provide protection against intentionally false reports. A person who makes such a report can be sued for actual damages suffered by the person reported, as well as for punitive damages.

Although the immunity provided by the Act is substantial, reporters can protect themselves from liability by carefully identifying in their reports the sources of their allegations and the bases for their conclusions. Thus, if reporter R has seen bruises on patient P, and has been told by patient B that nurse N caused the bruises by hitting P, R will be well protected if he reports just that. If, on the other hand, R simply reports that N hit P, R exposes himself to possible liability.

The Act specifies that anyone making a voluntary or mandated report or participating in an investigation is immune from any criminal liability "that otherwise might result from the person's actions" if the person is acting in good faith. The core intent of this provision is to immunize individuals from potential criminal penalties which might attach to the improper disclosure of information.[9] A more obscure question is the effect this provision might have where the information provided in the report or the investigation leads to or could be used in a criminal prosecution of the reporter. Two scenarios are possible: (1) A mandatory reporter commits an act which is arguably reportable as abuse or neglect. The individual reports the act to the authorities. May the individual be prosecuted for the act on the basis of the self-incriminating statements contained the report? (2) A government employee who is a mandatory reporter witnesses abuse. He fails to report. When the abuse is subsequently discovered, his superiors request that he cooperate in the investigation. His lawyers argue that this participation would be self-incriminating, hence not mandatory, since it might show that he knew (or had reason to know) of the abuse but failed to report it. It is unclear whether the immunity provision of the Act is meant to protect against criminal prosecution arising from this sort of information provided during an investigation.

The Act, further, specifically prohibits a facility or person from retaliating against any person who reports in good faith suspected abuse or neglect. (Subd. 17.) Retaliation against the person with respect to whom the report was made is similarly prohibited. Any facility or person

[9] See Minn. Stat. sec. 13.09 (criminal penalty for improper disclosure of information).

who does retaliate is liable for actual damages, as well as a penalty up to $1000. Thus, if a facility fired an employee who had made a report, and the court found that the firing was in retaliation for the report, and the court found that the firing was in retaliation for the report, the facility would be liable for the person's damages -- here, the damages would include lost wages -- as well as penalty. the statute leaves unclear whether a person who was being retaliated against could get a court order enjoining the retaliation. Thus, for example, the Act would prohibit a facility from excluding a person from visiting a patient because that person had reported suspected neglect. It is reasonable to assume that a court would be authorized to order the facility to admit the person as a visitor, but such authority is not made explicit in the Act.

Recognizing that it is often difficult to pinpoint the exact reason for adverse action against a person who has made a report, the Act establishes a "rebuttable presumption" of retaliation in certain circumstances. Thus, if a facility takes an adverse action against a reporter or a victim within 90 days of the report, the action will be presumed to be retaliatory motive -- for taking the action. Examples of such "adverse actions" are provided in the Act:

> Discharging or transferring a patient, resident, or participant from the facility.
>
> Discharging or demoting an employee or reducing the pay of an employee.
>
> Restricting or prohibiting a person from having access to the facility or its residents.
>
> Placing any restrictions on the rights set forth in the Patients and Residents Bill of Rights (Minn. Stat. 144.651).

In Ziegler v. Leo Hoffman Center, 397 N.W.2d 378 (Minn. App. 1986), rev. denied Feb. 13, 1987, the court of appeals examined the anti-retaliation provisions of the Reporting of Maltreatment of Minors Act, Minn. Stat. sec. 626.556. The court took a rather restrictive view of the provisions, examining first whether the ex-employees actions amounted to a "report" under the Act. Finding that they did not, the court did not have occasion to apply the presumption provisions.

I. Enforcement provisions.

The Act attempts to insure that its requirements will be enforce in several ways.

1. Penalties for failure to report.

The Act imposes two sorts of penalties for failure to report. First, the intentional failure to report is a misdemeanor.[10] Recognizing, however, that it may often be difficult to prove that the failure to report was intentional -- that is, that the person knew he/she should have reporter, but chose not to -- the Act establishes a penalty for failure to report which is either intentional or negligent. A person who negligently fails to report is liable for any damages caused by the failure.

In Thelen v. St. Cloud Hospital, 379 N.W.2d 189 (Minn. Ct. App. 1985), the court of appeals held that the liability created by the failure to report provision of the Act was absolute liability.

> The doctrine of absolute liability applies to preclude affirmative defenses when the legislature intends by enacting the statute to place the entire responsibility for the injury on the individual who violated it. A showing that the hospital violated the statute is per se evidence of negligence. To prevail, Thelen must show in addition that the failure to report caused damage.

In particular, the court held that the vulnerable adult had no duty to show that she was "unable to protect herself from the type of abuse she received." However, the court did not find warrant in the Act for extending the absolute liability to the underlying abuse itself. Rather, the failure to report provision of the Act yields damages for injuries caused by the failure to report. Abuse which follows the failure, and which could have been prevented by a timely report, however, might be recoverable under the court's construction.

Thelen leaves unanswered the question whether liability for abuse and neglect arise from some source other than the Act. Damages for neglect might be recoverable on a malpractice theory. Damages for abuse might be recoverable on a battery, assault or infliction of emotional

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[10] The Minnesota Supreme Court has held that the criminal sanctions for failing to report in the Reporting of Maltreatment of Minors Act, Minn. Stat. sec. 626.556, is not unconstitutionally vague or overbroad. State v. Grover, 437 N.W.2d 60 (Minn. 1989). In doing so, the court construed the reporting requirement in that context to require conduct amounting to a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Id. at 63.

distress theories. In addition, the Patients And Residents Of Health Care Facilities Bill Of Rights, Minn. Stat. 144.651, creates a right to "freedom from abuse" for patients and residents of health care facilities. That Act incorporates the definition of "abuse" from the Vulnerable Adults Act, thus arguably creating a cause of action for the underlying abuse.

2. Licensing penalties.

Any facility which does not comply with the Act is ineligible for renewal of its license. There are at least five sections of the Act which are specifically directed at facilities:

Subdivision 14(a) requires facility abuse prevention plans.

Subdivision 14(b) requires individual abuse prevention plans.

Subdivision 15 requires facilities to develop procedures to ensure reporting and investigation of suspected abuse or neglect.

Subdivisions 10 and 11 require facilities to allow investigating agencies access to the facility and to records.

Subdivision 19 makes it a criminal violation for a caretaker (which might be a facility) to permit abuse or neglect.

With respect to licensed persons, the Act requires the licensing agency to discipline any such person who willfully fails to comply with the Act. In general, the only portions of the Act which directly relate to licensed persons are the reporting requirements. However, licensed persons who are in charge of facilities might also be disciplined if they willfully fail to maintain the facility in compliance with the Act.

3. Criminal penalties.

In addition to civil penalties, the Act specifies two criminal penalties. The first as mentioned above was "failure to report" which is a misdemeanor. The second criminal penalty attempts to address the issue of a caretaker, as defined in subdivision 2, intentionally abusing or neglecting a vulnerable adult, or knowingly permitting conditions to exist which result in abuse or neglect. Such actions on the part of a "caretaker" are a gross misdemeanor.

There are two requirements of each aspect of this crime. Under the first clause the caretaker must intend to abuse or neglect the vulnerable adult and the caretaker must then abuse or neglect the vulnerable adult. Under the second aspect the caretaker must know that the condition which exists could result in abuse nor neglect and the condition must then result in abuse or neglect. Both require the caretaker to be culpable beyond simple negligence.

J. Provisions to prevent abuse.

The Act contains three provisions designed to prevent abuse: The Act requires each facility to develop a facility abuse prevention plan. (Subd. 14(a).) The plan must be in writing, and contain an assessment of the physical plant, its environment, and its population. The plan must identify factors which might encourage or permit abuse, and include a statement of the specific measures to be taken to minimize the risk of abuse. The purpose of this section is to require facilities to think about their population in general terms, and identify factors which might lead to abuse. For example, if the facility is populated by young mentally retarded women, the plan might identify sexual abuse as a possible problem, and take steps to minimize the risk of such abuse. One such step, for example, might be that the facility would not schedule a man as the lone staff person at night. If the facility is in a neighborhood where assaults are frequent, the plan should indicated what steps will be taken to minimize the possibility that its residents will be assaulted.

While the obligation to develop facility abuse prevention plans attaches to all defined facilities, a more extensive obligation to develop individual abuse prevention plans attaches to a subgroup of covered facilities. The Act requires individual plans for vulnerable adults "residing" in a facility and for vulnerable adults receiving services from DHS-licensed facilities (except for outpatient mental health and chemical dependency clients), and for vulnerable adults receiving home care services.

Some comments on the obligation to produce abuse prevention plans: First, this is an obligation that attaches to facilities, not to "caretakers" in general, and not to particular staff

people. Second, the precise scope of the requirement is somewhat more narrow than the coverage of the Act itself. The Act appears to omit from the individual plan requirement vulnerable adults who are "inpatients" in acute care facilities. However, "residents" of both health and human services licensed facilities would appear to be covered, as well as most non-residential service recipients who are "categorically" vulnerable.

The plans must contain an individualized assessment of each person's susceptibility to abuse, and the specific steps to be taken to prevent abuse, and the specific steps to be taken to prevent abuse. Although not explicitly stated in the Act, these abuse prevention plans could well be developed with and made a part of each resident or patient's care or program plan.

Some questions court be raised about the relationship between the Act's mandate that the abuse prevention plan specify measures to "minimize the risk of abuse," on the one hand, and, on the other, the "normalization principle". The normalization principle dictates that the programs and environment of persons in facilities should be aimed at producing a life for the resident which is as close as to the norm as possible. One critical element of this process is the concept is the concept of risk taking. For example, a resident of a facility may have, as part of his program, the goal of learning how to ride the bus independently. Although every precaution will be taken to ensure that the resident knows how to do this before setting him off on his first solo trip, there will always be a certain degree of risk involved in the resident's going out without supervision. Similarly, the deinstitutionalization principle may result in some residents who are abusive being taken into the facility. Although this creates the risk that some other residents will be subject to abuse, it is necessary to take some risk of this sort in order to bring institutionalized person into the community.

How can a facility justify taking actions which result in some risk of abuse to its residents when the Act requires it to develop a plan specifying the measures taken to "minimize the risk of abuse?" In this author's opinion, the abuse prevention plans -- both facility and individual -- provide an appropriate vehicle for balancing those parts of a program which produce risk against

the need for protection from risk. The abuse prevention plan provides the facility with the opportunity to make a well considered judgment about this balance. This judgment will be made by an interdisciplinary team, with the participation of the resident, and his or her family, where possible.

The mandate of the Act to "minimize the risk of abuse" must be read in the context of the principles of normalization and deinstitutionalization. One of the questions which must be answered by the abuse prevention plan is what degree of risk is appropriate for this person's program, given his or her developmental stage and need for normalization. Similarly, given the fact that some persons with behavior problems will be moving out of institutions and into community facilities, what is the degree of risk posed to other residents by these persons, and what can be done to minimize that risk.

By carefully identifying, before the fact, the potential risk, its source, and the reasons why the facility believes the risk to be either inevitable or appropriate, both the facility and the resident will benefit.

K. Status of Data Collected Pursuant the Act

The status of information collected under the Act is, of course, of critical importance. Those involved in the process will have varied and mutually incompatible interests in the information. People who report suspected abuse or neglect may be subjected to retaliation if their identifies are disclosed. The reputations of people or facilities falsely accused would be harmed by disclosure. Potential and current residents and clients of programs may wish to have information about the quality of service provided in order to decide whether to entrust vulnerable adults to their care. Advocates for victims want access to information to insure that investigations are thorough and prompt.

The Act creates four general categories of information, each treated differently. (Subd. 12.)

In general, all information collected in connection with the Act is private data on individuals. That is, it is accessible to the subject of the data, to government agencies with a reason to access it, but, absent court order, to no one else.

However, during an investigation, data collected is classified as "investigative data" pursuant to section 13.39. As such, it is classified as protected nonpublic data. It must be made available to law enforcement agencies, and may be made more generally available if the agency determines that the access will aid the law enforcement process, promote public health or safety or dispel widespread rumor or unrest.

The subject of the report, i.e., the alleged perpetrator, can compel disclosure of the name of the reporter, but only "upon a written finding by the court that the report was false and that there is evidence that the report was made in bad faith." In construing similar language in the Reporting of Maltreatment of Minors Act, Minn. Stat. sec. 626.556, Minn. Stat. sec. 626.556, the Supreme Court appeared to assume that the falsity/bad-faith determination was required to be made by the court based solely on the files furnished by the investigating agency. Guetter v. Brown County Family Services, 414 N.W.2d 729 (Minnesota 1987) Nothing in the Act limits the court's consideration to the agency's file. The high court's conclusion to the contrary apparently arises from the fact that the ability of the subject of the report to produce evidence of bad faith is crippled by the subject's lack of knowledge of the identify of the reporter. The Court had these thoughts on the bad faith determination:

> We concede that frequently, if not always, endemic to a determination of whether evidence of bad faith exists is the relationship existing between the accuser and the accused that might play a part in the motivation for such an accusation. Helpful to a court's finding of the existence of evidence of good faith, or its absence, is information such as the existence of ongoing disputes between the two, or, in this instance, the existence of animosity arising from former employment or policy disputes concerning the operation of the parish--all matters unlikely to appear in the files furnished by the agency to the court. The statute, however, contemplates that the trial court ascertain whether evidence of bad faith exists solely from the examination of these files. Under this restriction the trial court, nevertheless, must make written findings after examination of the evidence gathered during the investigation, consider as best possible from those records whether the reports reveal some known biases or prejudice against the subject of

> the report, or demonstrate that the reporter has "an axe to grind." From whatever evidence the file contains, the court must conclude whether there exists some evidence of bad faith. Factual evidence in the agency's file, or the absence thereof, may be of such character as to permit the judge to reasonably infer the existence of bad faith. To require this type of analysis in resolving the "evidence of bad faith" issue does not impose a completely novel procedure upon trial courts. In arriving at other types of ultimate conclusions, trial courts frequently have to infer that the facts, or the absence of facts, provides sufficient evidence to sustain the ultimate conclusion drawn.

The last category of information is referred to as "summary records." These records, which are to be maintained by all licensing agencies, are accessible to the public (classified as public information pursuant to section 13.03). The summary records contain summaries of "reports" of alleged abuse and neglect and alleged violations of the Act. Part of the "summary record" is an "investigation memorandum." Apparently, a separate "investigation memorandum" is to be prepared for each investigation. The memorandum contains the name of the facility investigated; the nature of the alleged abuse or neglect or violation; "pertinent information" obtained from records; the investigator's name; a summary of the investigation's findings; statement of the conclusion (substantiated, false, inconclusive); and a statement of action taken by the agency. The memorandum must be written in a manner which protects the identities of the reporter, the victim and the alleged perpetrator. The memorandum is public.[11]

[11] Note that only licensing agencies are to prepare investigation memoranda. Local welfare agencies prepare written memoranda of their completed investigations pursuant to subd. 10a(c). As discussed above, those memoranda must be distributed to certain interested persons. Beyond that, however, they appear to be private data on individuals.

The Minnesota Vulnerable Adults Protection Act: Analysis

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