Responding to Vulnerable Adult Abuse, Neglect and Exploitation: The Challenges

South Carolina Adult Protection Coordinating Council

“Dot”

Comments about the case

Forms present

Have you handled similar cases?

Case Issues?

Introductions

DSS Attorney(s):

Social Worker:

Investigator/Law Enforcement:

For the Good of the Order…

Breaks and lunch. Please return promptly to class.

Location of restrooms

Please:

- Do not text during class
- Put phones on silent
- Step outside if you need to take a call

Why Are We Here?

The Most recent data (National Elder Mistreatment Study, NIJ, Acierno, et al, 2009)

- **5.1 %; family financial exploitation**
- 4.6%; emotional:
- 1.6%; physical:
- 0.6%; sexual and
- **5.1%; neglect**
- Social isolation the most predictive factor
- Partner/spouse most often suspect

SC Statistics

Cases reported in 2013

- DSS: 2,831
- Long Term Care Ombudsman: 1,764
- Medicaid Fraud Control Unit: 174
- SLED Vulnerable Adult Unit: 945

Issues and Challenges

Discussion

What makes the investigation of vulnerable adult abuse

- Different from other incidents/crimes ?
- More challenging?

Challenges Investigating Vulnerable Adult Abuse

- Victim characteristics (communications, age, gender, race)
- Suspect characteristics
- Jurisdictional issues
- Other mandated investigations
- Coordination with other agencies
- Proving causation
- Difficulties obtaining evidence
- Multiple forms may occur at same time

Other Agencies and Entities

- **Medicaid Fraud Control Unit**
- **SLED**
- **Local law enforcement**
- **Long Term Care Ombudsman**
- **APS**
- Protection & Advocacy

The Legal System (Omnibus Adult Protection Act)

Who is a Vulnerable Adult

- A person who is 18 years or older
- Has a physical or mental condition
  - which substantially impairs the person from adequately providing for his/her own care
- Due to infirmities of aging, including:
  - organic brain damage
  - advanced age, and
  - physical, mental, or emotional dysfunction
- A resident of a facility is a vulnerable adult

Who is a Mandated Reporter

- Physician
- Nurse
- Dentist
- Optometrist
- Medical examiner
- Coroner
- Other medical, Mental Health or allied health professional
- Christian Science Practitioner

Mandated Reporters (cont)

- School teacher
- Counselor
- Psychologist
- Mental Health Specialist
- Intellectual Disability Specialist
- Social or public assistance worker
- Caregiver
- Staff or volunteer of an adult day care center or facility
- Law enforcement officer
- Religious Healer

When Must a Mandated Reporter Make a Report

- Incident must personally be reported within 24 hours orally by telephone or in writing
- No facility can make policies that interfere with reporting
- A state agency may make a report on behalf of an employee if policies have been approved by SLED VAIU or other investigative entity

Mandated Reporters

- Per statute, a mandated reporter can take color photographs of the visible trauma on or to the body of the vulnerable adult.

- A person reporting in good faith or participating in an investigation or judicial proceeding resulting from a report is immune from civil and criminal liability. Neither can a person's employment status be changed due to his/her making a report or cooperating with an investigation.

To Whom are Reports Made

- Long Term Care Ombudsman of the Lieutenant Governor's Office for incidents in all other facilities
- SLED Vulnerable Adults Investigation Unit (VAIU) for incidents in facilities operated by or contracted for operation by DMH or DDSN
- Local law enforcement (in all cases)
- South Carolina Department of Social Services Adult Protective Services for incidents in all other settings

To Whom Reports are Made

Investigative entities will insure that if report is made to wrong agency it is forwarded to the proper agency

Reports of Death

- The death of any DMH client or DDSN consumer must be reported to the SLED VAIU within 24 hours.
- The suspicious death of any vulnerable adult in the community or any other facility setting must be reported to the County Coroner or Medical Examiner.

What are Privileged Communications

- Communications between attorney and client and priest-penitent are privileged
- Communications between the following are not excused from mandated reporting
  - Husband and wife
  - Professional person and patient or client

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What are Penalties for Failing to Report

Mandatory reporter knowingly and willfully fails to report abuse, neglect or exploitation

If convicted they are guilty of a misdemeanor

- Fined not more that $2500
- Imprisoned not more than one year

Who is Covered by the Act

A caregiver is someone who:

- Provides care to a vulnerable adult
- With or without compensation
- Temporary or permanent
- Full or part-time
- Can be a
  - relative
  - household member
  - day care personnel
  - adult foster home sponsor
  - personnel of a public or private institution or facility

What is a Facility under the Act

- A facility directly operated by or contracted for operation by:
  - Department of Mental Health
  - Department of Disabilities and Special Needs
- Nursing care facility
- Community residential care facility
- Psychiatric hospital
- Residential program operated or contracted for operation by:
  - Department of Mental Health
  - Department of Disabilities and Special Needs

What Must be Reported

- Physical Abuse
  - Including sexual abuse
- Psychological Abuse
- Neglect
- Exploitation

Physical Abuse

- Physical Abuse
  - Intentional infliction or allowing to be inflicted injury
- Types of Physical Abuse
  - Slapping
  - Hitting
  - Kicking
  - Biting
  - Choking
  - Pinching
  - Burning
  - Actual or attempted sexual battery
  - Use of medication outside the standards of medical practice

Physical Abuse

- Use of restricted or physically intrusive procedure to control behavior
  - For punishment
  - Not used as part of a written plan of care from a physician or qualified professional

What is Not Physical Abuse

Altercations or acts of assault between two vulnerable adults

Refer to the agency policy and report to local law enforcement

Sexual Abuse

Actual or:

- Attempted sexual battery

- Sexual battery means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

Psychological Abuse

Deliberately subjecting a vulnerable adult to threats or harassment or other forms of intimidating behavior

- causing fear
- humiliation
- degradation
- agitation
- confusion, or
- other forms of serious emotional distress.

Example: Resident who is fearful of the dark and that fear is used as punishment.

SC Code Ann. § 43-35-10(10)

What is Not Abuse

A vulnerable adult may be furnished non-medical remedial treatment by spiritual means through prayer if the vulnerable adult has practiced this in his/her religion.

Detection, Investigation and Reporting

Victims and Perpetrators

- On going relationship where there is a societal expectation of trust
- Perpetrators are
  - Intimate Partners
  - Family Members
  - Caregivers
  - Those in Positions of Authority

Risk Factors

- Abuser dependency
- Victim dependency on abuser (ADL related)
- Disturbed mental state of the abuser
- Frailty, disability, or impairment of an elder or vulnerable adult

Risk Factors

- Social isolation
- Substance abuse or mental pathology of either the victim or abuser
- Prior history of abuse as a caretaker

Reasons Victims Do Not Report and Stay in Abusive Relationships

- Fear of retaliation
- Financial concerns
- Housing concerns
- Medical condition
- Isolation
- Immigration concerns

Reasons Victims Do Not Report and Stay in Abusive Relationships

- Concerns regarding homophobia
- Negative view of law enforcement
- Cultural/religious values
- Barriers related to the justice system
- Barriers related to the victim's family

What About Caregiver Stress?

- Early theory of elder abuse
- Assumes a well-intending, normally competent caregiver
- Becomes overwhelmed and lashes out
- High stress and low resources results in maltreatment

Limitations of Caregiver Stress

- Not supported by more recent research (pointing to domestic violence) as the primary cause of abuse
- Identifies the victim as the “problem”
- Not a legal defense
- What if the victim were a child?

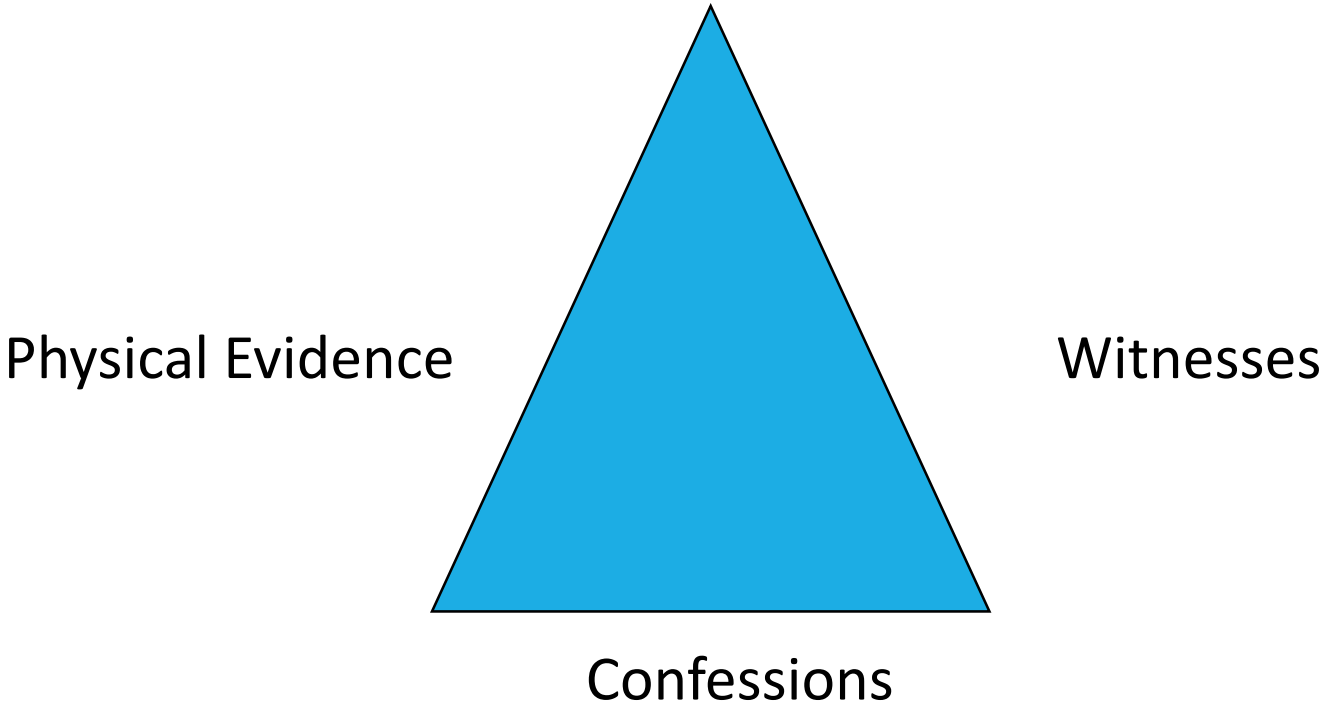
Standards/Language

- Civil v. Criminal
- APS/Law Enforcement
- Victim/Client
- Regulatory

Investigative Standards

- Cases Built on Facts
- Must decide what happened
- Who did it
- Investigation can be flawed if focus on “Why”
- “Why” is important for trial, if known

Framework for Investigations



Investigative Entities

- What do investigative entities report?
  - "shall" report an alleged incident of abuse, neglect, or exploitation against a health care professional to the occupational licensing board by whom that person is licensed.
- Upon receipt of a report, the Long Term Care Ombudsman or Adult Protective Services promptly shall
  - initiate an investigation; or
  - review the report within two working days for the purpose of reporting those cases that indicate reasonable suspicion of criminal conduct to local law enforcement or SLED. The report to SLED must them be made within one working day of completing the review.

Powers of Investigative Entities

- gain access to facilities in order to conduct an investigation;
- request and receive written statements, documents and other items pertinent to an investigation including, but not limited to, a VA's medical records (which the hospital is authorized to release upon written request of the investigative entity without obtaining patient authorization);
- issue administrative subpoenas for the purpose of gathering information and documents;
- initiate court proceedings to carry out the provisions of the law;
- require a VA's family members, facility staff, state officials and state agencies to cooperate with the investigation or the provision of protective services;
- conduct studies and compile data regarding abuse, neglect, and exploitation;
- issue reports and recommendations

FOR ENTERTAINMENT PURPOSES ONLY

CSI is not Real!
We know that but the public does not!

Forensic Issues

Victim Issues

- Ability to testify
- Relationship dynamics
- Proving case with or without victim
  - Some cases are provable because of victim's incapacity and/or vulnerabilities; others require victim participation
- Victims have complex and ongoing needs
- May have lost everything
  - Financial, family, health, support, trust

Forensic Issues

- Investigation may be begun or completed by non-law enforcement professionals
  - Different rules and limitations collecting information
  - Chain of custody issues
  - Improper storage and/or contamination of samples
- All can be addressed and overcome by
  - Multidisciplinary training and cooperation
  - Building teams

Witnesses

- Identify persons in victim's life
  - May be able to describe prior functioning
  - May have heard complaints from victim
  - May have information on relationship between victim and suspect and others
  - May corroborate victim
  - May provide dates of events
  - Are victim's potential support system

Neglect

The Death of Trixie Gross

Case Information

- Victim: Female, Age 91
- Suspects: Daughter, Son, Daughter-In-Law
- Location: Son’s Home
- Cause of Death: Severe malnutrition and sepsis

Investigating the Gross Case

Working with what you have seen:

- What do you know?
- What do you need to know about the facts, medical issues, and cognitive issues?

Neglect

- Failure or omission of caregiver to provide
  - care, goods, or services necessary to maintain the health or safety of a vulnerable adult
- Such as, failure to provide
  - food
  - clothing
  - medicine
  - shelter
  - supervision
  - medical services
- May be repeated conduct or a single incident
- Failure or omission has caused or presents a substantial risk of causing physical or mental injury

Neglect

Includes the inability of a vulnerable adult, in the absence of a caretaker, to provide for his or her own health or safety which produces or could reasonably be expected to produce

- serious physical harm or
- psychological harm or
- substantial risk of death

What is Not Neglect

Noncompliance with regulatory standards alone does not constitute neglect.

Self Neglect vs. Caregiver Neglect

Situations in which a person is no longer willing or able to provide basic care for self

- Form most often reported to Adult Protective Services ("APS")
- Often co-occurs with other types of abuse
- Often an underlying medical condition
- Maybe an outcome of earlier crime victimization

Self-Neglect

Self-neglect can happen as a result of an individual's choice of lifestyle, or the person may be depressed, have poor health, have cognitive (memory or decision making) problems, or be physically unable to care for him/her self.

Self-Neglect

Self-neglect includes:

- Living in obviously unsanitary conditions
- Suffering from an untreated illness, disease or injury without medical treatment.
- Suffering from malnutrition to such an extent that, without any intervention, the vulnerable adult's physical or mental health is likely to be severely decreased or impaired.

Self-Neglect

- A dangerous situation is created that will likely cause serious physical harm to the vulnerable adult or others or cause considerable damage to or loss of resources/income, and
- Suffering from an illness, disease or injury that results in the vulnerable adult dealing with his or her resources in a manner that will likely cause considerable damage or loss of the resources/income.
- Always consider co-occurring financial exploitation
  - What is being spent on the vulnerable adult
  - What spent to benefit caregiver
  - Who controls the finances
  - Is caregiver focused on costs rather than the vulnerable adult's needs and resources

Common Defenses

- What she wanted
- Not the legal caregiver
- I did my best

Financial Exploitation

The Lucille Case

Lucille

- 76 years old
- Husband deceased, no children
- Closest relatives: Niece and her 2 children
- Assets: 2 homes, land, annuities
- Mental health issues, primarily depression
- Primary suspect: Grand-nephew (police officer)

Date	Action/Narrative	Notes
12.1.2005	Franklin US Gov't securities bond was redeemed for $49,673.03	Left zero balance in account. No record of a deposit.
1.14.2006	Kathy R. signs an lease/option to buy on Lucille R.'s house for $82,000	Payments to begin 10.25.2006
6.23.2007	Kathy R. purchases the house in town from Lucille for $48,000	On 6.24 a deposit of $40,097.40 is made to Lucille's bank account. It was ultimately discovered that the husband (Bill R.) of Kathy R. used this transaction to obtain a mortgage for the full $82,000, gave Lucille only the $40,097.40 and used the rest to pay off his debts
9.1.2007	Kathy R. writes a check from Lucille's account for $5,000	Loan
Aug to Nov, 2007		Several checks written from Lucille's account to Kathy R. and Ann P. for "gifts", loans, country club dues, and other unknown purposes. A series of checks were used to drain Lucille's accounts.
2.15.2008	Ann P. receives a $10,000 check from Lucille	This was supposed to be used by Ann P. to "take care" of Lucille
7.24.2008	Check written to Greg P. for $1,100	Used for purchase of a riding lawn mower
8.8.2008	Check written for $315	Survey fee on 35 acres of land deeded to Greg P. and 5 acres to Ann by Lucille with no financial gain for Lucille. Transaction was done in June
4.4.2009	Kathy B. reported to APS for financial exploitation	APS noted a loan to Kathy R. for $12,500 with only $1,375 paid back. No payments for 2 years on another property

Date	Action/Narrative	Notes
7.15.2003	Lucille R. prepares last will and testament	Neither Gregg P. or Kathy R.. were named in the document
7.15.2003	A POA prepared naming Austin S. but not recorded or filed.	
Unk.2004	Smith comes under care of Dr. E. for mental health issues	He had been her doctor 20 years prior for the same issues
7.15.2005	Lucille R. is admitted to a local hospital for major depression and panic disorder.	The medical report states that Lucille is “increasingly scared of people over the last 2 years” and “paralyzed with depression”
7.17.2005	Ann P. reports to attending physician that Lucille is “antisocial “ and “afraid of people”	
3.24.2006	Handwritten will prepared by Lucille leaving a house, a farm and all personal belongings to Anne P. and Greg P.	
11.xx.2007	Lucille develops depressive illness	
12.24.2007	Lucille admitted to local mental health facility	
1.25.2008	Lucille admitted to a psychiatric hospital for “depression” and “hallucinations”	
2.3.2008	Lucille discharged from the hospital	Records indicated that she “doesn’t appear confused”
2.14.2008	Lucille sees Dr. E for ECT (electroconvulsive therapy)	
2.14.2008	Lucille sees Dr. B for colon cancer	
2.20.2008	Lucille admitted to hospital for mental health issues	Major depression, chronic and severe, underwent ECT
3.7.2008	Discharged from hospital	
3.22.2008	Dr. E sees Lucille	“depression is better but seems to be in much conflict with niece Ann
4.5.2008	Dr. E sees Lucille again	“irritable” “dysphoric” (depressed)
6.26.2009	Lucille seen at Doctor	“sad, lonesome, very forgetful, lives alone, drives
10.9.2010	Assessed for admission to assisted living	
10.13.2010	Ann reported to APS for financial exploitation	
11.13.2010	Lucille admitted to local RCF	
11.14.2010	Case referred to law enforcement by APS	

Lucille

- What do you know?
- What do you need to know?
- How do you plan on getting that information?

Exploitation

Causing or requiring a vulnerable adult to engage in activity or labor

- which is improper, unlawful, or
- against the vulnerable adult's reasonable and rational wishes

Exploitation

Improper, unlawful, or unauthorized use of the

- funds
- assets
- property
- power of attorney
- guardianship, or
- conservatorship of a vulnerable adult
  - by a person for the profit or advantage of that person or another person

Exploitation

Causing a vulnerable adult to purchase goods or services for the profit or advantage of the seller or another person through

- undue influence,
- harassment,
- duress,
- force,
- coercion, or
- swindling by overreaching
- cheating, or
- defrauding the vulnerable adult through cunning arts or devices that delude the vulnerable adult and cause him to lose money or other property

What is Not Exploitation

- Requiring a vulnerable adult to participate in an activity or labor
  - which is a part of a written plan of care or
  - which is prescribed or authorized by a licensed physician attending the patient

Investigative Issues

Competency

Capacity

- Now
- When critical events occurred

Use of deceit or false statements

Undue Influence

Competency

- A court finding that a person has the ability to do or not do something - ***legal determination***
- Ability to
  - Provide testimony as a witness;
    - Distinguish truth from fantasy
    - Able to communicate information so as to be understood
  - Handle own affairs

Until the contrary is demonstrated, adults are presumed to be capable of making their own decisions

Capacity

- Focuses on person's abilities
  - What a person can do
- Clinical term and assessment, not legal determination
- Assessments of capacity are used to make judgments of competency

Capacity Concepts

- Capacity--continuum of decision making abilities
- Capacity is situational
- Capacity is contextual
  - Varies by complexity of the task to be done or decision to be made
    - The more significant the decision and the consequences of the decision, the higher the level of capacity required

Capacity (cont)

- Ability to plan, consider and evaluate steps and alternatives, and carry out a plan
- Critical in financial transactions
- Person can have deficits in executive function without having dementia or memory impairment (Dyer et al)
- Requires alertness and attention
- Ability to process information
- Ability to modulate mood and affect

Financial Capacity

"The capacity to manage money and financial assets in ways that meet a person's needs and which are consistent with his or her values and self interest."

- Marson, Hebert, and Solomon, 2011; Marson and Sabatino, 2012

Decline in an older adult's financial skills can be an early warning sign of impending Alzheimer's type dementia

- Marson and Sabatino, 2012

Legal Instruments and Authority

Legal Authority

Examples

- Powers of attorney
- Trusts
- Guardianships and conservatorships
  - Person
  - Estate
  - Established and monitored by a court

Fiduciary relationship between parties

Presence of real or apparent legal authority does not make the case civil!

Power of Attorney

- Is a written instrument whereby one person, the principal, appoints another, the attorney-in-fact/agent to act as agent and confers on the attorney-in-fact the authority to perform certain acts on the principal's behalf
- The attorney-in-fact has a legal duty to act solely in the interest of the principal and must avoid conflicts of interest
- In most states it is not monitored or registered by a court. SC requires registration if addressing financial affairs

Power of Attorney

- Cannot make a loan or gift to self unless specifically authorized in the POA
- Has a duty of due diligence, faithful service, and fair dealing with the principal
- POA is not a license to steal.
- It is improper to commit a fraud of the principal
- May not make a gift of the principal's assets unless POA specifically authorizes

Types of POAs

- Durable power of attorney
  - Operates even after incapacity
  - Effective when signed
  - Lasts until revoked or principal's death
- Springing durable power of attorney
  - Effective after a particular event occurs, usually incapacity
- Health Care Proxy
  - Legal document designating a surrogate to make health care decisions for another in the event of incapacity
  - Requires medical decision person incapable of making own medical decisions

SECTION 62-5-501. When power of attorney not affected by disability.

(A) Whenever a principal designates another his attorney in fact by a power of attorney in writing and the writing contains (1) the words "This power of attorney is not affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his own estate", (2) the words "This power of attorney becomes effective upon the physical disability or mental incompetence of the principal", ….

Investigative Issues

- Secure a copy of actual instrument
- Exact authority conferred
- Individual's capacity when instrument executed
- May be parallel criminal and civil/judicial proceedings
  - Court ordered accountings
  - Depositions and other discovery
- Joint accounts?

What are the common defenses in elder financial abuse cases like Lucille?

Common Defenses

- Consent
- Gift or loan
- My inheritance
- Spending down the estate to make eligible for Medicaid
- My salary/compensation

Elements of Consent

Elements

- Mental capacity
- Knowledge of true nature of act
- Acted freely and voluntarily

Building the Financial Abuse Case

- Follow the money
- Spending Patterns over Time
- Make it understandable with charts and timelines

Summary

Court Involvement

- **Court of General Sessions (Criminal Court**): Law Enforcement
- **Probate Court**: Appointment of a guardian and/or conservator to protect the welfare/finances or assets of incompetent persons
- **Family Court**: APS Protective Services Proceedings, law enforcement EPC hearings, DSS investigations, Inspection Warrant, Ex Parte Order, Merits Hearing seeking the provision of protective services, appointment of an attorney and Guardian Ad Litem for the vulnerable adult

May 16, 2014: Creation of a Statewide Guardian Ad Litem Program to serve Vulnerable Adults in Family Court Cases. It is operated by the SC Vulnerable Adult GAL Program.

Issues and Challenges

- Courts (multiple proceedings)
- Emergency Protective Custody
- Resources available to victims
- Cases involving other VA (not just an aging issue)
- The criminal justice system as a response

Thanks