

LEGAL RESPONSIBILITIES FOR SUSPECTED ELDER ABUSE

ALABAMA MEDICAL DIRECTORS ASSOCIATION



Gregg B. Everett, Esq.
334-409-2218
GEverett@gilpinivhan.com

Christopher L. Richard, Esq.
334-409-2233
CRichard@gilpinivhan.com



1

Why should you care?

- It's the right thing to do
- Protect our elder Alabama citizens and their assets and financial means
- **Civil Liability:**
 - Fine up to \$300,000 under Elder Justice Act
 - civil action by family members for negligent failure to report, etc.
- **Potential exclusion from Federal health care programs under Elder Justice Act**
- **Criminal Liability: misdemeanor conviction, with up to 6 months in jail and fine up to \$500**



2

Adult Protective Services Act of 1976 (AL)

Purposes:

- Give elderly individuals the same rights as other citizens (to maximum degree of feasibility)
- Protect elderly individuals from abuse, neglect, exploitation, and degrading treatment
- Place the least possible restriction on personal liberty and exercise of constitutional rights consistent with due process and protection from abuse, exploitation and neglect

Ala. Code § 38-9-3 (1975)



3

Adult Protective Services Act of 1976 (AL)

Basic Structure

- **Protective Services:** protect against danger to health or safety of individual
- **Emergency Protective Services:** for persons who, because of physical or mental abilities, cannot provide for basic needs of shelter, food, clothing, or health care, and whose health or safety is in immediate danger
 - Through DHR; by consent or upon petition and determination by court
- **Protective Placement and Other Protective Services:** upon determination that the individual is unable to provide for their own protection from abuse, neglect, exploitation, sexual abuse, or emotional abuse
 - By petition of any interested person
- **Mandatory Reporting:** by physicians and other practitioners of the healing arts
 - Immunity for reporting
 - Penalties for failure to report



Adult Protective Services Act of 1976 (AL)

“Abuse” - the infliction of physical pain, injury, or the willful deprivation by a caregiver or other person of services necessary to maintain mental and physical health

Ala. Code § 38-9-2(1) (1975)



Adult Protective Services Act of 1976 (AL)

“Emotional Abuse” - the willful or reckless infliction of emotional or mental anguish or the use of a physical or chemical restraint, medication, or isolation as punishment or as a substitute for treatment or care of any protected person

Ala. Code § 38-9-2(6) (1975)



Adult Protective Services Act of 1976 (AL)

“Sexual Abuse” - any conduct that is a crime as defined in Sections 13A-6-60 to 13A-6-70, inclusive (rape, sodomy, sexual misconduct, indecent exposure)

Ala. Code § 38-9-2(22) (1975)



Adult Protective Services Act of 1976 (AL)

“Neglect” - the failure of a caregiver to provide food, shelter, clothing, medical services, or health care for the person unable to care for himself or herself; or the failure of the person to provide these basic needs for himself or herself when the failure is the result of the person's mental or physical inability

Ala. Code § 38-9-2(12) (1975)



Adult Protective Services Act of 1976 (AL)

“Exploitation” - the expenditure, diminution, or use of the property, assets, or resources of a protected person without the express voluntary consent of that person or his or her legally authorized representative or the admission of or provision of care to a protected person who needs to be in the care of a licensed hospital by an unlicensed hospital after a court order obtained by the State Board of Health has directed closure of the unlicensed hospital

Ala. Code § 38-9-2(8) (1975)



Adult Protective Services Act of 1976 (AL)

“Misappropriation of Property of Nursing Home Resident” - the deliberate misplacement or wrongful, temporary, or permanent use or withholding of belongings or money of a resident of a nursing home without the consent of the resident

Ala. Code § 38-9-2(11) (1975)



Adult Protective Services Act of 1976 (AL)

Mandatory Reporting

- **Who:** physicians, other practitioners of the healing arts, any caregiver
- **What:** reasonable cause to believe a protected person has been subjected to abuse, neglect, exploitation, sexual abuse, or emotional abuse
- **To:**
 - County DHR
 - Chief of Police (City, County, or both)
 - Sheriff (if observed in unincorporated territory in County)
 - ADPH (report of abuse/neglect/misappropriation of property by nursing home employee)
- **Reporting Requirements:**
 - Oral Report (by telephone or otherwise), to be made immediately
 - Written Report (no timeline???)
 - Deemed satisfied if report made in accordance with Board of Health rules
- **Investigation:**
 - Within 7 days following oral report
 - Conducted by County DHR or other law enforcement official
 - Written report of investigation

Ala. Code § 38-9-8 (1975)



Adult Protective Services Act of 1976 (AL)

Contents of Report

- Name, age, and address of the person.
- Nature and extent of injury suffered by the person.
- Any other facts or circumstances known to the reporter which may aid in the determination of appropriate action.
(technically seems to be requirement for investigating authority, but physician/health care provider report should probably include this information)

Ala. Code § 38-9-8 (1975)



Adult Protective Services Act of 1976 (AL)

Immunity

- **Who:** any person, firm or corporation
- **What:** immunity from any civil or criminal liability that might otherwise be imposed
- **For:**
 - making or participating in the making of a report pursuant to the Act
 - Participating in any resulting judicial proceeding

Ala. Code § 38-9-9 (1975)



Protecting Alabama’s Elders Act (AL)

- Criminal penalties for abuse, neglect, and financial exploitation of elders
- Provides additional civil liability immunity for individuals making a report or participating in a judicial proceeding, unless the entity acted recklessly, in bad faith, or with malicious purpose (Ala. Code § 13A-6-199)
- Exempts from the definition of abuse and neglect any acts or omissions that constitute the practice of medicine (Ala. Code § 13A-6-201)

Ala. Code § 13A-6-190 through 13A-6-201 (1975)



Elder Justice Act (Federal)

- Created by § 2046 of the Affordable Care Act (Pub. L. 111-148)
- Applies to long-term care facilities receiving Federal funding in excess of \$10,000 annually
- Owner/operator must make annual determination of whether facility receives in excess of \$10,000 in Federal funds
- Owner/operator must notify “covered individuals” of obligation to report crimes committed in long-term care facilities
- “Covered Individual” - owner, operator, employee, manager, agent, or contractor of a long-term care facility
- Notice posted conspicuously in appropriate location in facility to inform employees of rights



Elder Justice Act (Federal)

Reporting Requirements

- **Who:** any covered individual (owner, operator, employee, manager, agent, or contractor of long-term care facility)
- **What:** reasonable suspicion of crime committed against resident or individual receiving care from the facility
- **To:** Secretary of HHS and law enforcement officer of political subdivision where facility is located
- **When:**
 - Immediately, but no later than 2 hours after forming the reasonable suspicion (if the event results in serious bodily injury)
 - Within 24 hours after forming the reasonable suspicion (if the event does not result in serious bodily injury)



Elder Justice Act (Federal)

Anti-Retaliation Protections

- Long-term care facility may not:
 - discharge, demote, suspend, threaten, harass, or deny a promotion or other employment-related benefit to an **employee**, or in any other manner discriminate against an **employee** in the terms and conditions of employment because of lawful acts done by the employee; **or**
 - file a complaint or a report against a nurse or other **employee** with the appropriate State professional disciplinary agency because of lawful acts done by the nurse or **employee**



Elder Justice Act (Federal)

Penalties

- **Failure to Report**
 - Civil Fines: \$200,000 (\$300,000 if the violation increases the harm to the victim or the crime results in harm to another individual)
 - Exclusion: HHS Secretary has authority to exclude from participation in Federal health care programs
- **Retaliation**
 - Civil Fines: \$200,000
 - Exclusion: HHS Secretary has authority to exclude from participation in Federal health care programs for a period of 2 years



What if . . . ?

You notice a nurse taking jewelry and other personal items from a resident's bedside table.



What if . . . ?



A family depletes an elderly individual's financial resources by "paying themselves to take care of the individual" and by appropriating other financial resources of the individual for their own needs.

What if . . . ?



A nursing home withholds a patient's personal needs allowance (\$30) to recover fees owed by the patient for beautician services without the patient's consent.

What if . . . ?

When a resident at your facility asks an orderly for a glass of warm milk, the orderly responds that the resident can trouble him for “a warm glass of shut the hell up” and threatens “You will go to sleep, or I will put you to sleep.”



22

What if . . . ?



A nurse manager administers excessive amounts of antipsychotics to patients to control their behavior and shames them with characteristics of their underlying medical or psychiatric conditions.



23

How and Where to Report

- **DHR Adult Protective Services Division Hotline**
 - 1-800-458-7214
 - aps@dhr.Alabama.gov
- **ADPH Nursing Home and ALF Complaint Hotline**
 - 1-800-356-9596
 - 1-800-873-0366
- **Eldercare Locator**
 - 1-800-677-1116
- **Local Law Enforcement**



24

Questions?

Gregg B. Everett, Esq.
Gilpin Givhan, PC
334-409-2218
GEverett@gilpingivhan.com

Christopher L. Richard, Esq.
334-409-2233
CRichard@gilpingivhan.com

Follow on Twitter: [@GG_HealthLaw](https://twitter.com/GG_HealthLaw)



25
