

Recognizing and Remedying Elder Financial Abuse in Medicaid Denials

Jennifer Goldberg, Directing Attorney at Justice in Aging
Amy Kurlansky, Attorney at Pro Seniors, Inc.

February 16, 2016



National Elder Rights Training Project for the National Legal Resource Center.
Sponsorship for this Webinar is provided by the National Consumer Law Center and
a grant from the Administration for Community Living.

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This webinar today is brought to you as part of the National Legal Resource Center

- NLRC is a Partnership of five national organizations providing legal support to aging advocates
- On this website you can request technical assistance, case consultation and training
- <http://nlrc.acl.gov>

The screenshot shows the NLRC website homepage. At the top, the NLRC logo is displayed alongside the American Council on Education (ACE) logo. A search bar is located in the top right corner. Below the header is a navigation menu with links for Home, About, Library, Legal Service Development, Provider Resources, Aging Network, Find Legal Help, Legal Training, and Case Consultation. The main content area features a vertical navigation bar on the left with numbered links (1-8) for Library, Legal Service Development, Email Discussion List, Aging Network, Find Legal Help, Legal Training, Case Consultation, and Elder Abuse Prevention. To the right of this bar is a large image of hands clasped together, with a dark overlay on the right side containing the text '9 Supported Decision-Making' and 'Find resources on empowering all persons in decision-making'. Below this is a 'Latest News & Events' section with a list of articles, including 'Knowing and Improving Your Credit Score' and 'NHS Research Briefs on Elder Abuse Prevention'. To the right of the news section is a 'Connect with NLRC' section featuring a 'Tweets' widget with two tweets from @NLRCgov. A central graphic for 'CASE CONSULTATION for PROFESSIONALS and ADVOCATES in the FIELD OF AGING' is also visible, featuring a woman's portrait.

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- Experts from across the nation discussing legal responses to elder abuse
- Series of free webinars for elder advocates
- Sept. 2015 – June 2016
- Sign up at <http://www.nclc.org/webinars.html>
- The Role of Long Term Care Ombudsman and Legal Aid Attorneys
- The Role of Adult Protective Services, Legal Aid, and Protection and Advocacy
- Representing Clients in Guardianship Actions: Winning the Case for Supported Decision Making
- Restoring Public Benefits Compromised by Elder Financial Exploitation
- Legal Remedies to Financial Exploitation: "Let's Get Grandpa's House Back!"
- Recovering Assets Lost to Financial Abuse: "Can I get their Money Back?"
- Transactional Capacity and Vulnerability to Elder Abuse





Presenter – Jennifer Goldberg

- Jennifer Goldberg is Directing Attorney of the Justice in Aging Health Team, and is based in their Washington D.C. office. She develops and implements projects and initiatives that improve access to health care and long term services and supports for low-income older adults across the country.
- Prior to joining Justice in Aging in 2015, she served as the Director of Advocacy for Elder Law and Health Care at Maryland Legal Aid. Jennifer spent fourteen years in legal services, advocating for low-income older adults on Medicaid, long term care, income security, housing and consumer issues. Jennifer received a JD from Harvard Law School; and a LL.M. in advocacy from Georgetown University Law Center. She is a graduate of Harvard and Radcliffe Colleges.



Presenter – Amy Kurlansky

- Amy Kurlansky is an Attorney at Pro Seniors, Inc. and began working as the legal fellow for The Annie W. and Elizabeth Anderson Legal Fellowship for the Prevention and Resolution of Financial Exploitation of Seniors in July 2014.
- Amy began her legal career in the Hamilton County Public Defenders' Office advocating for abused and neglected children. She then began working on the Pro Seniors, Inc. Legal Hotline which led to a full time position as a Staff Attorney for Pro Seniors, Inc. as the Medicaid Project Attorney. Since that time, she has also worked on legal cases involving protecting Ohio Seniors from Elder Abuse and helping Seniors resolve legal issues in order to maintain their homes and independence.
- As a Staff Attorney for Pro Seniors, Inc., Ms. Kurlansky has presented on the topics of Medicaid and Elder Abuse and Financial Exploitation to community groups, students, social workers, and other attorneys.



JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Justice in Aging is a national non-profit organization that fights senior poverty through law. We secure health and economic security for older adults of limited income and resources by preserving their access to the courts, advocating for laws that protect their rights, and training advocates around the country to serve the growing number of older Americans living in poverty.

Visit us at - justiceinaging.org



What is elder abuse?

- Elder abuse: Any knowing, intentional, or negligent act by a caregiver or any other person that causes harm or a serious risk of harm to a vulnerable adult.
- Definitions vary by state.



Types of elder abuse

**Physical
Abuse**

**Emotional
Abuse**

Sexual Abuse

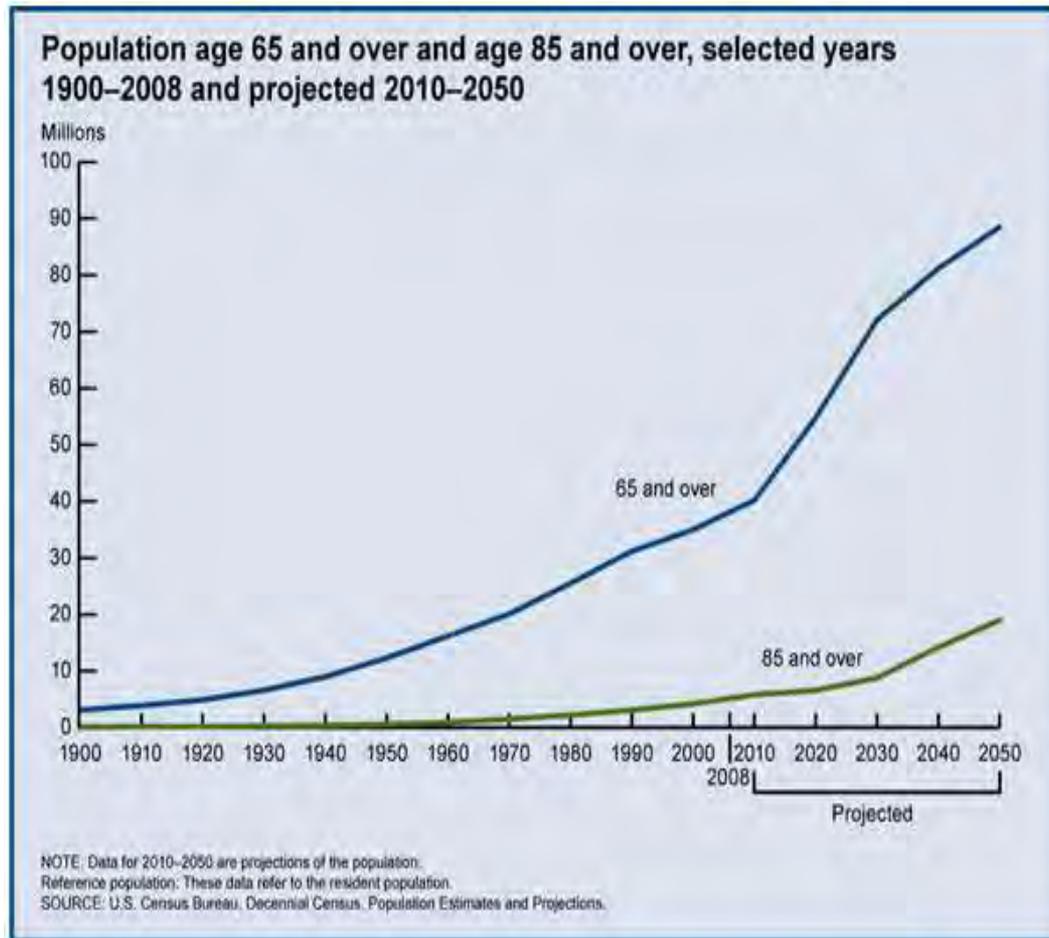
Exploitation

Neglect

Abandonment



Increase in the aging population:



Official Poverty Measure (10%)



Supplemental Poverty Measure (15%)



Economically Vulnerable (48%)



<http://kaiserfamilyfoundation.files.wordpress.com/2013/05/8442-a-state-by-state-snapshot-of-poverty-among-seniors.pdf>

NATIONAL NUMBERS



Elder financial exploitation-OAA:

The term 'exploitation' means the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an older individual for monetary or personal benefit, profit, or gain, or that results in depriving an older individual of rightful access to, or use of, benefits, resources, belongings, or assets.

Older Americans Act Definition, Section 102(a)(18)(A),
42 U.S.C. §3002(a)(18)(A)

Examples of elder financial exploitation:

- **Misuse** of an older adult's personal checks, credit cards, or bank accounts
- **Stealing** cash, income checks, or household goods
- **Forging** an older adult's signature
- Engaging in **identity theft** using an older adult's information
- Misuse or abuse of a **financial power of attorney**
- **Scams** perpetrated against older adults



Elder Financial Abuse – By the Numbers

Annual financial loss to elder financial abuse

- \$2.9 billion

Highest rate of any elder mistreatment

- 1 in 20 older adults will be affected by financial abuse after age 60



Diminished capacity

Older adults with **diminished capacity** are at a greater risk

- Particularly at risk for financial exploitation
- Danger of undue influence
- Dementia is one of the risk factors in elder abuse



Risk factors for seniors

The following do not excuse abuse, but, do create an increased risk for seniors

The intensity of the elder's illness or dementia

Social isolation; i.e., the elder and caretaker are alone together almost all of the time

Family history of domestic violence

Signs of abuse or exploitation

- Signs of physical harm
- Sudden Behavioral changes
- A caregiver who refuses to allow visitors to see the adult alone
- Hazardous or unsanitary living conditions



Signs of abuse or exploitation

- Dehydration, malnutrition or poor personal hygiene
- Previously uninvolved relatives showing sudden interest in the adult's rights, affairs, and possessions
- Unexplained, sudden transfers of assets or finances to an individual

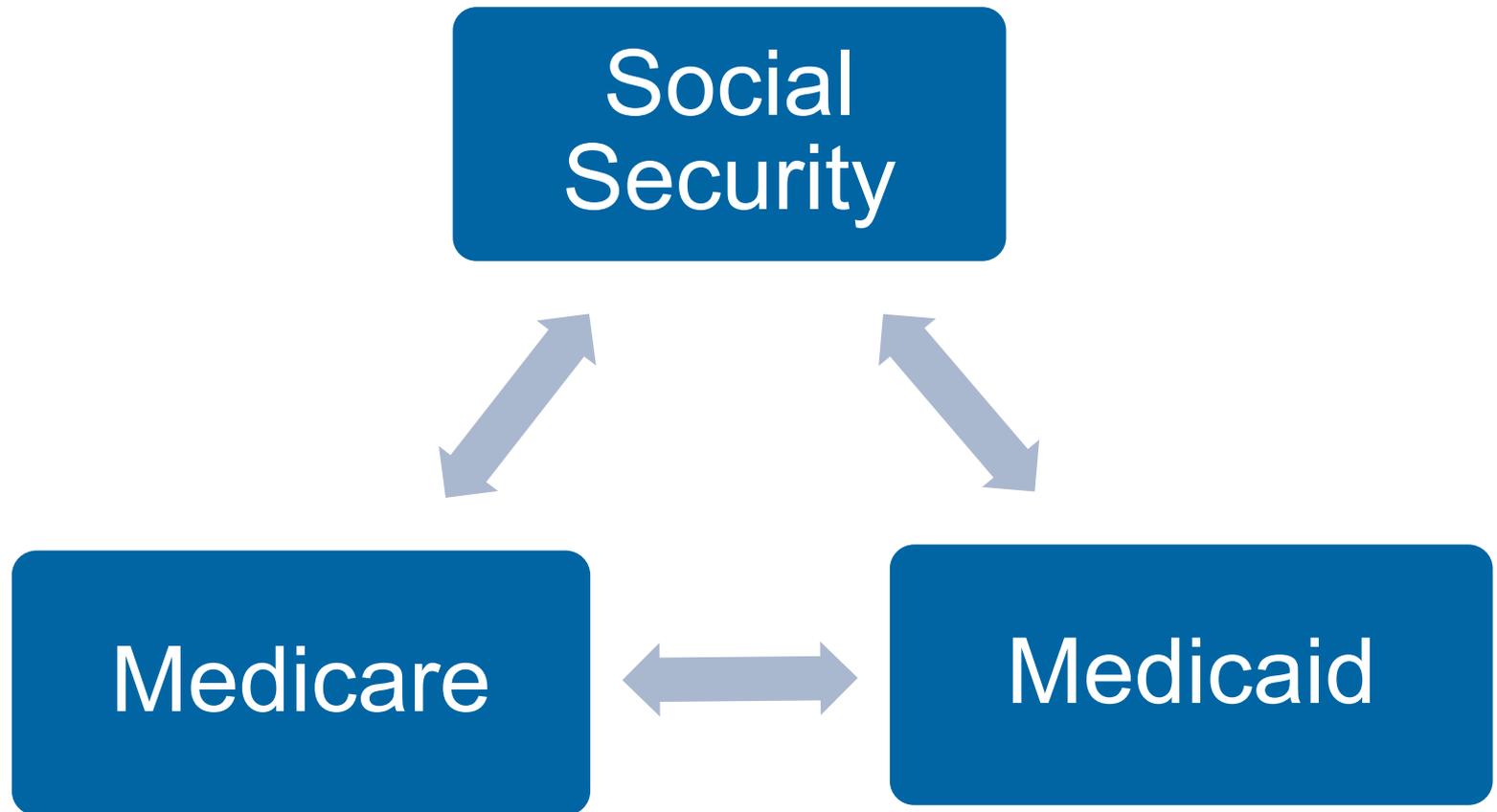


Signs of abuse or exploitation

- Unexplained disappearances of funds or valuable possessions
- Abrupt changes in a will, financial documents, bank accounts, or banking practice
- Financial activity the Senior could not have done; ex. ATM withdrawals
- Different signatures on checks



Financial exploitation in public benefits cases:



Social Security and elder financial abuse

- Abusers **misusing** Social Security funds
- May **divert** funds from elder's account
- May **use funds** not for the elder's benefit
- Older adult is left with insufficient funds, basic needs are not met
- Similar issues with VA benefits, other forms of cash payments





Possible Solution: Representative Payee

- Representative payee is required to be fiduciary
- If representative payee is misusing funds, can complain to Social Security, get new payee appointed:



Potential Challenge with Representative Payee

- Payments may stop while Social Security investigates.
- May need assistance of advocate to transfer payments to new payee quickly.



Medicare Fraud

- Examples of Medicare Fraud:
 - **Healthcare provider** bills Medicare for services the person never received.
 - **Supplier** bills Medicare for equipment the person never got.
 - Someone uses another person's **Medicare card** to get medical care, supplies, or equipment.
 - A company offers a Medicare drug plan that has **not been approved** by Medicare.
- **\$50 billion:** Medicare paid in improper payments



Harm from Medicare Fraud:

- Durable Medical Equipment:
 - Beneficiaries may get cheap, fake medical equipment or not get any equipment
 - Medicare is still billed for full price, new equipment
 - Makes it more difficult to get needed equipment in future



Harm from Medicare Fraud:

- Upcoding
 - Increases copayments for individuals
- Unnecessary procedures
 - Can cause medical harm





Key Resource

Senior
Medicare
Patrol

- Conducts outreach and education
- Over 5000 volunteers nationally
- Receives beneficiary complaints



Medicaid

- **State and federal** program
- Requires **financial eligibility** to receive assistance
- Unlike Medicare, Medicaid covers long-term services and supports, including **nursing home care** and home and community-based services (**HCBS**)



Medicaid problems from financial exploitation

Denial based on financial eligibility

Penalty period based on “gifts”

Eviction from a nursing home because of nonpayment

Need for hardship waiver



Financial Exploitation

- Financial Exploitation cases often present as another substantive issues.
- Sometimes it takes some very careful and considerate “digging” in order to discover that there are issues of exploitation occurring in someone’s life.
- As with other types of abuse, it can take a while for a client to trust their attorney to share what is happening.



Financial Exploitation

- Power and Control Wheel

www.ncall.us



Improper Transfer & Hardship

- 42 U.S.C.A. § 1396p
- **§ 1396p. Liens, adjustments and recoveries, and transfers of assets**



Improper Transfer

- Improper transfer
 - Transfer on or any time after the look-back date
 - Of a legal or equitable interest in a resource for less than fair market value
 - For the purpose of qualifying for Medicaid,
 - A greater amount of Medicaid, or
 - For the purpose of avoiding the utilization of the resource to meet medical needs or other living expenses



Improper Transfer

- The presumption of an improper transfer is rebuttable by clear, convincing, and credible evidence.



Undue Hardship

- The individual, otherwise eligible for medical assistance, will not be subject to restricted Medicaid coverage resulting from an improper transfer if restricted Medicaid coverage will result in an undue hardship.



Undue Hardship

- An undue hardship exists when application of the restricted Medicaid coverage would deprive the individual of the following:
 - Medical care such that the individual's health or life would be endangered; or
 - Food, clothing, shelter, or other necessities of life.
- Applicant must prove undue hardship by clear, convincing, and credible evidence.



Case Studies

- Case # 1
- Mr. H is 85. He lives in a Nursing Home and has been privately paying his bill.
- He is preparing to apply for Medicaid.
- Mr. H. reports he should have \$45,000 saved in his bank account.
- He is oriented and competent and has no Power of Attorney in place.



Case Studies

- Mr. H is prepared to pay for additional months in the nursing home and has a few other things he can “spend down” for, such as his burial and funeral expenses.
- Upon contacting Mr. H’s bank, he learns that he has \$.25, not the thousands he that he had been saving



Case Studies

- Inspection of the bank records reveals that Mr. H's son has been forging his signature on withdrawal slips and taking his money.
- What can Mr. H Do?



Case Studies

- Case #2 (Facebook Case)
- Mrs. O is 94 lives in a nursing home and is preparing to apply for Institutional Medicaid.
- She had previously drafted a power of attorney naming her daughter as her Attorney in Fact.
- Mrs. O's grandson approached her and persuaded her to change her power of attorney and name him as her agent.



Case Studies

- When it was time to complete the Medicaid application, Mrs. O's grandson failed to provide verifications.
- Mrs. O contacted her bank directly and learned that her grandson had been making large withdrawals from her account, depleting her funds in a short time.
- For example, one day he withdrew \$20,000 from her account.



Case Studies

- He did not use the funds for Mrs. O's care, in fact, through social media, Mrs. O found out that he had purchased a car and jewelry for his wife.
- What can Mrs. O do?



Case Studies

- Case # 3
- Mrs. N's husband was a small business owner. When he died, Mrs. N's health declined and she moved to a nursing home.
- Mrs. N was issued an involuntary discharge notice from the Nursing Home for non-payment of her bill.
- Mrs. N is no longer competent and her daughter is her Attorney in Fact.



Case Studies

- Mrs. N's daughter was preparing to apply for Institutional Medicaid for Mrs. N's long term care.
- In going over the bank records, Mrs. N's daughter discovered suspicious withdrawals.
- One of Mr. N's employees had been forging checks and using his accounts for her own personal needs.



Case Studies

- What options does Mrs. N have?



Case Studies

- Case #4
- Mrs. W lives at home and participates in a Medicaid waiver program.
- Mrs. W has a home-health aid who comes into the home 3-4 times a week. She has trusted this caregiver.
- Mrs. W authorized her home-health aid to use her debit card to pay for groceries and other items.



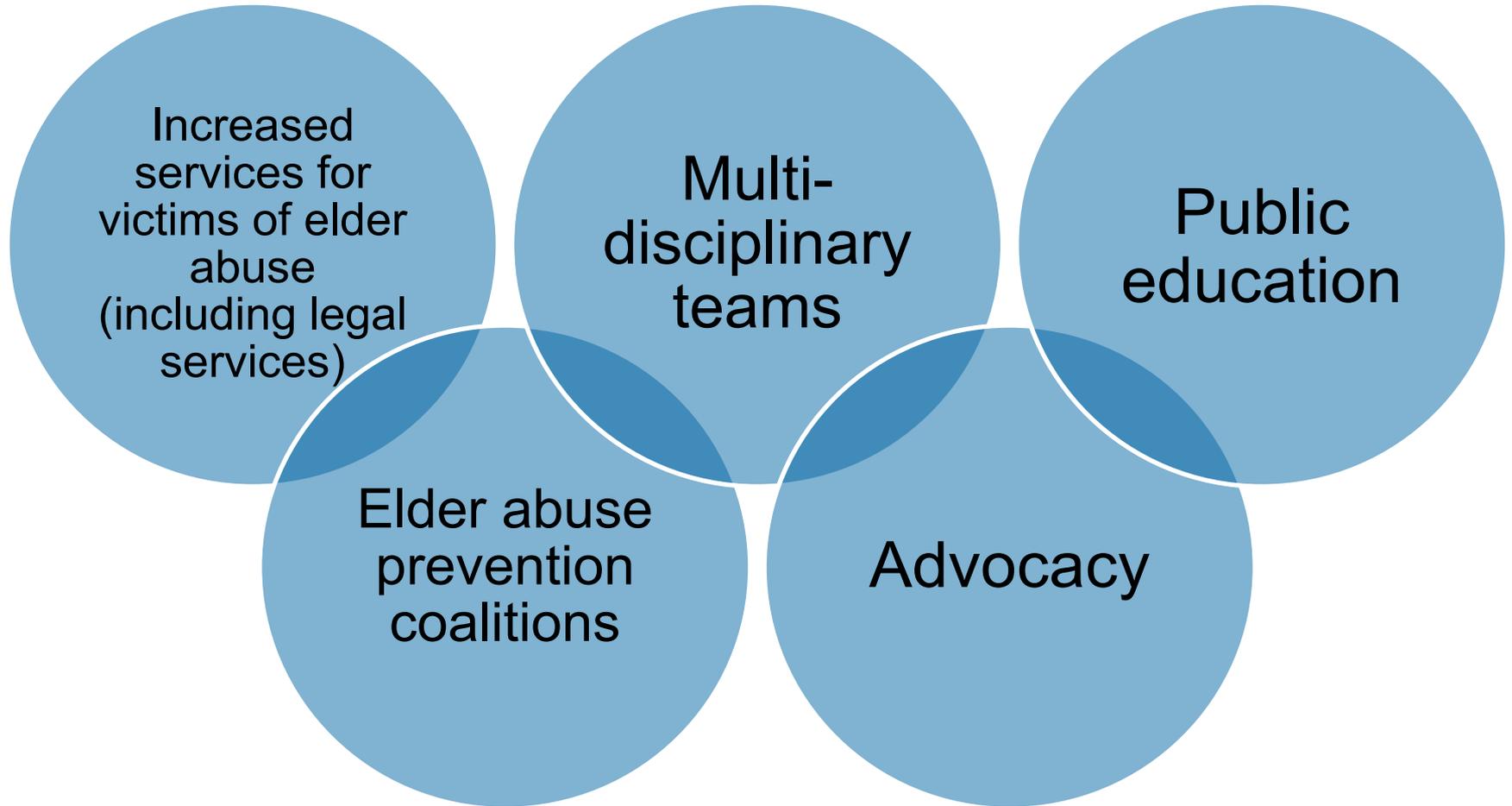
Case Studies

- In reviewing her bank statements carefully, Mrs. W began to notice withdrawals that she did not authorize.
- These transfers could be deemed improper transfers (i.e. gifts) and negatively impact her Medicaid.
- What can Mrs. W do?





Community Responses to Elder Abuse:



Resources

- National Center on Elder Abuse
 - <http://www.ncea.aoa.gov/index.aspx>
- Department of Justice Elder Justice Initiative
 - <http://www.justice.gov/elderjustice/>
- Assessment of older adults with diminished capacity – a handbook for lawyers
 - American Bar Association Commission on Law and Aging and American Psychological Association
 - <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>
- National Consumer Voice for Quality Long Term Care
 - Resources on financial exploitation in nursing homes and assisted living
 - <http://theconsumervoice.org/issues/other-issues-and-resources/financial-exploitation>



Questions?

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Just a Reminder

- Please fill out the evaluation when you sign-out
- I will email you the PowerPoint and recording in a few days
- Thank you to our speakers!