

Drafting Advance Planning Documents to Reduce the Risk of Abuse or Exploitation

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The mission of the American Bar Association Commission on Law and Aging (ABA Commission) is to serve as the collaborative, interdisciplinary leader of the Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons, particularly low-income and vulnerable elders. Since 1979, the ABA Commission has carried out this mission through research, policy development, technical assistance, advocacy, education, and training.

Key Lessons

1. Extra care in the creation of advance care planning documents can reduce the risk of abuse and exploitation.
2. Requiring accountability, additional checks and balances, and limited authority are drafting tools lawyers can utilize to limit risk of abuse.
3. Attorneys should advise clients to be extra diligent when selecting the agent(s) named in advance planning documents.
4. Authorizing revocation by third parties can help to limit the damage done by named agents who start to abuse or exploit the client.

Introduction to Risks in Advance Planning Documents

We use a variety of tools such as powers of attorney and advance health care directives to carry out the goal of advance planning to put into place a plan for decision making if the person should lose the ability to make choices. The tools used to empower agents and advisors to help make and carry out decisions, in the event of incapacity, can become tools of abuse and exploitation. The health care surrogate or proxy can start making health care decisions that are clearly not a reflection of the person. The agent under a power of attorney can mismanage or steal assets, empowered by the appointment as an agent.

This Issue Brief explores the extra care that should be taken when drafting advance planning documents and selecting agents or advisors. Attorneys should include safeguards when drafting documents to ensure the documents require accountability, are transparent, limit high risk decisions, and expand the ability to revoke the authority if the agent starts to act inappropriately.

Selecting Agents

The first step to minimize risk in advance planning is carefully selecting agents for health care, financial or personal decisions. Most families default the selection to a spouse, child, or other close relative with little thought given to the ability of the person to do the job. Attorneys should first take time to discuss the responsibilities of the agent with the client. Some of the responsibilities of an agent include:

- Understanding the goals and values of the person;
- Making decisions as the person would;

- Safeguarding the person and their property;
- Avoiding conflicts of interest; and
- Acting as a fiduciary.

Characteristics to look for in an agent or proxy:¹

Selecting an agent or proxy is a big decision. The client should know the person, and feel comfortable that the person selected will be able to make decisions that reflect the wishes of the designator. Here are some of the characteristics a client should look for when selecting an agent or proxy:

- Trustworthy: if there is any doubt—name someone else.
- Commitment: the agent should be committed to the person driven principles of supported decision-making.²
- Listener: active listening to all involved is needed for good decision making.
- Available: the agent needs to be nearby or easy to contact when decisions need to be made. The agent should also be over 18 and healthy enough to be available and act.
- Organized: the agent needs to keep good records, take care of tasks on time, and calendar needed actions.³
- Emotional strength: health care and financial decisions can be very stressful. The agent needs to have the strength to make hard decisions.
- Diplomatic: the agent should be able to resolve conflict when disagreements arise between family members. The agent needs to be able to hear everyone out, explain the options, the reasons for the choice being made.⁴

While it is impossible to predict exactly how an individual will act as the agent, there are certain characteristics that are red flags to both the individual and the attorney when selecting an agent. Here are some characteristics the client may want to avoid when selecting an agent or proxy:

- A person who lacks emotional stability or strength;
- Personal financial problems (agents who steal money frequently do so because they need money);
- Persons with active substance abuse or addiction issues;
- Someone in poor health; and
- Persons who are not easily available when needed.

1 “How to Select an Attorney-In-Fact,” Legal Nature, (2013) published online at legalnature.com/article-center/power-of-attorney/how-to-select-an-attorney-in-fact.

2 Practical Guide to SDM, American Bar Association Commission on Law and Aging, (2016) available at americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html.

3 “Help for agents under a power of attorney,” Consumer Financial Protection Bureau, available online at consumerfinance.gov/consumer-tools/managing-someone-elses-money/#power-of-attorney.

4 “Making Medical Decisions for Someone Else: A How-To Guide,” American Bar Association Commission on Law and Aging, (2009), available online at americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_bk_proxy_guide_gen_authcheckdam.pdf.

CASE EXAMPLE

Joyce named her youngest son, Sam, as her health care proxy and agent on her power of attorney. Sam lived 800 miles away and traveled frequently for work. Joyce discussed her personal, financial and health care values with Sam. When Joyce got sick, her daughter, Denise, moved to live nearby. Denise was Joyce's primary caregiver during the last couple of years of Joyce's life. Joyce never discussed her personal, financial and health care values with Denise. Denise made Joyce's health care decisions, managed her money and paid Joyce's bills after Joyce was no longer able to communicate. The advance directives naming her son, Sam, were nearly useless, because of his lack of availability. The financial and health care decisions that were made didn't always reflect Joyce's values. The planning failed because Sam's availability was not factored into the selection of an agent, the personal and health care values and goals of Joyce were not documented and Joyce was not encouraged to discuss her wishes with everyone in the family.

Drafting Health Care Directives: Discussing Health Care Values

The first step to assuring an advance health care directive is used to make health care decisions that reflect the values and goals of the person is careful selection of the agent as discussed above. The second step is a conversation between the person and the agent and other family members about health care goals and values. Health care *values* are deeply held personal beliefs about the kinds of care a person wants, or does not want, and about what is most important in the person's life. Health care *goals* are the desired outcome for treatment. Values are deeply held and long lasting, goals are formed at the time of illness or injury. The [Conversation Project](#) workbooks, [Five Wishes](#) directive, and [Go-Wish cards](#) are available to help guide conversations about health care values.⁵

A common misconception with health care planning is that the person can dictate all future health care decisions to the agent well in advance. However, because the spectrum of health conditions is so incredibly broad, it is very difficult to leave specific directions regarding specific treatments that are useful or effective. The directions commonly left in living wills about specific treatments are often difficult for the agent and health care practitioner to interpret. It is hard to tell when death is imminent, there can be disagreement if the person will ever regain consciousness. The agent should have a meaningful understanding of the person's strongly held values. This understanding will provide much more useful guidance when it is time to make a decision.

The person and the agent should have these value conversations early and often. The conversations should also be held between the person and all family members while the person is able to lead the discussion. This should help foster open communication between family members. If the person is eventually unable to make or communicate decisions, open communication between family members is a helpful practice to avoiding bad choices by the health care proxy or agent.

PRACTICE TIP

Powers of attorney and health care advance directive laws are state specific. All changes or additions to a power of attorney or advance health care directive form should be done by an attorney with expertise in the laws of the state the person is in. Examples offered may not work in your state.

Drafting Powers of Attorney

A power of attorney is an important planning document; however, a power of attorney in the wrong hands can be a license to steal. A power of attorney creates a legal right for the agent to transact business on behalf of the person who has created the power, known as the grantor. The authority granted in a power of attorney can be

⁵ "Health Decision Resources," American Bar Association Commission on Law and Aging, (2017) available online at [americanbar.org/content/dam/aba/administrative/law_aging/Health_Decisions_Resources.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/Health_Decisions_Resources.authcheckdam.pdf).

limited, and accountability can be drafted into the document. Powers of attorney can be revoked; however, it can be challenging for the grantor to revoke power.

Five safeguards to consider adding to a power of attorney for finances

Every Power of Attorney should be carefully tailored to the needs of the individual creating the power (called the principal or grantor). Because of the potential for misuse of powers by the person named as one's agent, the following safeguards should be considered:

- 1. Third Party Accounting:** Enlist a trusted third party to do accounting and oversight and ensure transparency. Powers of attorney normally have no monitoring or oversight after the principal loses capacity. Having a second set of eyes on the money provides a minimum amount of transparency. Accountings need not be professional products, but they should at least document the dates, nature, and amount of all financial transactions. The grantor can arrange online access for copies of bank and credit card statements to be sent to the third party.
- 2. Second Signature:** Require a second signature by a trusted third party for large transactions. Large transactions, such as the sale of a home, or liquidation of a large investment, can be the hardest to undue. A second signature by a trusted third helps ensure the appropriateness of the transaction.
- 3. Power to Revoke:** Grant a power to revoke the agent's authority to a trusted third person. This is a serious power to give any third person, so it requires an exceptional level of trust and reliability in the third person. But, if the agent's actions prove seriously out of line, this can be a last resort. Some powers of attorney also authorize law enforcement or adult protective services to revoke the authority of the agent if they believe abuse or exploitation is taking place.
- 4. Define Gifting Power:** Clearly define the power of the agent to make gifts. The safest option is to prohibit gifts, but many people want to continue their pattern of giving even after they lose capacity. Limiting gifting requires identifying the permitted recipients or class of recipients and limits on the amounts and frequency.
- 5. Limited Powers:** Limit any changes to beneficiary rights under accounts or contracts. This may include rights of survivorship under bank accounts, or changes in beneficiary designations under trusts or life insurance policies, annuities, investment portfolios, or similar instruments.

PRACTICE TIPS

Increasingly, financial institutions can arrange to provide electronic records to anyone designated by the account holder. Having access to financial records makes it much easier for the agent and designated third party to monitor transactions.

When limiting the dollar amount of transactions, it is important to cover the possibility of a large transfer being broken down into many smaller transfers. It is also important to provide for a back-up on a second signer.

Draft language for a power of attorney

My agent shall keep complete records of all transactions on my behalf and provide a quarterly accounting to _____. The quarterly accounting shall include copies of all financial statements, credit card or loan statements.

Any transaction or series of related transactions totaling more than \$_____ shall require two signatures, the signature of my agent named in this document and the signature of _____.

I authorize _____ to revoke this power of attorney on my behalf, if they believe the powers granted in this document are being abused.

My agent is not authorized to make gifts of my money or property.

My agent is not authorized to change the beneficiary, payable on death, or transferable on death designations on any bank account, financial account, life insurance policy, pension, trust, annuity or similar contract or instrument, with the exception that my agent may assign a life insurance policy for the limited purpose of pre-paying funeral arrangements for me incident to an application for Medicaid benefits.

Glossary

Advance planning

Planning ahead of time for decision making, in the event of incapacity.

Advance Care Directive

Document containing directions for health care in the event of incapacity.

Agent

Person named in a power of attorney to transact business or make decisions on behalf of another person. Also known as an “attorney in fact.”

Attorney in fact

Person named in a power of attorney to transact business or make decision on behalf of another person, also known as the “agent.”

Grantor

The person signing an advance directive or power of attorney.

Living Will

Document leaving directions for end of life health care, may also include appointment of a surrogate or proxy.

Proxy

Person who makes health care decisions for another person.

Surrogate

Person who makes health care decisions for another person.

Trustee

The person named to manage the assets in a trust.

Revocation

Ending the authority of an agent.

Conclusion

Unfortunately, abuse and exploitation happen with or without advance planning. When attorneys help clients with advance planning, they can take steps to reduce the risk of the advanced planning tools being used as tools of abuse and exploitation. Attorneys can help clients select better agents, encourage discussing personal, financial and health care values and goals, and draft reasonable limitations into advance planning documents that reduce risk. There’s no guarantee that abuse will not happen, but we can take steps to reduce the risk and make it harder for these tools to be tools of abuse and exploitation.

Additional Resources

- David Godfrey, Senior Attorney, ABA Commission on Law and Aging, david.godfrey@americanbar.org
- [Listing of power of attorney laws in all 50 states](#), ABA Commission on Law and Aging

- [Selected Issues in Power of Attorney Law in all 50 states](#), ABA Commission on Law and Aging
- [Listing of advance health care directive laws in all 50 states](#), ABA Commission on Law and Aging
- [Managing Someone Else's Money guides](#), Consumer Financial Protection Bureau
- [Department of Justice, Elder Justice Initiative](#)
- [Administration for Community Living](#)
- [ABA Commission on Law and Aging](#)
- [National Adult Protective Services Association](#)

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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