

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

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- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About ABA COLA

The ABA Commission on Law and Aging is a collaborative and 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.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

# 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, limited authority, are drafting tools lawyers can utilize to limit risk of abuse.
3. Attorneys should advise clients to be extra diligent when selecting of the agent(s) named in advance planning documents.
4. Third party revocation can help to limit the damage done by named agents who start to abuse or exploit the client.

# Section 1: Introduction to Risks in Advance Planning Documents

# What Are The Risks?

- Powers of Attorney and Advance Health Care Directives are tools to help plan for decision making
- Can become tools of abuse and exploitation
- Financial agents can financially exploit
- Health care agents can make inappropriate health care decisions



# Careful Selection of Agents

- Agents are often selected by tradition, obligation, or default
- To help select better agents ask about
  - Character
  - Personal challenges
  - Availability





# Agent Responsibilities

- Understanding goals and values
- Making decisions as the person would
- Safeguarding the person and their property
- Avoiding conflicts of interest
- Acting as a fiduciary

# Characteristics to Look For

- Trustworthy
- Commitment
- Listener
- Available
- Organized
- Emotional strength
- Diplomatic

# Good Agents Are Committed to SDM

- Always informing and involving client in decisions
- Explaining issues in an understandable manner
- Offering advice and guidance
- Allowing to person to make a choice as long as possible
- Voicing concerns over choices, without being demeaning
- Helping to implement decisions as needed

# Characteristics to Avoid

- Lack of emotional stability or strength
- Personal financial challenges
- Substance abuse or dependency
- Poor health
- A sense of entitlement
- In conflict with other family members
- Unavailable

# Case Example

- Joyce named her youngest son, Sam, as her health care proxy and agent on her power of attorney
- Sam lives far away
- Joyce discussed her values and wishes with Sam
- Joyce's daughter, Denise, moved to live near Joyce when she got sick
- Joyce never discussed her values and wishes with Denise
- Denise made Joyce's health care decisions and managed her money

# Section 2: Drafting Health Care Directives

Discussing Health Care Values

# Improving Health Care Directives

- Careful selection of the agent or proxy
- Make available
  - Lots of copies – give to all health care providers
  - Give to all family or close friends
  - Registries?

# Limited Usefulness of Living Will

- Illness or injury is terminal
- Death is imminent
- Permanent unconsciousness or persistent vegetative state
- Life prolonging care
- Artificially provided nutrition or hydration



# Personal and Health Care Values

- Values are strongly held, personal beliefs
- Understanding the persons values, helps to make better choices for them
- Values surveys
  - [Five wishes](#)
  - [Conversation project](#)
  - [Stanford Letter Project](#)
  - [Go Wish Cards](#)
- Encouraging development and discussion of values should be incorporated into drafting documents

# Section 3: Drafting Powers of Attorney

# Five Safeguards to Consider Adding to a Power of Attorney for Finances



# 5 Safeguards to Add to POA

- Third Party Accounting
- Second Signature
- Power to Revoke
- Define Gifting Power
- Limited Powers

# Third Party Accounting

- Name a trusted third party
- Require full accounting
  - Inventory
  - Accounts
  - Documents
  - Transactions
- Arrange access to financial records

# Sample Language for Accounting

- 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.

# Second Signature

- Name a person, or class of persons for a second signature
- Dollar amount trigger
  - Cover serial transactions
- Certain transactions such as sale or encumbering real estate
- Sale of investments

# Sample Language Requiring 2<sup>nd</sup> Signature

- The sale, pledge, mortgage, transfer, rental or lease of any real estate shall require, in addition to the signature of my agent named in this document, the signature of Sally Smith or Braden Smith.
- 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 \_\_\_\_\_.



# Power to Revoke Authority

Give a trusted third party the power to revoke the authority granted in an advance directive, if the third party believes the grantor is being abused, neglected or abused.

# Sample Revocation Language

- I authorize \_\_\_\_\_ to revoke this power of attorney on my behalf, if they believe the powers granted in this document are being abused.
- I authorize police or adult protective services to revoke this document if they believe that I am being abused, neglected or exploited by the agent(s) named in this document.
- Revocation shall be in writing with a copy served on the agent named in the document and recording in the county records.

# Define Gifting Power

- Deny or specifically limit gifting
- Specific categories of gifts
- To specific persons or classes or persons
- In limited amounts and frequencies
- What about gift tax or Medicaid asset planning?

# Sample Gifting Language

- My agent may only make gifts to my children or grandchildren, at Christmas or on their birthdays, in keeping with my traditions, no gift shall exceed \$100 in value, of cash, real or personal property.
- No gifts shall be made of my money, real or personal property by my agent to anyone for any reason.

# Limited Powers

- Limit any changes to beneficiary rights under accounts or contracts:
  - Life insurance, bank accounts, securities accounts
- Changing the beneficiary undermines the estate plan of the person
- Is a stealth form of financial exploitation
- Limit to paying for funeral and burial arrangements incident to applying for Medicaid or similar benefit programs

# Sample Language on Beneficiaries

- 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.

# Practice Tips

- Provide back ups for agents and 2<sup>nd</sup> signers
- Online banking makes arranging access to financial accounting easier
- Increasingly financial institutions will arrange to have copies of statements sent to 3<sup>rd</sup> party
- Monitor not just bank statements but credit card statements and other bills.
- Limit on contracts, arbitration agreements
- Secure valuable items that are easily removed

# Thank You

- Questions





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**WEBINAR: Civil Litigation as a Remedy for Financial Exploitation of Vulnerable Older Adults**  
By [Krisna Messore](#) | [NCLER Webinar](#)  
Wednesday, February 21st, 2018 at 11:00 a.m. PT/2:00 p.m. ET.  
The financial exploitation of vulnerable adults is epidemic. While police, prosecutors, and adult protective services offer one course of action, many of these cases end up – or should end up – as civil lawsuits. The procedures for pursuing a civil remedy in these cases often crossover between probate processes and civil actions, and may involve a variety of legal theories. This webinar will cover:

- Jurisdictional issues
- Legal theories and remedies
- Client capacity and vulnerability

This webinar is tailored to experienced civil attorneys serving vulnerable older adults. A recording of a previous webinar detailing the legal basics of financial exploitation is available here.

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