

Drafting Powers of Attorney to Deter Exploitation

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A power of attorney is an important planning tool. However, a power of attorney can potentially be misused as a tool for exploitation. Careful drafting can create accountability, and limit the ability of the agent using a power of attorney to financially exploit the grantor. Attorneys working with older adults should consider including safeguards in power of attorney documents to help deter exploitation. This Practice Tip details six safeguards to consider when drafting a financial power of attorney: **1) Agent selection; 2) Third party accounting; 3) Limit and define gifting power; 4) Second signatures; 5) Limit authority; and 6) Power to revoke.**

Agent selection. The most important step in reducing the risk of exploitation is careful selection of the agent being named. It is essential to name a trustworthy and reliable agent. The agent must be able to help the grantor make and carry out decisions (the principle of Supported Decision-Making), and commit to making decisions that reflect the values and goals of the grantor. The discussion of who to appoint needs to go beyond “who do you want to name as your agent?” to include an open discussion of the proposed agent.

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.

Limit and define gifting power. Gifting money and property using a power of attorney is one of the most common forms of exploitation. The power of attorney should specifically limit and define any gifting authority. While it may be desired to make traditional holiday or special occasion gifts, these can be clearly defined and limited in the document. If there is a concern about needing gifting for tax planning, discuss this with the client in the drafting process and clearly define and limit the kinds of gifts and the circumstances under which those gifts would be made in the document.

Require a second signature on certain transactions. It is bothersome to require two signatures to pay the electric or phone bill. But larger transactions such as the sale of real estate, or cars, can easily be used to exploit. The power of attorney can define transactions, either by type, or by dollar amount that require a second signature.

Limit authority. Sometimes exploitation is not discovered until after the grantor is deceased. For example, changing the beneficiary on life insurance, annuity or other contracts, adding rights of survivorship, or beneficiary designations on financial accounts, trusts, or similar instruments, may not be discovered until after the individual dies. It is important to discuss limits to account changes and these limits should be drafted into documents. It may be necessary to change a beneficiary or assign a life insurance policy incident to a Medicaid or SSI application. If this is a possible need for the client, draft limited authority into the power of attorney for this purpose.

Power to revoke. The ultimate oversight protection is granting a third party the power to revoke the power of attorney, if the third party believes it is being used to abuse, neglect or exploit the grantor. Often, exploitation begins when the grantor has a limited or no ability to object. Stopping exploitation using a power of attorney can be time consuming if this authority is not created in the document.

Additional Resources

- Drafting Advance Planning Documents to Reduce the Risk of Abuse or Exploitation, National Center on Law & Elder Rights, [Issue Brief](#) and [webinar recording](#)

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