

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

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The mission of the Commission on Law and Aging is to educate and advocate to protect the rights and dignity of adults as they age. The vision of the ABA Commission on Law and Aging is a society where the rights of every adult as they age are acknowledged, respected, and protected. 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 Chapter Summary 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.
- Involving the person in the decision-making process.
- When necessary, making decisions as the person would.
- Safeguarding the person and their property.
- Avoiding conflicts of interest.
- Acting as a fiduciary.

Characteristics to Look for in an Agent or Proxy

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.
- **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.
- **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 and explain the options and the reasons for the choice being made.

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;
- Persons who are unlikely to be able to support; and
- Persons who are not easily available when needed.

CASE EXAMPLE

Jamie named Rob as health care proxy. Rob lived 800 miles away and traveled often. Jamie never talked with Rob about the appointment—in fact, he never told Rob he had been named. Jamie was in an accident and when the hospital called Rob seeking consent to perform surgery, Rob had no idea what to do or say. A few weeks later the hospital was ready to discharge Jamie to a skilled nursing facility and couldn't reach Rob, as he was in the middle of the Atlantic on a slow boat to Spain. When Rob was reached, it was unclear if the healthcare proxy could sign the admissions agreement or request financial records to arrange payment for long term care.

Drafting Health Care Directives: Discussing Health Care Values

The first step to assuring an advanced health care directive will be used to make health care decisions that reflect the values and goals of the person is thinking about what those values and goals are, and then selecting an agent who will support those goals. There should be a conversation between the person and the agent and other family members or supporters 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, [PREPARE for Your Care™](#), and [Go-Wish cards](#), among others, have helpful guides about developing values, goals, and having meaningful conversations.

An understanding of health care values and personal goals is often more helpful than specific directions. The spectrum of health care conditions is so incredibly broad, it is very difficult to leave specific directions regarding specific treatments that are useful or effective. Many of the directions are illness or condition specific, and hard to apply outside of a very limited spectrum of health care conditions. The agent should have a meaningful understanding of the person's strongly held values and personal goals. Physician's Orders on Life Sustaining Care (POLST) are now available in all 50 states. POLST orders are created in consultation with health care professionals when the person has a serious or terminal illness, and the orders document the care instructions based on the actual diagnosis and facts at the time they are needed. POLST can be authorized by anyone who can consent to medical care.

The person and the agent should have these conversations about values early and update as things change. The conversations should also be held between the person and all family members or supporters while the person is able to lead the discussion. This should help foster open communication among family members and supporters. If the person is eventually unable to make or communicate decisions, open communication 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 (POA) can also be easily misused to exploit the authority. A power of attorney creates a legal authority 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 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 receive an accounting and provide oversight. 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 do not

need to 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 offers some assurance of 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. 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

- Many financial institutions can arrange “read only” access to online account information. This gives the person providing oversight access to financial information, without the authority to transact business. Sharing the account owner's username and password often makes it possible for the person who has that information to transfer or withdraw money from the account. Setting up accounts with “read only” access will prevent this.
- Many financial statements and invoices are now sent electronically. A good way of sharing these with someone who is monitoring or providing oversight, is to set up a shared email address for the messages to be sent to. This gives access to information, without giving access to the underlying accounts.

PRACTICE TIPS: 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 discussion of 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 advocates can take steps to reduce the risk and make it harder for these tools to be tools of abuse and exploitation.

Additional Resources

- [Advance Planning Basics](#), NCLER
- [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
- [Health Care Planning Guides and Tools](#), ABA Commission on Law and Aging
- [Managing Someone Else's Money Guides](#), Consumer Financial Protection Bureau

- [Five Safeguards for Power of Attorney](#), ABA Commission on Law and Aging
- [Department of Justice, Elder Justice Initiative](#)
- [Administration for Community Living](#)
- [ABA Commission on Law and Aging](#)
- [National Adult Protective Services Association](#)
- [POLST/MOLST](#)

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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