By **L. Paul Hood, Jr.**

Property or Financial Powers of Attorney

Prudent estate planning or a source of liability?

Property or financial powers of attorney (POAs) are ubiquitous in estate planning and with very good reason. The likelihood of becoming incapacitated prior to death is significantly greater than the risk of dying at any particular time.[1] Therefore, the actuarial odds are that the property or financial POA will be needed before other estate-planning documents are required.

Many estate planners pay lip service to the fact that the property or financial POA is the most important estate-planning document. However, the sad fact is that the POA too often is treated as a throw-in document that's not even reviewed by the principal prior to execution. Few estate planners spend any time customizing a POA for a particular client. Because of this practice, most clients believe that all POAs are merely forms, and most are similar and really boilerplate. Nothing could be further from the truth!

Simply put, the vast majority of property or financial POAs used for estate-planning purposes are very broad because the goal is to obviate the need for a conservatorship, interdiction or guardianship. Unfortunately, the breadth of most property or financial POAs also creates opportunities for abuse, as several articles in the popular press have called property or financial POAs "licenses to steal."[2]

Here are some selected best practices and tips in the drafting and execution of property or financial POAs. For purposes of this article, I use the Uniform Power of Attorney Act (the Act) as a surrogate for applicable state law. However, caution always is advisable because some significant differences exist in the law among the states on property or financial POAs.[3]

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Lies, Damn Lies and Statistics

According to a recent study by the U.S. Consumer Financial Protection Bureau Office of Financial Protection for Older Americans (CFPB),[4] if a fiduciary (agent, trustee, guardian or agent) was behind the loss due to financial abuse, the amount of money involved was steeper than in any other category, an average of $83,600 per victim.

If a non-family caregiver was the culprit, the average loss was $57,800; if it was a family member, the average loss was $42,700; and if it was a stranger, the average loss was $17,000. CFPB analyzed government reports of suspicious financial activity, which CFPB said involved more than $6 billion in attempted and actual losses between 2013 and 2017.

How much warning do you give to clients who sign POAs? Could a client sue an estate planner for failure to warn about the risks of a POA? Could a scrivener be sued for failure to explain the duties, powers and obligations of the agent to the agent? Unfortunately, the answer is "yes" to the last two questions.

The CFPB study cited above shows that the cases of elder financial exploitation (EFE) filed with the government in suspicious activity report (SAR) monthly filings quadrupled from 2013 to 2017, with money services businesses, for example, banks and other financial institutions, filing an increasing percentage of these SARs. Sadly, that report further indicates that EFE SARs likely account for but a tiny fraction of actual incidents of EFEs.

The amount of money that perpetrators stole or attempted to steal from older adults is substantial but likely significantly understated. In 2017, EFE SAR filers reported that $1.7 billion was involved in suspected

incidents. According to one study cited by the National Council on Elder Abuse,[5] approximately one in 10 Americans aged 60 and older have experienced some form of elder abuse. Some estimates range as high as five million elders who are abused each year. One study estimated that only one in 25 cases of abuse is reported to authorities.[6]

Abusers are both women and men. In almost 60% of elder abuse and neglect incidents, the perpetrator is a family member. Two thirds of perpetrators are adult children or spouses.

Elders who've been abused have a 300% higher risk of death when compared to those who haven't been mistreated. While likely significantly underreported, estimates of elder financial abuse and fraud costs to older Americans range from $2.9 billion to $36.5 billion annually.[7] Yet, financial exploitation is self-reported at rates higher than emotional, physical and sexual abuse or neglect.

Liability

Abuse of property and financial POAs is increasing, as are situations in which estate planners are being sued for, among others, not explaining the breadth of the instrument to the principal and for not explaining the agent's powers, duties and obligations to the agent. I'll quickly analyze just two cases (there are others) in which a lawyer was successfully sued for malpractice for failing to do exactly that. There are cases in which the scrivener was sanctioned ethically.[8]

In *Meyer v. Purcell*,[9] a lawyer was held liable for malpractice in the amount of $256,896 in litigation fees pursuant to a contingency fee agreement in an asset recovery action in connection with a POA in favor of a niece when a jury found that the lawyer was negligent because he:

> . . . [1] caused the transfer of all of the assets of [Holtz] and [Boliance] to [Niece] in her own name, without regard to their estate plans, or [2] failed to advise [Niece] to cooperate with the personal representative of the Estates . . . and failed to advise or assist [Niece] to return the assets [to Estates]. . .[10]

The expert for the plaintiffs testified that the lawyer :

> . . was negligent for, among other things, failing to consult with Boliance and Holtz [who were in their 90s] pursuant prior to drafting their respective powers of attorney, failing to make any reasonable inquiries when meeting with them, and for instructing Niece to retitle Boliance's and Holtz's assets and property to include herself in joint capacity. Schuster testified Purcell *should have consulted with Boliance and Holtz to ascertain their wishes prior to drafting the powers of attorney, and should have made reasonable inquiries into their prior estate plans and their respective capacities to execute powers of attorney.*[11]
> (Emphasis added.)

Don't get dragged into a potential "emergency" mess by someone who'll benefit by the POA and who wants you to drop everything and do immediate work.

The lawyer prepared the POAs at the niece's request, and the lawyer never instructed the niece as to the powers and obligations of being an agent prior to the execution and delivery of the POAs. Does this sound at all familiar to you?

Tip: Don't get dragged into a potential "emergency" mess by someone who'll benefit by the POA and who wants you to drop everything and do

immediate work. Insist on representing the real client and talking to that client outside of the presence of the protagonist. If the agent isn't available, insist on educating the agent as to his duties, powers and responsibilities. Explain the import and impact of an immediately effective POA to the client before he executes it. Put this all in writing!

In *Svaldi v. Holmes*,[12] a lawyer drafted a POA for an elderly client that appointed two neighbors as agents. The lawyer included a protective provision in the POA that required the agents to give the lawyer an inventory of the principal's assets within 30 days of appointment and to give the lawyer annual accountings. The agents proceeded to ignore those duties and purloined approximately $800,000 from the client. Unfortunately, the lawyer failed to follow up with the agents on their duties, which they never performed.

If you take on an accountability function, you had better do that, or face the consequences.

Nonplussed (to say the least), the client then sued the lawyer for malpractice. He alleged that the lawyer had negligently failed to monitor the neighbors as provided for in the POA. The court held that by including this provision, the lawyer had increased the scope of his representation and had assumed a responsibility to attempt to make it work. The court relied on a comment in the *Restatement (Third) of the Law Governing Lawyers* Section 50 (a lawyer "must exercise care in pursuit of the client's lawful objectives in matters within the scope of the representation"). The appellate court, in reversing the grant of summary judgment in favor of the lawyer and remanding for trial, as corrected, noted:

> We conclude that, by incorporating the inventory and accounting scheme into the power of attorney, Holmes *expanded the scope of his representation* of Svaldi beyond the mere drafting of legal documents. By setting up the inventory and accounting scheme, Holmes assumed a responsibility to attempt to make it work. Thus, Holmes had a duty to follow up with Johnson and Esquibel regarding their obligation to complete an inventory and the annual accountings and encourage Johnson and Esquibel to comply with the scheme.[13]
> (Emphasis added.)

This one had to hurt because the lawyer got half of it right, that is, putting in some accountability rules. However, he failed to monitor obvious miscreant thieves pursuant to the accountability scheme that he devised. His failure to monitor meant that he had to go to trial wearing a duty that portended his future liability for damages as a result of the failure to monitor the agents. If you take on an accountability function, you had better do that, or face the consequences.

Best Practices

Here's a checklist of items to consider in POAs:

Durability and effectiveness. Clearly, a property POA is of little use to avoid a court-supervised proceeding if it isn't durable, that is, survives the incapacity of the principal. Therefore, best practice is to use durable POAs.

Despite the fact that the Act provides that POAs are durable unless they say otherwise,[14] it's best practice to specifically so provide because this isn't the law in every state.[15] As of this time, approximately 30 U.S. jurisdictions have adopted the Act, although all states recognize durable POAs.

Best practice is to include the word "durable," together with an affirmative statement about incapacity having no impact on its continuing viability to fully cover the waterfront.

The meaning and effect of a POA is determined by the law of the jurisdiction indicated in the POA and, in the absence of an indication of jurisdiction, by the law of the jurisdiction where the POA was executed.[16] A POA executed other than in the jurisdiction of execution is valid in that jurisdiction if, when the POA was executed, the execution complied with the law of the jurisdiction that determines the meaning and effect of the POA pursuant to Section 107 of the Act or with the requirements for a military POA pursuant to 10 U.S.C. 1044b.[17]

Here are some other tips:

- There will be times that you'll want to expressly provide which jurisdiction's laws govern the interpretation of the POA.
- Newly executed property or financial POAs don't automatically revoke prior POAs. Each property POA should expressly revoke all prior property POAs (but cull out health care POAs from this revocation).
- The POA should be in writing, signed, witnessed by two people who aren't involved, dated and notarized. You never know where or why it's needed, so you have to shoot for the highest common denominator, which is Louisiana and New York (although New York recognizes foreign POAs if valid in that state).[18]
- You should ask the client for the right to contact the banks, brokerage houses and other financial institutions to review the POA in advance for their input and blessing or acceptance.
- Expressly authorize the agent to sign any additional POAs on forms required or preferred by the third party.
- Put a formal certification process in the POA instrument.
- Authorize the agent to pursue damages and costs of litigation when a recalcitrant third party either refuses to accept the POA or drags its feet in so doing, and you should indicate to the agent that he should aggressively pursue that third party. Unfortunately, not every jurisdiction adopted Section 120 of the Act as written,[19] so some jurisdictions that have adopted the Act don't expressly allow for damages and attorney's fees for failing to accept a legitimate property or financial POA.

Incorporation by reference? The Act contains a laundry list of areas that one can cover in a POA by mere reference to the applicable section of the Act.[20] Should you incorporate those powers by reference, or should they be expressly separately stated? There's a difference of opinion here.

I believe in a "belts and suspenders" approach, in which you incorporate by reference and specifically provide for certain enumerated powers. I believe that the POA form should nevertheless carefully and expressly provide for the powers that the principal wants the agent to have, because the incorporation by reference powers are very broad. In fact, those broad powers can be more than your client principal wants the agent to have. In addition, what happens if the POA is needed in a jurisdiction that hasn't yet adopted the Act? Incorporation by reference may cause a delayed acceptance during which damage occurs while the third party confirms what applicable law provides.

Best practice is not solely to rely on incorporation by reference.

Usually, the client should affirmatively negate certain powers if that's what the client intends, because, again, agents in other places may have these powers under the law applicable in that jurisdiction. Quite often, the client wants to authorize some part, but less than all, of the powers that must be expressly authorized, so you should discuss that list with the client.

POA modifications often are necessary to your regular forms, particularly in blended families.

Do you specifically discuss the so-called "hot powers[21] with the principal to see whether he wants them? Or, do you simply include them in the POA without discussing or highlighting them? If your answer to the first question was "yes," you're using best practices. However, if your answer to the second question is "no," then you're not using best practices and are at some risk.

Blended family issues. POA modifications often are necessary to your regular forms, particularly in blended families. The POA shouldn't permit an agent partner to significantly alter the principal's estate plan; likewise, the powers of an agent child should be similarly restricted.

The limitations might need to be both affirmative and negative. For example, a negative limitation might include restricting beneficiary changes and gifts that aren't in accord with the principal's estate plan. An example of an affirmative limitation might include requiring continuation of annual gifts. To dispel uncertainty, the POA should require the agent to give the children of the principal access to financial and medical information, or to the partner, if a child is the agent.

Here are some other tips:

- The POA in a blended family should limit giving away precious family heirlooms (for example, silverware, china and family pictures). I've seen this misused to divert family heirlooms, and people get very upset about that.
- It also should limit changing beneficiary designations and distribution provisions in individual retirement accounts and retirement plans.
- The POA should automatically terminate on separation or divorce, including appointments of relatives of the now former spouse.
- The POA should severely limit the exercise of powers of appointment, and it shouldn't waive any accountings and, in fact, should probably require periodic accountings by the agent, including to a third party, particularly after the principal's incapacity.
- The POA should affirmatively and broadly restrict self-dealing, including hiring relatives or affiliates.

Two agents can be helpful to cut down on abuse if one agent essentially keeps up with the actions of the other agent.

Avoiding tax problems for the agent. A well-drafted POA should expressly not create a transfer-tax issue for the agent and should cull out of the powers of the agent certain prohibited powers to avoid a general power of appointment, for example, the power to appoint to himself, his estate, his creditors or the creditors of his estate, which could cause inclusion of the principal's property in the agent's estate.

Cut Down on Abuse

Various methods can be employed to attempt to cut down on agent abuse of the property POA. Each option comes with advantages and disadvantages, which I'll discuss.

Select two agents instead of one.

Advantages:

- Have two agents who can keep each other accountable.
- More flexibility.

Disadvantages:

- One more unrestrained individual to worry about.
- The potential for collusion between the co-agents.
- Unless the POA allows each agent to operate independently, which puts the principal at risk for a second agent who may be acting at cross-purposes with the other agent, the POA instrument must provide for what happens when the agents disagree in a matter that requires the consent of both agents, that is, a way to settle the dispute.

A twist on this idea: Make one individual the "acting agent" and the other individual the "accountability agent." The accountability agent's sole role is to review the actions and accountings of the agent and empower that agent to take whatever actions are necessary to protect the principal, literally from the acting agent.

Choose your agents and backups wisely. Inquire as to the mental health and financial condition of the individual chosen to be an agent or a backup.

As a general rule, lawyers are required to discuss with the client all of the material risks, and advantages and disadvantages, of a particular strategy.[22] Because of the sheer amount of jurisprudence and popular press articles involving abuses of POAs, the risks of using or misuing a POA are real and significant.

Based on the identity and condition of the parties, there may be situations in which the lawyer shouldn't permit the client to sign an immediately effective POA. A lawyer can recommend a springing POA or an escrow system for an immediately effective POA.

Bottom line: Two agents can be helpful to cut down on abuse if one agent essentially keeps up with the actions of the other agent.

Really hold the agent accountable. Don't take "not yet" or "I'll get around to it" excuses. Regularly demand, receive and review the accountings, which should look like a trustee's accounting.

Have the agent *formally* accept the duties of agent and educate the agent as to his fiduciary duty and explain the powers, duties and obligations under the POA. Underscore the solemn importance of the property or financial POA with an execution ceremony. Make it clear to the agent that all violations will be considered serious and pursued and prosecuted to the fullest extent of the law and that his actions will be closely monitored.

Except as otherwise provided in the POA, an agent isn't required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal or, on the death of the principal, by the personal representative or successor in interest of the principal's estate.[23]

In a blended family, when a representative from one side of the family is serving as agent, it's best practice to require the agent to account to the other side of the family or to some independent third party, at least after the principal is incapacitated. This might be an appropriate use of the two agent strategy discussed earlier. It's also prudent to name different individuals as agent and as executor, or the POA should require an agent-executor to account to someone other than himself, which can be dangerous in a blended family.

Prohibit self-dealing between the agent (and a broad definition of affiliates) and the principal.

Have a different individual serve as agent and as successor trustee of a revocable trust or as executor because the agent has an accounting obligation that would be considered effectively moot if the agent is accounting to himself wearing a different hat.

Bottom line: The POA is very dangerous unless the proper context is set with the agent. Agents who know that their actions are going to be reviewed and scrutinized are more likely to tow the line.

Informal escrow approach. In this method, the estate planner would hold the original and all copies of the POA until such time as the principal was in distress or incapacitated, at which time that the estate planner would release the property POA.

Advantages:

- Provides a level of protection.
- The estate planner doesn't have to determine whether the principal is incapacitated legally, so there's some flexibility here, which many like.
- It helps to retain the client long term.

Disadvantages:

- Usually uncompensated.
- Runs the risk of having a "dormant client" who's actually still a real client.
- There are storage concerns, for example, what happens if the estate planner dies or retires?

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- What happens when you want to retire and can't find the principal?[24]
- There are real liability concerns, for example, liability to the principal for wrongful release, especially if the POA is abused.

Bottom line: On balance, I don't generally recommend this approach. Best practice dictates that estate planners never hold original documents for clients.

Formal escrow approach. In this approach, the client actually puts the original and all copies of the POA in a formal escrow with a third-party escrow agent who's authorized to release the instrument and copies on the occurrence of some event, for example, the principal's incapacity, which would have to be formally defined. Alternatively, it could be released on the order of someone (you should name backups for this individual).

Advantages:

- Stronger protection for the principal than the informal "escrow" arrangement.
- It's better for the estate planner, who doesn't have to worry about holding and releasing a POA.

- It's the core business for a company in the escrow business.

Disadvantages:

- Probably has a cost associated with it.
- It's not as flexible as the informal arrangement in which the estate planner, who's probably more familiar with the family and psychological dynamics of the principal, could release it on his decision.
- There's another contract to interpret.
- Delays.
- Interpretation of the defined term "disabled" in the escrow agreement, although better practice may be for a third party to make that determination, which escrow agents probably don't want to make.

A property or financial POA in the wrong hands can change the principal's estate plan beyond recognition unless appropriate measures are taken.

Bottom line: On balance, the escrow arrangement is best in my opinion, but could be saved for what I believe to be "high risk" situations, for example, a blended family, a non-family member, particularly a caregiver, as agent, and the informal escrow could be used for other cases, although I far prefer that clients receive all original documents, and I rarely if ever retain a client's original documents. The two agents approach is preferable to informal escrow.

Springing POAs. In a classic springing POA, the powers aren't immediately in effect on execution, but they "spring" into existence on satisfaction of some criteria, for example, a disability determination.

However, a springing POA needn't be solely sprung on the principal's incapacity. Instead, it could be triggered on the decision of some neutral third party, which is more flexible and doesn't necessarily require a formal determination of incapacity, particularly if the instrument requires a formal determination by a qualified physician, because a principal might be teetering on the edge of capacity and frustrate the process by refusing to submit to the capacity examination. I've seen this scenario occur several times. Or a physician, sensing an unpaid witness deposition in his future, declines to get involved.

Advantages:

- Provides a layer of protection and comfort not provided by any of the other methods because, in the case of a springing POA, the powers aren't effective immediately. Even in a formal escrow arrangement, there's a small chance that the POA is released improvidently.

Disadvantages:

- The powers aren't immediately effective, which creates its own set of problems for third parties asked to rely on the POA because the third party must go outside of the four corners of the instrument. This greatly troubles many third parties, particularly financial institutions.
- There are potential delays between the principal not being able to care for himself and the formal determination of incapacity or whatever other means by which the POA springs into existence.
- The POA spring is subject to potential conflicting interpretations, particularly around the definition of "disability."
- Sometimes, the principal frustrates the process by refusing to submit to an examination.
- Some physicians balk at getting involved in these potentially contested matters.
- Suppose that the principal disappears, for example, a mountain climber or spelunker. Because the principal isn't available to be examined, and because the laws of declaring someone deceased require significant time, measured in years, the POA literally doesn't spring into existence unless that possibility is built into the agreement.

Bottom line: On balance, I prefer immediately effective POAs, with appropriate protections offered

either by the two agent approach or the formal escrow arrangement.

License to Steal?

Contrary to the common practice of most lawyers, the POA used for estate planning isn't a throwaway document filled with regular boilerplate, so you shouldn't treat it like one—it's a real potential source of liability—for you! In fact, in the hands of the wrong person, a broad POA can be a license to steal, which makes it a more dangerous document than a will! As I discussed earlier, most money or other property purloined by a crooked agent is never recovered. A property or financial POA in the wrong hands can change the principal's estate plan beyond recognition unless appropriate measures are taken.

With that said, the grieving principal or the principal's beneficiaries will want to be made whole, and they'll start looking for deep pockets to sue. Guess what? Your malpractice insurance policy (or your personal assets) is low hanging fruit, particularly if you failed to go over the form and what it meant with the principal before he signed it, confirmed these instructions and explanations in writing and educated the agent, in writing.

Endnotes

1. If you want proof of this statement, simply compare the prices of life insurance and disability insurance.
2. *See, e.g.,* Debra Whitman and Jilienne Gunther, "Get a Power of Attorney (But Make Sure It's Not a License to Steal)," *AARP Blog* (March 3, 2017), *https://blog.aarp.org/thinking-policy/get-a-power-of-attorney-but-make-sure-its-not-a-license-to-steal*; Deborah L. Jacobs, "Putting Your Faith in a Power of Attorney," *The New York Times* (May 20, 2009), *www.nytimes.com/2009/05/21/your-money/estate-planning/21POWER.html*, which quotes prominent elder law attorney Bernard A. Krooks as describing the property or financial power of attorney as a license to steal.
3. New York General Obligations Law Section 5-1501B.
4. "Suspicious Activity Reports on Elder Financial Exploitation: Issues and Trends," Consumer Financial Protection Bureau (February 2019).
5. Mark S. Lachs and Karl A. Pillemer, "Elder abuse," *New England Journal of Medicine*, 373, 1947–56 (2015), *www.nejm.org/doi/full/10.1056/NEJMra1404688*.
6. Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University and New York City Department for the Aging, "Under the Radar: New York State Elder Abuse Prevalence Study" (May 2011), *https://ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf*.
7. *Supra* note 5.
8. *See, e.g., Atty. Grievance Comm'n of Md. v. Hodes*, 441 Md. 136 (Ct. App. Md. 2014).
9. *Meyer v. Purcell*, 405 S.W.3d 572 (Mo. Ct. App. 2013).
10. *Ibid.*, at p. 577.
11. *Ibid.*, at p. 579.
12. *Svaldi v. Holmes*, 986 N.E.2d 443 (OH Ct. App. 2012).
13. *Ibid.*
14. Uniform Power of Attorney Act (Act) Section 104.
15. *See, e.g.,* Cal. Probate Code Arts. 4124, 4215 and 4128.
16. Act Section 107.
17. Act Section 106(c).
18. La. Civ. Code Arts. 1833 and 1836; New York General Obligations Law Section 5-1501B.
19. *See, e.g.,* Ohio.
20. Act Section 202(a).
21. Act Section 201(a).
22. Model Rules of Professional Conduct Rule 1.4.
23. Act Section 114(h).
24. *See, e.g.,* NYSBA Ethics Opinion 1182 (Jan. 23, 2020).