

# Addressing Power of Attorney Abuse: What Courts Can Do to Enhance the Justice System Response

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## Executive Summary

The Conference of Chief Justices and Conference of State Court Administrators Joint Committee on Elders and the Courts (Joint Committee) addresses issues related to the aging population, vulnerabilities associated with aging, and the growing number of cases involving older people coming before the courts. One of the Joint Committee's current priorities is financial exploitation of older adults, including abuse of powers of attorney (POAs). At the request of the Joint Committee, the National Center for State Courts examined the role that state courts might play in deterring POA abuse and providing appropriate and timely remedies. This paper reports the findings from an exploratory study focused on the literature on POAs and the views of national and state experts engaged in addressing financial exploitation and power of attorney abuse.

POAs have become a popular estate planning tool due to their low cost, ease of execution, privacy, and scope of authority. These qualities also afford opportunities for abuse, and experts express concerns about the ease with which an agent could secure a POA through undue influence, duress, or fraud and then conduct transactions involving the principal's property with little or no oversight. POAs are private contracts executed and implemented under the authority of state law. A number of states have taken steps to amend their POA statutes to reduce the potential for abuse or to increase the likelihood that such abuse will be identified and remedied effectively. Over a dozen states have replaced previous POA statutes with the 2006 Uniform Power of Attorney Act (UPOAA).

Much of the literature on POAs points to the lack of reliable information about the frequency of POA abuse or the magnitude of its impact on the financial security of the elderly. Although many government agencies and commercial industries recognize that POA abuse is a serious problem, the lack of data contributes to difficulty in developing effective prevention and remediation by state and local governments, criminal justice and social service agencies, national advocacy groups, and community organizations.

Sixteen state and national experts in elder law and financial exploitation shared their knowledge and perspectives about issues identified in the literature review with NCSC staff. The experts included members of the UPOAA Drafting Committee, leaders of state and national associations of elder law and trust and estate attorneys, Consumer Financial Protection Bureau officials, authors of scholarly articles on POA abuse and financial exploitation of the elderly, and judges and other professionals involved in a variety of capacities to protect incapacitated adults. Their consensus view is that approaches to reducing POA abuse should maintain the viability of POAs as a useful, non-judicial, inexpensive, and easily accessible vehicle for individuals to make financial arrangements and to avoid guardianship, which is considered to be more expensive, intrusive, and cumbersome. With these caveats, also supported by the literature, the state and national experts identified several measures that state courts can undertake to more effectively address power of attorney abuse:

- Courts should develop resources to assist judges and courts in recognizing indicators of financial exploitation, including abuse of a power of attorney, in all types of cases coming before the court.

- Court resources should include: model forms and orders specifying the format and documentation expected for POA accountings from agents; policies that limit continuances and extensions for POA agents to file accountings; funding for qualified court-appointed guardians ad litem (GALs) and/or counsel to conduct investigations and monitor compliance with court orders; protocols for the appointment of GALs and/or counsel including professional qualifications and expertise required of such individuals; and protocols for making referrals to APS or other community agencies or services.
- Trial judges would benefit from education on the legal aspects of POAs, elder abuse and exploitation, the impact of aging on cognitive capacity, functional limitations that make older people more vulnerable to exploitation, and the family dynamics that may affect an agent's actions on behalf of the principal.
- State courts should set standards for Continuing Legal Education curricula on POAs that include instruction on the ethical obligations of lawyers to the principal in a POA or a client who wishes to execute a POA.
- State courts should proactively inform their state legislatures about gaps or ambiguities in state POA statutes that may impede effective court responses to POA abuse.
- State courts should engage actively in state and local multidisciplinary partnerships that address elder financial exploitation, facilitate prevention and early identification, and offer community education about the court's role in these multidisciplinary efforts.

The Conference of Chief Justices and Conference of State Court Administrators Joint Elders and Courts Committee can speak with an informed and influential voice to bring attention to these issues, encourage court engagement in reform efforts, and advocate on behalf of state courts for the resources necessary to address POA abuse and other financial exploitation of older persons.

## **I. Introduction**

The Conference of Chief Justices and Conference of State Court Administrators Joint Committee on Elders and the Courts (Joint Committee) addresses issues related to the aging population, vulnerabilities associated with aging, and the growing number of cases involving older people coming before the courts. Examples of initiatives the Joint Committee has undertaken include estimating the number of adult guardianship and conservatorship proceedings, participating in guardianship reform efforts, and improving the courts' responses to elder abuse.

One of the Joint Committee's current priorities is financial exploitation of older adults, including abuse of powers of attorney (POAs). The Joint Committee asked the National Center for State Courts to examine the role that state courts might play in deterring POA abuse and providing appropriate and timely remedies. This paper reports the findings from an exploratory study involving review of the literature on powers of attorney and interviews with national and state experts on elder law, local practitioners, and other leaders in addressing financial exploitation and power of attorney abuse.

## The Benefits and Hazards of Powers of Attorney

Powers of attorney (POAs) are private contracts executed and implemented under the authority of state law. POAs serve important values of assisting people in conducting personal and financial affairs and preserving their autonomy to choose one or more trusted persons to conduct their affairs in the event they no longer are able. Durable powers of attorney, which remain in effect after the principal's incapacity, can be an economical estate planning tool and avoid the potentially contentious and costly process of guardianship or conservatorship. Courts traditionally have attended to powers of attorney only in response to a claim filed by one or more interested parties regarding the validity of a POA or the agent's use of powers conveyed by the POA.

POAs have enjoyed tremendous popularity due to their low cost, ease of execution, privacy, and scope of authority. In many states, statutory POA forms are appended to legislation and are freely available to the public online or in any community library that houses a collection of state statutes. Commercially developed forms also are generally available. This widespread access allows potential principals and agents to by-pass legal assistance in drafting POAs.<sup>2</sup> Absent restrictions on the agent's authority in the POA instrument itself, a general power of attorney grants the agent broad powers to conduct transactions involving the principal's property. The execution of a POA generally requires only the principal's signature and notarization; except for transactions involving real estate in some states, there is no registration requirement. Unless the POA expressly requires the agent to provide an accounting to the principal or to a third party, there is no routine oversight of the agent's performance under authority of the POA. In most jurisdictions, the agent is obligated by common law to act in the interest of the principal – that is, to make judgments that comport with the principal's interests and values, but the details of how the agent carries out his or her responsibilities typically are not prescribed. Furthermore, the fiduciary duty of an agent to the principal is not necessarily the same as that of a trustee who is legally obligated to act for the good of the beneficiary.

The qualities that render POAs so attractive also make them ripe for abuse. There is growing concern about the ease with which agents can secure a POA through undue influence or duress, or obtain a POA in spite of the principal's incapacity, given the minimal execution requirements. Once the POA is in effect, the agent's ability to conduct transactions involving the principal's property receives little or no oversight. Unless the principal or an observant family member, friend, or caregiver acts on suspicions about unusual transactions or the disappearance of the principal's property, the principal's entire assets can easily be depleted and become unrecoverable, leaving the principal financially destitute and often psychologically devastated. A number of states have taken steps to amend their POA statutes to reduce the potential for abuse or to increase the likelihood that such abuse will be identified and remedied effectively. However, most of these protective efforts have been tempered by concerns about imposing

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<sup>2</sup> Some states offer assistance in completing forms through self-help centers. For example, the Minnesota Judicial Branch Self-Help Center offers an online program to create a power of attorney using guided interview questions. The program includes detailed instructions and warnings about the legal effect of the various powers that can be conveyed through the POA and the potential misuse of those powers. (See <http://www.lawhelpmn.org/resource/power-of-attorney-do-it-yourself?ref=m32MO>.) This self-help technology (LawHelp Interactive) is sponsored in part by the State Justice Institute, the Legal Services Corporation and HotDocs.

burdensome requirements that would substantially undermine the use of POAs as an inexpensive, non-judicial estate planning tool.

Section II of the paper describes the methodology for conducting this exploratory study. Section III summarizes the contributions and comments of the national and state experts on the role of the courts in preventing and redressing POA abuse, including the need for statutory reforms, development of adequate court resources, judicial education, and community networking. Section IV provides a set of specific recommendations for steps that courts can undertake to strengthen their ability to address POA abuse. Section V offers suggestions for actions by the Joint Committee.

## II. Project Methodology

### Literature and Case Law Review

To develop areas of inquiry to pursue with national and state experts, the NCSC undertook a review of contemporary literature and case law concerning POAs and their role in financial exploitation of the elderly. Relevant case law was sparse,<sup>3</sup> but the literature review identified several potential areas of interest. A common concern expressed in much of the literature is the lack of reliable information about the frequency of POA abuse or the magnitude of its impact on the financial security of the elderly. Although many government agencies and commercial industries recognize that POA abuse is a serious problem, efforts to systematically identify it or measure its magnitude have thus far been unsuccessful. Most criminal justice agencies, for example, do not categorize financial crimes against the elderly separately from crimes against other adults. Nor are crimes involving POA abuse distinguished from other forms of financial exploitation (e.g., credit card fraud, identity theft, misuse of joint financial accounts, unauthorized use or sale of a victim's assets). Only a few reports offer tentative estimates of the frequency and scale of the problems associated with POA abuse,<sup>4</sup> and a strong consensus exists that the lack of data contributes to difficulty in developing effective prevention and remediation by state and local governments, criminal justice and social service agencies, national advocacy groups, and community organizations.<sup>5</sup>

Despite these challenges, a number of government agencies and non-profit organizations have begun working both independently and cooperatively to develop strategies to combat elder financial exploitation.<sup>6</sup> Law enforcement and adult protective services agencies have increased resources

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<sup>3</sup> In most instances, reported court opinions focused on issues related to the validity of the POA including whether the principal was subject to undue influence or duress while executing the instrument. The case law review did not reveal particular concerns about court procedures or other operational aspects of court management that might be relevant to the effectiveness of courts' response to POA abuse.

<sup>4</sup> See, e.g., MetLife Mature Market Institute et al., *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders* (2011)(estimating \$350 million in losses annually from all forms of elder financial exploitation); Jilene Gunther, *The 2010 Utah Cost of Financial Exploitation*, Utah Division of Aging and Adult Services (2012)(estimating losses to seniors and/or financial institutions at \$68 to \$300 million per year depending on assumptions about reporting rates).

<sup>5</sup> U.S. Government Accountability Officer, *Elder Justice: National Strategy Needed to Effectively Combat Elder Financial Exploitation* (2012).

<sup>6</sup> The Consumer Financial Protection Bureau's (CFPB) Office of Financial Protection for Older Americans offers educational and self-help tools to prevent elder financial exploitation, including power of attorney abuse. A section

allocated to identifying and prosecuting financial crimes committed against older people. Banking and financial services organizations have dedicated resources toward developing training materials and organizational protocols for front-line staff to better identify and respond to instances of suspected financial exploitation of their elderly customers. Health care professionals, especially home health care providers, are receiving similar training and organizational direction. Many of these agencies and organizations provide community education to seniors and their family members about risk factors associated with elder abuse, consumer fraud, and financial exploitation.

Much of the effort to prevent and address power of attorney abuse has focused on legislative revisions to state POA statutes. Over a dozen states have replaced previous POA statutes with the 2006 Uniform Power of Attorney Act (UPOAA).<sup>7</sup> The UPOAA was drafted and adopted by the Uniform Law Commission to replace the former Uniform Durable Power of Attorney Act with the intent to fill in substantive gaps for which states had developed divergent approaches.<sup>8</sup> The resulting model legislation preserves the POA as an inexpensive, non-judicial means by which a principal can direct his or her financial affairs both before and after incapacity, while implementing protections against abuse. Several safeguards directly implicate state courts as a key actor, including provisions that expand the list of persons with standing to petition the court to review the agent's conduct,<sup>9</sup> and require the court to expressly revoke or modify a previously executed POA upon appointment of a fiduciary for an incapacitated principal.<sup>10</sup>

Many instances of alleged POA abuse arise due to ambiguity in the POA instrument as to whether the agent is authorized to make gifts or to alter significant property rights, and whether in doing so the agent is acting according to the incapacitated principal's intent or former practice. Preventive measures in the UPOAA include requirements that the principal expressly and specifically grant authority to the agent to conduct certain transactions on behalf of the principal, such as creating or changing rights of survivorship, creating or changing a beneficiary designation, making a gift, and other actions affecting the principal's property rights.<sup>11</sup> These provisions concerning "hot powers" are intended both to alert the principal to the extent of the authority delegated in the POA and to provide greater clarity to third parties about the agent's authority to conduct those transactions.

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of the CFPB website provides information about powers of attorney (<http://www.consumerfinance.gov/askcfpb/1149/what-power-attorney-poa.html>). *Money Smart for Older Americans: Prevent Financial Exploitation (June 2013)*, is a curriculum developed in partnership with the Federal Deposit Insurance Corporation. It includes a resource guide ([http://files.consumerfinance.gov/f/201306\\_cfpb\\_msoa-participant-guide.pdf](http://files.consumerfinance.gov/f/201306_cfpb_msoa-participant-guide.pdf)) that addresses powers of attorney and a training module for instructors (<http://www.fdic.gov/consumers/consumer/moneysmart/OlderAdult.html>). In addition, the CFPB is developing a set of lay fiduciary guides that will include a guide on powers of attorney, *Managing Someone Else's Money: Help for Agents Under Powers of Attorney*, forthcoming in 2013.

<sup>7</sup> States that have adopted the UPOAA include Alabama, Arkansas, Colorado, Idaho, Maine, Montana, Nebraska, Nevada, New Mexico, Ohio, Virginia, West Virginia, Wisconsin, and the U.S. Virgin Islands. Mississippi and Pennsylvania introduced legislation to adopt the UPOAA in 2013.

<sup>8</sup> Uniform Power of Attorney Act, Prefactory Note (2006).

<sup>9</sup> Section 116.

<sup>10</sup> Section 108.

<sup>11</sup> Section 201(a).

## Expert Interviews

NCSC staff employed a snowball sampling strategy to identify state and national experts on the topic of POA abuse. Beginning with experts already known to the NCSC Center for Elders and the Courts through its work on elder abuse and guardianship issues, project staff asked each expert interviewed for the project to recommend additional individuals who could offer insights about the role of the courts in preventing or addressing POA abuse. Through this approach, NCSC staff gathered the perspectives of 16 experts, including members of the UPOAA Drafting Committee, leaders of state and national associations of elder law and trust and estate attorneys, Consumer Financial Protection Bureau officials, academicians and authors of scholarly articles on the topic of POA abuse and financial exploitation of the elderly, professionals involved in a variety of capacities to protect incapacitated adults (e.g., state APS officials, public guardians, health care professionals), and judges and court staff identified as being particularly informed about and innovative in addressing issues related to financial exploitation of incapacitated adults.

Working from an informal interview script (see Appendix), NCSC staff asked the state and national experts about their personal and professional experience with cases involving POA abuse, the circumstances under which those cases were brought to the attention of the court, practices or policies employed by the court that were particularly helpful for addressing the issues, and suggestions for actions or procedures that in retrospect might have been more effective. NCSC staff also asked experts about circumstances or case characteristics that should alert judges or court staff to the potential existence of a POA or the inappropriate use of one. The next section of the paper summarizes the experts' comments and suggestions from these interviews.

### III. Issues Related to Power of Attorney Abuse

Review of the literature on the benefits and risks of powers of attorney (POA) and interviews with state and national experts and local practitioners identified a number of policy issues and proposals for reform. Individuals and professional organizations involved in drafting the Uniform Power of Attorney Act, revising state power of attorney legislation and promoting practice reforms struggle to balance the effectiveness of the POA as an instrument for managing a principal's affairs against the need to protect vulnerable or incapacitated adults from exploitation. The consensus view is that approaches to reducing POA abuse should maintain the viability of POAs as a useful, non-judicial, inexpensive, and easily accessible vehicle for individuals to make financial arrangements and to avoid guardianship, which is considered to be more expensive, intrusive, and cumbersome. Some experts seek to promote greater protections for principals through legislative measures that impose restrictions on the powers of the agent or require principals to expressly state the fiduciary responsibilities of the agent, or both. Others believe these protections are best accomplished by improving the POA drafting process to ensure the document is tailored to the needs of the principal and clearly states the powers and responsibilities of the agent.

## Power of Attorney Registration or Recordation Requirements

Several experts noted a proposed reform that would require registration or recordation of a POA as a condition of execution. A few states require registration before an agent under a POA can conduct transactions involving real property,<sup>12</sup> but POA registration has not gained traction as a key reform in the United States.<sup>13</sup> Only Puerto Rico currently requires registration of POAs that convey broader and more general powers to the agent.<sup>14</sup> The purported benefit of registration is to provide public notice of the existence of the POA. Another perceived value is that a court of competent jurisdiction can revoke a POA that is not registered. Even in the absence of a registration requirement, some lawyers file the POA with the court as a matter of practice to support the POA's utility and credibility.

Many practitioners question the efficacy of registration as a remedy for POA abuse and express concerns about the potential unintended consequences of requiring registration. For example, recordation or registration requirements might falsely lend the appearance of legitimate execution and responsible use by the agent, or imply that transactions conducted with the POA are routinely monitored. In reality, registration or recordation does not guarantee the authenticity of the POA nor does the fact of registration confer upon the court the responsibility, or even authority, to routinely monitor transactions conducted by agents. A risk of requiring POAs to be registered is that individuals who suspect that the POA was invalidly executed or that the agent is misusing his or her powers may be less likely to raise their concerns with appropriate persons or agencies because registration conveys to the POA the imprimatur of legitimacy.

Another potential unintended consequence of registration or recordation requirements for POAs is the infringement of the privacy interests of the principal, particularly when recordation or registration is required to effectuate a springing POA (one that becomes effective only after a specified triggering event or condition of the principal occurs). In this circumstance, recordation of the POA can function as a public announcement that the principal now lacks capacity to conduct his or her own affairs, a development that the principal most likely would have wished to keep private.

Two additional concerns about the consequences of adopting POA registration requirements are related to expenses associated with implementing a registration system. For the court or executive agency charged with creating and maintaining the administrative architecture of the POA registration system, the implementation costs may be prohibitive. Those costs would, of course, be passed on to the principal and agent in the form of registration fees. Adding a registration requirement to the associated costs involved may have a chilling effect on the willingness of individuals to accept responsibility for an

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<sup>12</sup> For example, New York Real Property – Article 12 - § 421 *Powers of Attorney to be Filed and Registered*.

<sup>13</sup> Australia requires POAs to be submitted to a national registry when an agent is going to sell, mortgage, lease or otherwise deal with a principal's real estate. (*L.P.R.A. (2004). Power of Attorney Registration Act, §921-927*).

<sup>14</sup> The duty to register a power of attorney lies with the notary before whom a power of attorney is constituted, modified, extended, substituted, renounced, revoked or renewed. The notary is required to send notice with specified information about the POA and the parties to it to the Notarial Inspection Office within three business days. (TITLE 4. JUDICIARY, PART IV. LAW AND NOTARIAL PRACTICE, CHAPTER 69. REGISTRY OF POWERS OF ATTORNEY. 4 L.P.R.A. § 922 (2010)).



adult who needs help managing his or her affairs, which can be difficult to encourage even without this further barrier.

### **Identifying Potential Power of Attorney Abuse**

State and national experts identified certain circumstances or case characteristics that should alert trial judges and court staff to the possibility of financial exploitation of an older person, including POA abuse. Most experts observed that the issue of potential POA abuse most commonly is raised (1) as an explicit challenge to the validity of a POA or its use by an agent; (2) in the context of a guardianship petition; or (3) as an APS complaint.<sup>15</sup> However, POA abuse could be an underlying issue in other types of cases in which the existence or effect of a POA has not been expressly raised before the court.

For example, POA abuse may be at the heart of a debt collection or eviction case involving an older defendant. Judges should be alert to indicators such as evidence that the defendant had always paid bills on time and funds typically used to pay expenses are now missing. An inquiry into the defendant's situation is especially warranted when the debt involves payment for the person's care (e.g., housing, food, health care). If funding for essential goods and services is not available, who has control of the money and what has been done with it? If a valid POA exists, did the agent fail to act or fail to protect the principal's property? Does the agent have financial records to account for how the money was spent? The absence of clear documentation often is a sign of self-dealing on the part of the agent (e.g., frequent cash withdrawals from ATMs rather than checks made out to specific entities providing goods or services to or for the benefit of the principal).

Other situations that raise concerns about potential financial exploitation include actions to change how the property of an older person is titled, the designation of the payee for various benefits (e.g., Social Security, Medicare/Medicaid, disability, pension), the designation of survivor benefits, or the principal's place of residence or care. The court also should scrutinize divorce cases in which an adult child files the petition acting as an agent under a POA to invalidate the principal's marriage to an allegedly "unworthy spouse." The adult child may be acting in the true interest of the principal, but the action also may signal misuse of the POA for financial gain or to interfere maliciously in the principal's relationship with a person the adult child merely dislikes.

One expert suggested that judges should watch for any case in which an older person is either the alleged victim or the defendant, especially if someone other than the person's attorney insists on speaking for that person at court hearings. The trial judge should be prepared to ask the older person why someone is speaking for him or her. If the person is not capable of speaking for herself or himself, the trial judge should make additional inquiries about the relationship between the older person and

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<sup>15</sup> Florida's 17<sup>th</sup> Judicial Circuit hosts an online program named "STOPFAN: Stop Fraud Abuse and Neglect," which provides an opportunity for people who are concerned about relatives, friends, and neighbors to report fraud, abuse, neglect, and exploitation (<http://www.17th.flcourts.org/index.php/component/content/article/34-17th-fl-courts/196-stopfan-hotline>). If a guardianship for the person is open in the Circuit, the Court Monitor's Office will immediately investigate the reported case. If no guardianship is open, the Circuit Court has no jurisdiction over the matter; in these instances, the report is sent to Florida's Department of Children and Families hotline to alert the agency regarding the need for an investigation into the allegation.

the person purporting to speak for him or her. Is there a legal or familial relationship? If so, what is that relationship? Is there any other person with a superior relationship who should be involved in the proceedings? Although POA abuse may not be an identified issue in the case, the situation should alert the judge to the potential need for a referral to a social welfare agency or public guardian.

### **Court Resources and Procedures**

Several state and national experts described the need for additional resources and specialized procedures for courts to effectively address incidents of POA abuse. For example, in some jurisdictions procedures for judicial review and oversight of POA accountings are far less stringent than those required for annual guardianship reports. Of particular concern among several experts is the lack of standardized accounting templates or documentation criteria for POA accountings that would enable judges and court staff to quickly review and identify POA abuse. One suggestion is to require courts to conduct an assessment of POA accountings to determine, at minimum, that the reported transactions for income and expenses correctly sum and reasonably correspond to the principal's circumstances, and that all documentation for those transactions are appended to the report. Certain deviations should trigger a more thorough review. For example, minor rounding errors are acceptable, but a deviation greater than a certain threshold amount (e.g., \$1,000) should trigger a closer review. One Colorado court reportedly has adopted a draft order for a POA accounting with the following elements: the date the POA became effective, a report of all transactions, a list of assets and liabilities including how title to property is held, copies of all supporting documentation (e.g., bank statements), and a statement disclosing all gifts to the agent or agent's family members.

Experts also noted that court orders should set clear and definite deadlines for submitting the POA accounting, and the court should have strict continuance or time extension policies. Absent extenuating circumstances or extraordinarily complicated finances, a suggested maximum length of time to submit a POA accounting is 30 days following an order. The court's case management system should be configured to indicate when the accounting is due, filing and review dates, and whether the accounting meets all of the review criteria. In addition to a general review by the court, one trial judge advocated for the resources to conduct random audits, similar to U.S. Internal Revenue Service audits, as a mechanism to raise the standards to which agents and guardians are held.

Experts differ in their perspectives on the extent of judicial responsibility for conducting an independent investigation into the circumstances under which the POA was executed or the transactions made through the POA. Some experts recommend that the trial judge undertake these tasks personally, rather than delegating them to quasi-judicial personnel (e.g., magistrates, commissioners) or appointed guardians ad litem (GAL) or counsel. The majority view, however, recognizes that many judges lack either the expertise (especially general jurisdiction trial judges) or the time to conduct thorough investigations themselves. In those instances, courts need sufficient funding to appoint qualified GALs to serve as advocates or neutral investigators to advise the court about relevant information.<sup>16</sup> In the opinion of some experts, appointment of GALs who can investigate the case objectively and will

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<sup>16</sup> The funding for appointed counsel or GALs may exist, but express statutory or administrative authority may be needed to access those funds.

advocate for the "best interest" of the principal is preferable to appointment of counsel. The experts agree, however, on the importance of establishing and enforcing training and qualification criteria for all court appointed GALs and counsel. Appointments should not be made from lists of general practice lawyers who volunteer for these appointments but have no particular expertise in elder law and elder abuse.

### **Training for Judicial Officers, Appointed Counsel, Guardians ad litem, and Private Attorneys**

The need for training and education was a common theme in the discussions with state and national experts. Several experts emphasized that judicial officers and attorneys should participate in subject matter education that addresses the legal aspects of POAs (e.g., the difference in POA agent responsibilities compared to trustees or executors of a will), as well as understanding cognitive capacity and how capacity determinations should be made. Judges also should become familiar with current terms of art related to frequently occurring elder exploitation schemes, including the "new best friend" and "sweetheart scams." Experts also voiced the need for more thorough education for principals (and those advising them) about the risks of POAs and for agents regarding their roles and responsibilities.

Experts also stressed that judicial officers should understand the family dynamics involved in POA cases. One problematic area is the extent to which an agent may act to give financial gifts to family members or make charitable donations in accordance with the principal's prior habits. For example, many agents who are family members continue giving birthday gifts to grandchildren or making regular charitable donations to organizations, and doing so may not be an abuse of the POA powers but rather simply acting in accordance with the principal's implied wishes.<sup>17</sup> State laws on powers of attorney can be ambiguous or silent about gifting, which then requires judges to look to other state law concerning fiduciary responsibilities, the powers expressly stated in the POA, and the relationship within the family to determine whether the agent has exceeded his or her authority by making gifts.

Another challenge related to family dynamics is that many state POA statutes are silent on the issue of conflicts of interest for agents. Principles from trust law concerning fiduciary responsibilities are not necessarily the same as those governing POAs. Judges may impose stricter limits and sanctions on agents than the agents understand their responsibilities to be. Judicial officers should be mindful of the impact that remedies available to redress POA abuse may have on the willingness of family members and other volunteers to serve as agents. They may become increasingly reluctant to serve if they feel at risk of overly intrusive monitoring or unwarranted accusations of wrongdoing by disgruntled family members. If fewer individuals are willing to become POA agents, guardianship will become a more common option for addressing the financial and personal needs of incapacitated adults.

Experts also recommend that judicial officers be aware of the impact of a guardianship or conservatorship on the powers granted to the agent under a POA. Under the UPOAA, the POA

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<sup>17</sup> One elder law attorney who acts as a public guardian explained, for example, that unless the POA explicitly prohibits the power to gift, she will settle rather than litigate cases involving gifts or charitable donations that appear self-serving.

continues in effect unless the court expressly modifies or revokes it.<sup>18</sup> The UPOAA drafting committee adopted this provision on grounds that this approach better respects the principal's autonomy. Consequently, judicial officers must investigate whether (1) the POA is adequate to meet the current needs of the principal, (2) the agent is acting responsibly, and (3) the agent remains willing to serve as agent. Removal of the agent may not necessarily be the best approach to protecting the interest of the principal and may thwart the wishes of the principal.

For guardianship proceedings involving an existing POA, one practitioner recommended that the court rule on the continuation of the POA during the hearing to appoint the guardian. This practice minimizes confusion and conflicting actions taken by the guardian and the agent. During the hearing, the judge should ask both the petitioner for guardianship and the POA agent to state their arguments concerning the agency under the POA. However, to allow the court to make this inquiry and issue a ruling, the hearing should be calendared with sufficient time for these arguments to be heard. This approach may be less viable in uncontested guardianship cases, which typically are calendared with brief hearing times.

Many of the practicing lawyer experts emphasized the need for higher quality continuing legal education for lawyers who draft POAs for clients. For example, attorneys should understand the importance of assessing the principal's cognitive capacity<sup>19</sup> and interviewing the client individually and privately (outside the presence of the proposed agent). These practices will help ensure that the principal understands the implications of granting POA authority to the agent and that the principal is not acting under duress or undue influence, which several experts believe is a more pervasive problem associated with POA abuse than fraudulent POAs. Lawyers also need to understand the ethical ramifications of drafting POAs, including the most basic rule that the lawyer owes his or her professional duty to the principal, not the agent.

### **Institutional Liaison Role for the Courts**

Most experts view the primary role of the courts to be redressing instances of POA abuse when they are alleged rather than preventing abuse. However, they agreed that courts as institutions of government could play a stronger role in reducing POA abuse through improved communications with the state legislature about inconsistencies, ambiguities, and other aspects of state POA statutes that can create opportunities for exploitation. Court leaders would have a powerful voice on issues related to broadening standing of third parties to demand an accounting from an agent suspected of using a POA against the interests of the principal. They also could support allocation of sufficient resources for adult protective services, public guardians, and other agencies charged with protecting elders. For example, an attorney explained that the state office of the public guardian lacks the statutory authority to

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<sup>18</sup> Section 116. Under the UDPOA (former uniform law), a later-appointed fiduciary had the same power to revoke the POA as the principal, which allowed someone to obtain a guardianship over the principal and then revoke the POA as a way to "solve" intra-family disputes.

<sup>19</sup> The American Bar Association Commission on Law and Aging and the American Psychological Association produced a useful resource to assist lawyers in identifying and addressing capacity issues of their clients: Assessment of Older Adults With Diminished Capacity: A Handbook For Lawyers (Downloadable at <http://apps.americanbar.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=4280025PDF>).

demand an accounting from an agent; this gap requires the public guardian to seek an order from the judge or through a social service agency or elder abuse ombudsman. However, the lawyers in the office of the public guardian are very cautious about taking such an action out of fear of reprisals in the form of complaints registered against the office or sanctions imposed on the lawyers. If the office of the public guardian had standing to act on its own and adequate staff resources, more cases of suspected abuse could be pursued.

Experts also generally agreed that the court as an institution should play an active role in multidisciplinary prevention efforts. Courts could establish interagency relationships with financial services firms, health care providers (especially home health care), long term care providers, local Area Agencies on Aging and others who are in a superior position to identify POA abuse in the first instance and bring it to the attention of appropriate authorities and agencies. Judicial officers can provide legal education to first responders about court roles, procedures, and legal remedies the court can offer.

Courts also should develop collaborative relationships with APS, public guardians, police, and prosecutors to strengthen legal procedures to identify, stop, and remedy POA abuse. Such relationships have been extremely valuable in improving justice system and community responses to family violence and elder abuse by creating protocols for law enforcement and prosecutors, and identifying enforcement mechanisms in existing laws. These approaches could be replicated or enhanced to include POA abuse more specifically. Within these relationships, partner agencies could provide education to judges and court staff about their internal procedures for identifying and preventing POA abuse.

#### **IV. Recommendations**

The review of literature and commentary provided by state and national experts identified the following steps that state courts can undertake to respond to power of attorney abuse:

- Courts should develop resources to assist judges and courts in recognizing indicators of financial exploitation, including abuse of a power of attorney, in all types of cases coming before the court.
- Courts should develop and use standardized accounting templates and procedures, similar to those used for annual guardianship/conservatorship reports, which provide sufficient detail and documentation for judicial officers to quickly review and identify suspicious transactions by an agent with a power of attorney.
- Courts should adopt and strictly enforce continuance and extension policies for orders for a POA agent's accounting, with allowances for extraordinary circumstances.
- All counsel or guardians ad litem appointed to investigate potential POA abuse should have successfully completed training on issues related to elder abuse, elder law, and POA and other fiduciary relationships.
- In addition to education on legal aspects of POAs, trial judges should have basic education on elder abuse and exploitation, the impact of aging on cognitive capacity, functional limitations that make

older people more vulnerable to exploitation, and the family dynamics that may affect an agent's actions on behalf of the principal.

- In their supervisory role over the practice of law, state courts should set standards for Continuing Legal Education curricula on POAs that include instruction on the ethical obligations of lawyers to the principal in a POA or a client who wishes to execute a POA.
- State courts should take an active role in informing their state legislatures about gaps or ambiguities in state POA statutes, especially on issues that may impede the courts from responding effectively to instances of suspected or alleged POA abuse.
- State courts should participate actively in state and local multidisciplinary partnerships that address elder financial exploitation, facilitate POA abuse prevention and early identification, and offer education for individuals involved in caring for and protecting the elderly about the court's role in these multidisciplinary efforts.

## V. Conclusions

The literature on powers of attorney and the discussions with state and national experts confirm expectations that powers of attorney increasingly will be used as a tool for estate planning and assisting people with personal and financial affairs as they become less able to manage these matters for themselves. A number of factors will contribute to this trend: (1) the population is aging; (2) POAs are an attractive tool because they are relatively inexpensive compared to costs associated with estate planning and guardianship; and (3) the execution of POAs is relatively easy because many states provide online POA forms that comply with statutory requirements and commercial vendors offer these services for a minimal fee.

With the increased use of POAs comes a greater risk of financial exploitation, both by unscrupulous individuals intending to prey on vulnerable elders and by otherwise well-intentioned family members and friends who lack knowledge about the responsibilities of serving as an agent for an incapacitated adult. Although law school clinics, legal services agencies, and other organizations offer free or reduced cost legal assistance to older individuals in many jurisdictions, funding for these services is declining just as access to them is becoming more imperative.

State courts have an important institutional role in protecting the interests of principals through both preventive and remedial efforts. Preventive measures involve collaboration with legislators to draft and adopt POA statutes that provide clarity to principals, agents, and judges and court personnel about the requirements of executing a POA and criteria for assessing whether its provisions have been adequately carried out by the agent. Courts also need to collaborate with community social service agencies (e.g., Area Agency on Aging, Adult Protective Services), the legal community, and other community stakeholders to ensure that all the potential agencies and organizations involved in providing care and protection for elders are aware of each others' roles, resources, and procedures. Such collaboration and mutual education also may help communities identify potential gaps (or duplications) in services and thus create opportunities to provide services more effectively and efficiently.

Remedial measures encompass efficient court responses to individual claims of financial exploitation and timely and effective remedies for POA abuse. Courts will need sufficient funding with which to develop appropriate procedures and protocols for addressing POA abuse. Key resources identified by the national experts include model forms and orders specifying the format and documentation expected for POA accountings from agents; policies that limit continuances and extensions for POA agents to file accountings; funding for qualified court-appointed GALs and/or counsel to conduct investigations and monitor compliance with court orders; protocols for the appointment of GALs and/or counsel including professional qualifications and expertise required of such individuals; and protocols for making referrals to APS or other community agencies or services.

The Conference of Chief Justices and Conference of State Court Administrators Joint Elders and Courts Committee can speak with an informed and influential voice to bring attention to these issues, encourage court engagement in reform efforts, and advocate on behalf of state courts for the resources to address POA abuse and other financial exploitation of older persons. Potential sources of support include institutional funding from state and federal governments, grants from business and philanthropic organizations and government entities such as the State Justice Institute, the Consumer Financial Protection Bureau, and the Veterans Administration, and collaborations with the financial industry and legal, banking and private foundations. To build federal awareness and support, the Committee should seek representation on the U.S. Department of Health and Human Services Elder Abuse Advisory Council to emphasize the vital role of courts in comprehensive approaches to effectively address all forms of elder abuse.

## Questions for Experts on the Court's Role in Addressing POA Issues

### Preventing POA abuse

In what contexts/situations have you observed POA abuse?

What community partnerships might be effective in preventing/curbing POA abuse? (e.g., CCR model for DV, elder abuse TFs, Financial Abuse Specialist Teams)?

### Identifying POA abuse

How do POAs come to the attention of the court? (other actions that involve a POA, standing, agencies)

How should the court become informed about the existence of POAs in cases in which the POA is not directly at issue? What are red flags indicating possible POA abuse? E.g., guardianship/conservatorship petitions, criminal charges alleging elder abuse generally or theft/forgery/uttering/fraud, civil claims of replevin/conversion, etc.

What type of court procedures would promote a more expeditious inquiry into POA abuse?

### Addressing POA abuse

What criteria should the court employ in determining whether a POA should be revoked? Does it matter what the common law or statutory duties of a fiduciary are in that jurisdiction?

For states that have adopted the UPOAA (or have analogous provisions), what criteria should a trial judge use to decide whether a preexisting POA should be modified, suspended or revoked when appointing a guardian/conservator?

Assuming that the court revokes the POA, how is that information communicated to third parties who are currently operating under the POA.

What protocols should courts follow for responding to requests for an accounting from an agent filed by an interested party?

### Other participation in project

Can you recommend other experts/persons with specialized knowledge with whom we should talk?

Contact information?

Would you be willing to participate in further activities in this project? (e.g., participate in survey, review draft documents)



## Questions for Judges/Court Staff

Please describe the types of cases in which POA abuse is raised as an issue. Are these primarily APS cases? Or does POA abuse become apparent in other types of cases?

Thinking back over the POA abuse cases over which you have personally presided, what steps did you take that were particularly effective or helpful? In retrospect, are there other steps that you wished you could have taken or steps that you wished you hadn't taken?

If the existence or misuse of a POA is not a primary issue in a case, for what types of circumstances or clues should a trial judge be alert and conduct a more thorough inquiry into the possibility of POA abuse?

The Uniform POA Act specifies that the powers of an agent under a POA should continue after the appointment of a guardian unless the court specifically revokes or modifies those powers? In your experience as a trial judge, is this a useful provision? Why or why not? What kinds of information would you want to have before making a decision to revoke or modify an existing POA?

What kinds of educational training would be helpful to trial judges hearing cases involving POA abuse?

Are there particular provisions of the current POA statute in [state] that would benefit from additional legislative clarification? Are there particular provisions that interfere with the ability of the courts to address POA abuse effectively?

What types of resources or procedures would make it easier for the court to identify and address POA abuse effectively? [probe for information about GAL appointments, training and resources for GALs or court-appointed counsel for incapacitated principals].

Some of the experts with whom we have communicated on POA abuse have suggested the need for model POA accounting forms that would make it easier to identify and document irregularities in an agent's management of assets under a POA. Do you agree or disagree, and why? If you agree that model forms would be helpful, what types of information should be documented? What would be a reasonable timeframe for an agent to produce such an accounting?

Has your court initiated or participated in any type of community outreach to educate interested stakeholders (e.g., local banking/financial professionals, health care providers including nursing home providers, APS and other local government agency staff) and the public about POA abuse? How would you rate the success of those efforts? What steps could local courts take to strengthen community partnerships?