Power of Attorney Abuse: Legal Remedies, Educational Tools, and Legislative Options

Lori Stiegel, Senior Attorney, American Bar Association Commission on Law & Aging, Washington, DC

Workshop Overview

- Background on POAs
- POA abuse & its manifestations
- Impact of POA abuse
- Civil law & criminal law remedies
- UPOAA protections
- UPOAA state enactments
- UPOAA resources
- New educational tools on fiduciary duties

Power of Attorney Background

- Purpose
- Types
- Terminology
- Fiduciary duty of agent
POA Abuse

- “License to steal”
  - Easy to prepare
    - Without legal advice
    - With good legal advice
  - Reluctance to believe abuse may occur
  - Breadth of authority granted
  - Lack of oversight

Manifestations of POA Abuse

- Problems with creation of the POA:
  - Incapacity at execution
  - Forgery
  - Fraud
  - Misrepresentation
  - Undue influence

Manifestations of POA Abuse

- Problems after execution of the POA:
  - Transactions exceeding intended authority
  - Transactions conducted for self-dealing
  - Transactions contravening principal’s expectations
Impact of POA Abuse

- Physical & emotional impact
- Guardianship may become necessary
- Loss of money & property
- Need for Medicaid & other public benefits
- Inability to obtain Medicaid benefits

Civil Law: Remedies

- Revocation
- Guardianship
- Accounting
- Conversion
- Rescission

Criminal Law: Arrest & Prosecution

- Elder abuse
- Embezzlement
- False instrument
- Financial exploitation
- Fraud
- Forgery
- Identity theft
- Larceny
- Money laundering
- Theft
Criminal Law: Other Remedies

- Temporarily freezing assets
- Restitution
- Incarceration or community corrections

Uniform Power of Attorney Act: Abuse Prevention

- Decision-making standard: in accordance with principal’s expectations, if known; otherwise, best interest [§114(a)]
- Preserve estate plan, with caveats [§114(b)(6)]
- “Hot powers” (those with propensity to dissipate property or alter estate plan) must be expressly granted in POA [§§201(a) and 301]

Uniform Power of Attorney Act: Abuse Prevention

- Restrictions on creation of interest in principal’s property [§201(b)]
  - Principal can indicate otherwise
- Clearly articulated fiduciary duties that constrain self-dealing [§114]
  - Principal can indicate otherwise
- Third party right to refuse POA if good faith suspicion of abuse by agent or agent’s collaborator [§120]
Uniform Power of Attorney Act: Abuse Detection

- Government agency charged with protecting principal (which specifically includes APS) may ask agent to disclose transactions [§114(h)]
- Any person with sufficient interest in principal’s welfare may ask court to review agent’s conduct [§116(a)]

Uniform Power of Attorney Act: Abuse Detection

- Agent with actual knowledge of breach or imminent breach by co-agent must notify principal and, if principal is incapacitated, take reasonably appropriate action to safeguard principal’s best interest [§111(d)]

Uniform Power of Attorney Act: Abuse Remedies

- Agent liable for restoring principal’s property as if violation had not occurred and for reimbursement of attorney’s fees and costs paid on agent’s behalf [§117]
- UPOAA remedies are not exclusive and do not preclude remedies under other statutes [§123]
Uniform Power of Attorney Act Enactments (as of 10/1/14)

- Alabama
- Arkansas
- Colorado
- Hawaii
- Idaho
- Iowa
- Maine
- Montana
- Nebraska
- Nevada
- New Mexico
- Ohio
- Pennsylvania
- Virginia
- Virgin Islands
- West Virginia
- Wisconsin

UPOAA State Enactment: Potential Issues

- Many interests other than POA abuse
- Diverse interests among stakeholder groups
- Study processes
  - Bar association
  - Legislature
- Last minute awareness of relevance
- Post-enactment revisions

UPOAA State Enactment: Potential Stakeholders

- AARP state offices
- APS
- Advocates for victims
- Aging & social services
- Attorneys general
- Bar association entities
- Court administrators
- Disability advocates & services
- Faith-based organizations
- Family members of victims
- Financial services industry
- Financial services regulators
- Guardians & conservators
- Health care professionals
- Judges
- Law enforcement professionals
- Lawyers
- Notaries public
- Real estate professionals
- Victims of POA abuse
UPOAA Resources


- UPOAA (Act, Summary, Enactment Kit, & more) can be found on the website of the Uniform Law Commission [www.uniformlaws.org](http://www.uniformlaws.org)

New Educational Tools on Fiduciary Duties


- ABA Commission on Law and Aging’s “Legal Issues Related to Elder Abuse – A Pocket (Desk) Guide for Law Enforcement” [www.ambar.org/ElderAbuseGuides](http://www.ambar.org/ElderAbuseGuides)