

Power of Attorney Abuse: What States Can Do About It

A Comparison of Current State Laws with the New Uniform Power of Attorney Act

This In Brief explores the problem of power of attorney abuse and how state legislatures can protect vulnerable adults against it. It explains how the new Uniform Power of Attorney Act helps prevent, detect and redress abuse, and provides resources to promote enactment of this model law.

In upcoming legislative sessions, states will consider adopting the Uniform Power of Attorney Act (UPOAA or Act). This model law aims to address power of attorney abuse, a type of elder abuse that can have devastating consequences. Research indicates that most states can improve protections for older people by adopting the UPOAA.

What is Power of Attorney Abuse?

A power of attorney (POA) is a legal document used by an individual to allow someone else to act on their behalf. It is commonly recommended by attorneys as a tool for planning for incapacity because a trusted person can stand in for an individual who can no longer make or communicate financial decisions. When used for planning, the POA generally is “durable,” meaning it continues if incapacity occurs.

While POAs enhance autonomy by authorizing a trusted person to act and avoiding court appointment of a guardian, they also confer a great deal of authority without regular oversight or clear standards for agent conduct.

Advocates for older people often call the POA a “license to steal.” While there are no national data on the incidence of POA abuse, adult protective services and criminal justice professionals report an

explosion of financial exploitation cases of this type.

POA abuse takes many forms. An agent may spend the principal’s money for self-dealing purposes, such as buying him- or herself a car rather than paying for the principal’s nursing home care. The agent may exceed the intended scope of authority by, e.g., making gifts of the principal’s property when that power hasn’t been granted. The principal’s estate plan may be undermined when assets are given to unintended recipients. The power of attorney itself may be a fraudulent document or a forgery.

State Regulation and the New Uniform Power of Attorney Act

Powers of attorney are regulated by state law and those laws vary substantially. In 2006, the Uniform Law Commissioners (ULC), who draft and propose model laws, approved the Uniform Power of Attorney Act. Among other goals, the UPOAA aims to promote autonomy and prevent, detect and redress power of attorney abuse.

Some of the key provisions of the UPOAA that benefit and protect people who execute POAs include:

- The clear statement of an agent’s duties, including the agent’s responsibility to act in good faith, within the scope of authority granted, and according to the principal’s known expectations or best interest—as well as more specific duties such as preserving estate plans and cooperating with health care proxies;
- Stringent requirements for exercising “hot powers”—those with a high propensity for dissipating property or altering an estate plan;
- The provision that a third party may refuse to honor a POA when the third party reports suspected abuse to an adult protective services agency or knows that someone else has made a report; and
- Liability of malfeasant agents for damages, attorney’s fees and costs.

How Do the States Measure Up?

While two states—New Mexico and Idaho—have enacted the UPOAA, a careful comparison of current state POA statutes with the UPOAA shows that a large majority of state laws lack most of the UPOAA’s protections for individuals creating powers of attorney. For example, at the beginning of 2008:

- Only four states had provisions regarding an agent’s mandatory duties that are identical, equivalent or substantially similar to Section 114(b) of the UPOAA.
- Only eight states had provisions requiring specific grant of the “hot powers” that are identical, equivalent or substantially similar to Sections 201(a) and 301 of the UPOAA.
- Only four states had provisions on agent liability that are identical or equivalent to UPOAA Section 117.

What States Can Do

State legislatures can adopt the UPOAA, in whole or in part. The full report includes tips for enacting the UPOAA provisions that protect against power of attorney abuse or promote autonomy. The text includes a list of stakeholders who may want to collaborate in the study and recommendation process.

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