

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



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## 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

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## Power of Attorney Background



- Purpose
- Types
- Terminology
- Fiduciary duty of agent

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**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

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**Manifestations of POA Abuse**

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

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**Manifestations of POA Abuse**

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

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### 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

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### Civil Law: Remedies



- Revocation
- Guardianship
- Accounting
- Conversion
- Rescission

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### Criminal Law: Arrest & Prosecution



- Elder abuse
- Embezzlement
- False instrument
- Financial exploitation
- Fraud
- Forgery
- Identity theft
- Larceny
- Money laundering
- Theft

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### Criminal Law: Other Remedies



- Temporarily freezing assets
- Restitution
- Incarceration or community corrections

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### Uniform Power of Attorney Act: Abuse Prevention



- Decision-making standard: in accordance w/ principal's expectations, if known; otherwise, best interest [§114(a)]
- Preserve estate plan, w/ 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]

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### 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]

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### 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)]

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### 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)]

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### 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]

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## 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

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## 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

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## 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

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## UPOAA Resources



- *Power of Attorney Abuse: What States Can Do About It – A Comparison of Current State Laws with the New Uniform Power of Attorney Act*, available through link on the ABA Commission on Law and Aging Elder Abuse Web page, <http://www.abanet.org/aging/elderabuse.shtml> (along with other information on POA abuse and elder abuse generally)

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

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## New Educational Tools on Fiduciary Duties



- Consumer Financial Protection Bureau's "Managing Someone Else's Money – Help for agents under a power of attorney" [http://files.consumerfinance.gov/f/201310\\_cfpb\\_lay\\_fiduciary\\_guides\\_agents.pdf](http://files.consumerfinance.gov/f/201310_cfpb_lay_fiduciary_guides_agents.pdf)
- 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)

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