

## Drafting a Financial Power of Attorney to Deter Exploitation [\(Back to FPOA Toolkit\)](#)

By David Godfrey, American Bar Association Commission on Law and Aging, August 2018

### Contents

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- [Summary](#)
  - [Agent Selection](#)
  - [Third Party Accounting](#)
  - [Limit and Define Gifting Power](#)
  - [Require a Second Signature on Certain Transactions](#)
  - [Limit Authority](#)
  - [Power to Revoke](#)
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### [Summary](#) [\(Top of page\)](#)

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A power of attorney is an important planning tool. However, a power of attorney can potentially be misused as a tool for exploitation. Careful drafting can create accountability, and limit the ability of the agent using a power of attorney to financially exploit the grantor. Attorneys working with older adults should consider including safeguards in power of attorney documents to help deter exploitation. This Practice Tip details six safeguards to consider when drafting a financial power of attorney:

- 1) Agent selection;
- 2) Third party accounting;
- 3) Limit and define gifting power;
- 4) Second signatures;
- 5) Limit authority; and
- 6) Power to revoke

### [Agent Selection](#) [\(Top of page\)](#)

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The most important step in reducing the risk of exploitation is careful selection of the agent being named. It is essential to name a trustworthy and reliable agent. The agent must be able to help the principal make and carry out decisions (the principle of Supported Decision-Making) and commit to making decisions that reflect the values and goals of the grantor. The discussion of who to appoint needs to go beyond “who do you want to name as your agent?” to include an open discussion of the proposed agent.

### Third Party Accounting (Top of page)

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Enlist a trusted third party to do accounting and oversight and ensure transparency. Financial powers of attorney normally have no monitoring or oversight after the principal loses capacity. Having a second set of eyes on the money provides a minimum amount of transparency. Accountings need not be professional products, but they should at least document the dates, nature and amount of all financial transactions. The principal can arrange online access for copies of bank and credit card statements to be sent to the third party.

Ohio's Statutory Financial Power of Attorney form has no provision requiring any type of independent accounting, but the agent is required to "keep a record of all receipts, disbursements, and transactions made on behalf of the principal." [RC § 1337.34\(B\)\(4\)](#). An Ohio Special Instruction clause that requires an annual financial accounting by the agent is:

My agent, and any successor agent, shall submit an annual financial accounting to my accountant, [name and address], by January 30<sup>th</sup> of each year or my appointment of this agent shall automatically terminate and my successor agent shall be appointed in his stead. . (\_\_\_\_\_)

### Limit and Define Gifting Power (Top of page)

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Gifting money and property using a financial power of attorney is one of the most common forms of exploitation. The power of attorney should specifically limit and define any gifting authority. While it may be desired to make traditional holiday or special occasion gifts, these can be clearly defined and limited in the document. If there is a concern about needing gifting for tax planning, discuss this with the client in the drafting process and clearly define and limit the kinds of gifts and the circumstances under which those gifts would be made in the document.

Ohio's Statutory Financial Power of Attorney form specifically states

Unless expressly authorized and initialed by me in the Special Instructions, this power of attorney does not grant authority to my agent to do any of the following:

- (3) Make a gift;

Even if the principal allows her agent to gift, by including such a clause in the Special Instructions, the amount, character and purpose of allowable gifts are controlled by [RC §](#)

[1337.58](#). However, the statutory restrictions to gifts by the agent found in RC § 1337.58 can also be negated by the principal so stating in the Special Instructions.

An Ohio Special Instruction clause that authorizes the agent to make gifts pursuant to RC § 1337.58 is:

I grant my agent, and any successor agent, the authority to make gifts. (\_\_\_\_\_)

In fact, authorizing the agent to make gifts may be valuable when considering eligibility for a benefit, a program, or assistance under a statute or regulation, such as Medicaid, and when the principal has a personal history of making or joining in making gifts and wants to continue doing so.

### **Require a Second Signature on Certain Transactions** (Top of page)

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Require a second signature on certain transactions. It is bothersome to require two signatures to pay the electric or phone bill. But larger transactions such as the sale of real estate or cars can easily be used to exploit. The power of attorney can define transactions, either by type, or by dollar amount that require a second signature.

### **Limit Authority** (Top of page)

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Sometimes exploitation is not discovered until after the principal is deceased. For example, changing the beneficiary on life insurance, annuity or other contracts, adding rights of survivorship, or beneficiary designations on financial accounts, trusts, or similar instruments, may not be discovered until after the individual dies. It is important to discuss limits to account changes and these limits should be drafted into documents. It may be necessary to change a beneficiary or assign a life insurance policy incident to a Medicaid or SSI application. If this is a possible need for the client, draft limited authority into the power of attorney for this purpose.

### **Power to Revoke** (Top of page)

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The ultimate oversight protection is granting a third party the power to revoke the power of attorney, if the third party believes it is being used to abuse, neglect or exploit the grantor. Often, exploitation begins when the grantor has a limited or no ability to object. Stopping exploitation using a power of attorney can be time consuming if this authority is not created in the document

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## **Additional Resources**

*Drafting Advance Planning Documents to Reduce the Risk of Abuse or Exploitation*, National Center on Law & Elder Rights, see [Issue Briefs](#) and [webinar recording](#).