



and medical affairs to another person. For example, many states provide sample forms (particularly health care powers of attorney) as part of their statutes. Many are limited in purpose and scope. Unfortunately, the sufficiency of power of attorney forms is usually tested only after it is too late to make necessary revisions.

## The Role of the Elder Law Attorney

The advice of a qualified Elder Law attorney is important to protect the rights and welfare of the principal who wishes to sign a medical or financial power of attorney. Elder Law attorneys usually have particular experience in drafting and enforcing powers of attorney. The agent under a power of attorney may also need legal advice or representation. Sometimes, interpretation or enforcement of a power of attorney (or recovery against an agent who has acted improperly) may require court proceedings and representation by an experienced Elder Law attorney. In choosing an attorney to prepare, defend or enforce a power of attorney, be sure to ask whether he or she has experience in such matters.

### About the National Academy of Elder Law Attorneys (NAELA)

NAELA, founded in 1987, is a national association of Elder Law Attorneys devoted to the education and training of attorneys who can meet the needs of seniors and people with disabilities, and who advocate for the needs of such individuals.

While NAELA Elder Law attorneys work one-on-one with clients in their local areas, NAELA also examines and advocates on national public policy issues facing seniors in America including long-term health care; planning for retirement; estate planning and probate; guardianship and conservatorship; health care decision making; and elder abuse and neglect.

This informational brochure is provided as a public service and is not intended as legal advice. Such advice should be obtained from a qualified Elder Law attorney.

More information on NAELA and a directory of NAELA members in your area can be found at [www.NAELA.org](http://www.NAELA.org).

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# Durable Powers of Attorney



National Academy of  
Elder Law Attorneys, Inc.

*Leading the Way in  
Special Needs and Elder Law<sup>SM</sup>*

The Law and Aging Series

## The Issues

With the aging of the American population, problems of the elderly have become more widespread. One unfortunate outgrowth of this development has been the increased frequency of abuse, neglect and exploitation of vulnerable adults.

Abuse, neglect and exploitation are usually defined by state legislation, and the definitions may vary significantly. Typically, however, the terms may be defined as follows:

**“Abuse”** typically refers to physical or sexual abuse.

**“Neglect”** means failure to provide necessities. In most states, it is necessary to show that the wrongdoer has a duty to provide for the victim.

**“Exploitation”** is usually defined as taking financial advantage of a disabled or elderly victim.

Because state law is much more important in preventing abuse, neglect and exploitation than federal law, rules and protections will vary tremendously from state to state. A few generalizations can be made about the issue, but concerned individuals should consult local authorities or an attorney familiar with Elder Law issues for more detailed information.

## What You Need to Know

A person may not perform legal tasks for an incapacitated adult without legal authority. The authority may be granted by a court, such as when an elder is incapacitated and a guardian is appointed, or the power may be granted privately through execution of a document called a power of attorney.

The document must have been executed prior to the incapacity. A properly drafted power of attorney may preclude the need for court action, saving substantial legal expense and invasion of privacy in the event of incapacity.

A power of attorney is a grant of authority to act for another person. The person giving the power is called the “principal” and the person receiving is the “agent” or “attorney-in-fact.” The power granted may be “durable”, which means it survives incapacity of the principal. If the grant is not durable, the power is suspended until the principal regains capacity and during this time the agent may take no action. A power of attorney imposes a duty of ethical representation of the principal by the agent.

A power of attorney is usually given to handle health care, financial and/or legal matters. Every state and United States territory permits some form of “durable” power of attorney. Specific requirements vary among jurisdictions, but may include particular language or witness requirements. The health care power of attorney may be referred to as “health care powers of attorney,” “medical powers of attorney,” “medical directives,” or similar terms, depending on the jurisdiction. The document may include an “advance directive” or “living will” that expresses the principal’s wishes concerning end-of-life treatment. Powers of attorneys that address end-of-life care decisions are regulated by state law. The rules for health care powers of attorney vary considerably. Most jurisdictions recognize the validity of such powers, and even states without specific authority may permit health care powers in practice.

Some states provide sample forms for financial and/or health care powers of attorney. In addition, most states also permit substantial latitude to include or exclude specific authority.

Despite broad and sweeping language in many powers of attorney, most states do not require third persons to honor the power. For example problems may arise with real estate transactions, tax returns or government bonds. Powers of attorney are more likely to be honored if they specifically refer to certain assets or types of transactions. The authority of the agent is limited to those items listed in the power of attorney.

When acting under a power of attorney, the agent will ordinarily sign documents by referring to the power. Other than receiving a fee, the agent is not permitted to benefit personally from the power of attorney, unless that power is specifically included in the document.

The agent under the power of attorney is accountable to the principal. The agent may be called upon to fully account for all actions taken to the principal. If the principal is incapacitated the agent may be required to account to a court either in a guardianship proceeding or a criminal court. If the agent abused the powers granted, he or she may be subject to criminal prosecution under elder abuse statutes.

## Where to Go for Help

While forms for powers of attorney are widely available, an Elder Law attorney should be consulted prior to executing documents that give access to one’s financial