# Durable Power of Attorney Abuse: It's a Crime Too

**A National Center on Elder Abuse[1] Fact Sheet for Criminal Justice Professionals**

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**PURPOSE OF FACT SHEET:**
Victims of durable power of attorney (DPA) abuse or their family members often report that their attempts to report this abuse to law enforcement are rebuffed with the following statement: "It's a civil problem. Go talk to a civil lawyer." While DPA abuse is a civil problem, it is also a crime and should be treated as one. An increasing number of newspaper stories describe successful investigations and prosecutions of DPA abuse. But too many criminal justice professionals still lack awareness of DPA abuse and the role they can play in holding offenders accountable and obtaining justice for victims. This fact sheet will enhance their awareness.

**CASE EXAMPLE:**
Helen was 85 and ailing when she made a DPA naming her daughter Susan as her agent. Two weeks later Susan used this DPA to sell Helen's home. Susan placed the sale proceeds into bank accounts that were in Helen's name. Within a year Susan had used her authority under Helen's DPA to withdraw all the money from Helen's accounts. Susan used the money to support her lavish lifestyle and her failing business. When Helen discovered her money was gone, she contacted the local law enforcement agency and was told by a detective that her only option was the civil justice system. Helen could not afford a civil lawyer and the local free legal services program for older people was not able to help her. The adult protective services agency told Helen that they couldn't help her recover her money. Helen lost all hope and died six weeks later.

**TERMINOLOGY:**

- The "*Principal*" is the person who authorizes another person to act on his or her behalf through a power of attorney or durable power of attorney.

- The "*Agent*" or "*Attorney-in-Fact*" is the person who acts on the principal's behalf through a power of attorney or durable power of attorney.

- A "*Power of Attorney*" (POA) is a legal document through which a principal authorizes an agent to act on the principal's behalf. An agent's authority ends if the principal revokes that authority or if the principal dies. By law, the agent's authority also ends if the principal loses decision-making capacity and can not revoke the agent's authority. The law does this to protect incapacitated principals who are no longer able to monitor their agents and take action if the agents abuse their authority.

- A "*Durable Power of Attorney*" is a POA that remains valid even if the principal loses the legal capacity to revoke the agent's authority. This characteristic makes the DPA a useful tool for people who want to plan for the possibility of incapacity. Planning may avoid the appointment of a guardian or conservator, which occurs when a court declares that a person lacks decision-making capacity and then appoints someone to make personal or property decisions on behalf of the incapacitated person. As DPAs are used to enable an agent to act on behalf of an incapacitated principal, they usually are written very broadly and give the agent a lot of authority to handle financial matters.

- A "*Springing Durable Power of Attorney*" is a DPA that does not become effective when the principal signs it (unlike the POA or DPA, which become effective upon signing). Instead, it springs into effect at a later time or when a certain event that is specified in the DPA occurs.

**THE PROBLEM:**
DPA abuse (sometimes referred to as POA abuse) is the misuse by the agent of the authority granted by the principal. It means making a decision or taking an action that is not in the principal's best interest. For example, as in the case described above, DPA abuse occurs when the agent spends the principal's money to benefit the agent, rather than the principal. It may also include forging the principal's signature on the DPA or coercing an older person to make a DPA against his or her wishes.

Powers of attorney, whether general, durable, or springing, usually are not subject to oversight by a court or third party. If the principal becomes incapacitated and can no longer monitor the agent's actions, this lack of oversight for a broadly written legal document makes it very easy for an agent to abuse the authority granted by the principal. For this reason, a DPA is often called a "license to steal."

**THE AGENT'S DUTY TO THE PRINCIPAL:**
Just like an agent for a sports player or actor, an agent under a DPA has a legal duty to act as a *fiduciary*. Generally this means that the agent is required to act in a trustworthy manner and to make decisions that are in the principal's best interest or that are consistent with decisions that the principal made for himself or herself before losing decision-making capacity.

**THE CRIMINAL LAWS RELATED TO DPA ABUSE:**
An agent who violates the duty owed to the principal may have committed one or more crimes. The agent may have violated state and federal laws, including laws on:
- Exploitation
- Embezzlement
- Forgery
- Fraud (e.g., credit card fraud, tax fraud, welfare fraud)
- Larceny
- Money laundering
- Theft[3]

Some states have laws criminalizing financial exploitation of older persons. Criminal laws of general application also may be used against agents who commit DPA abuse. Criminal justice professionals who are investigating or prosecuting DPA abuse should take action to prevent the agent from dissipating the principal's remaining assets. Assets should be frozen if allowed by law. Additionally, professionals should seek restitution on the principal's behalf.

## OPPORTUNITIES FOR CRIMINAL JUSTICE PROFESSIONALS:

Many communities have or are establishing multidisciplinary teams (MDT) that bring together an array of professionals to review and redress elder abuse cases, improve the response to elder abuse victims, and prevent victimization of other older people. There are several types of MDT including case review teams, crisis response teams, fatality review teams, and financial/fiduciary abuse specialist teams.[4] The expertise of criminal justice professionals is critical to the success of an MDT. Additionally, the professional contacts and knowledge gained by participating on an MDT enhances the ability of criminal justice professionals to investigate and prosecute elder abuse cases.

## SELECTED RESOURCES:

- The National Center on Elder Abuse (NCEA) website (www.ncea.aoa.gov) provides a wealth of information about elder abuse. It can help you determine whether your community has an MDT and link you to numerous other resources.
- The NCEA listserve connects you to other professionals throughout the U.S. and in many other countries and enables you to discuss cases and gather information. For information about or to join the listserve, visit the NCEA website.
- The Clearinghouse on Abuse and Neglect of the Elderly, an NCEA project, is a fully computerized archive of published research, training resources, government documents, and other sources on elder abuse. To access the CANE database and annotated bibliographies (which include the subject of financial exploitation), visit the NCEA website.

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[2] The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

[3] This list was developed based on news stories from November and December 2007 in which agents were indicted or successfully prosecuted for DPA abuse.

[4] Brandl, B., Dyer, C.B., Heisler, C.J., Otto, J.M., Stiegel, L.A., & Thomas, R.W. (2007). *Elder Abuse Detection and Intervention: A Collaborative Approach*. New York, NY: Springer Publishing.